8 Hughes (5)

Vol. I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1926

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)

(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Page
Record from the district court of the United States, district of New Jersey	*a*
Docket entries	*a*
Bill of complaint	1
Exhibit No. 1—Beech-Nut ham label and chewing-gum wrapper	15
Exhibit No. 2—Beech-Nut scrap tobacco container	17
Exhibit No. 3—Beech-Nut cigarette wrappers	19
Exhibit No. 4—Patent Office register of Beech-Nut trade-mark	21
Exhibit No. 5—Beech-Nut cigarette wrapper	23
Stipulation to extend time	25
Stipulation re filing of answer to counterclaim	25
Answer to defendant's counterclaim	26
Statement of evidence	31
Testimony of Harry S. Cohen	31
Robert Skene, Jr	38
Alfred W. Godfrey	49
Arthur A. Skinner	55

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

		Page
Testimony of	C. Houshing (stipulated)	339
	John J. King	58
	Richard E. Pope	63
	John F. Lapham	65
	Thomas F. Maloney	68
	George Catlin (stipulated)	70
	W. G. Torrey	71
	W. J. Burkley (stipulated)	76
	Margaret M. Hunt	77
	Leo Lewis	80
	R. W. Blanchard	89
	O. A. Hubbard	97
Stipulations re exhibits and testimony		104
Stipulation to extend time		105
Testimony of	Clarence A. Wilkins	107
	Alfred William Sturgis	116
	Ida W. Wilkins	119
	Edward Moscovitz	126
	Charles E. Geary	130
	James J. Creevan	135
	Robert James Winters	143
	Joseph S. Aisenberg	149
	Ralph H. Horne	159
	Dorace L. Bottomly	166
	John H. Lang	171
	Alvah L. Conant	180
	Horace R. Pearsons	195
	Franklin G. Neal	201
	Clement W. Kirkpatrick	210
	Martin T. Huggard	216
	Louis Isenberg	219
	Adelard J. Landry	224
	Robert N. Broughton	228
	George L. Carlton	232
	Michael O'Connor	237
	Henry Le Clair	241
	Henry Butcher	243
	John A. Peters	249
	Jerome F. Carney (stipulated)	261
	Mary W. Gregory (stipulated)	262
	James J. Cashman, Jr.	263
	Edward J. Glynn	267
	Robert G. Greene	274
	Nathan Hammerman	276
	James J. Marrinan	281
	T. J. Branigan	285
	J. P. McHugh (stipulated)	290
	Adam Sattig	291
	Sanford Hawkins	302
	Alexander C. Gardner	309

		Page
Testimony of	C. A. Sattig (stipulated)	316
	Newton Harrison	317
	John F. Griffin	322
	Frank Madden	325
	John F. Griffin	326
	Joseph De Rago	329
	Solomon S. Kramer (stipulated)	334
	James Eustace (stipulated)	335
	Edward Gross (stipulated)	336
	R. A. Brown (stipulated)	336
	Herman A. Dolge (stipulated)	337
	John F. Whalen (stipulated)	338
	C. Housling (stipulated)	339
	P. Lynch (stipulated)	340
	R. J. Andrews (stipulated)	341
	John Mead (stipulated)	342
	James Matrence (stipulated)	343
	Harry W. Avery	345
	E. Irving Ray	360
	T. J. Lenahan (stipulated)	370
	John Morelli	374
	George F. Moulton	376
	Tracy N. Collins (stipulated)	378
	William P. Melia	379
	Edward Abrams (stipulated)	387
	Roy B. Southern	390
	Albert B. Lewis	398
	Albert Levy	405
	John E. Watson	411
	William H. Sage	417
	A. H. Carlson	423
	Arthur E. Fechter	437
	Charles O. Larson	440
	John Sabelis	444
	Darrell S. Boyd	448
	M. W. Ryan	454
	Eugene C. Sullivan	457
Stipulations re testimony of certain witnesses		462
Testimony of	William I. Thomas	469
	A. V. Bobb	473
	James F. Ballard	478
	Alex. B. Christenson	482
	Daniel Huttner	485
	William Oliver Park	488
	F. J. Latzell	491
	Fred Knoop	496
	Mrs. Amelia Petersen	501
	H. N. Petersen	510
	Mrs. Amelia Petersen	524

	Page
Testimony of O. M. Wesling	525
Miss C. Heller	535
Miss M. Springer	543
Carl W. Nemetz	550
E. J. McFadzen	555
William C. Weigel	560
Henry W. Foote	565
E. R. Lewis	570
Clarence W. Smith	592
Theodore Mueller	605
J. E. Brimakow	612
Oscar Joseph	617
Mike Saba	622
John Jozsa	625
Lloyd Schultz	628
Stipulation re testimony of certain witnesses	633
Testimony of Frank M. Fairfield	636
Stipulation re Plaintiff's Exhibit No. 12 (A to A-11)	659
Testimony of George B. Roach	663
Bryan O. Foster	682
Charles P. Cook	695
H. W. Pelton	704
W. C. Pennell	712
William T. Hill	722
Wyatt P. Jennings	729
Robert L. Bowen	742
Jefferson D. Hayden	754
Richardson S. Marks	770
Francis E. Barbour	781
Stanton Van Wie (stipulated)	800
Stipulation re certain exhibits	800
Stipulation of facts	800
Testimony of Mrs. Edith B. Kearns	801
John S. Ellithorp	813
Stanton Van Wie	818
Marshall Davis	825
Webster Davis	829
Colonel Davis	832
Christina Carswell	838
Earl A. Nellis	847
Stipulation re Plaintiff's Exhibit No. 28	857
Testimony of Julia Hilke (stipulated)	857
Stipulation re extension of time	858
Stipulation re Plaintiff's Exhibits 12A-12 to 12A-17	860
Stipulations re Plaintiff's Exhibits 32, 33, and 34	862
Stipulation re testimony of certain witnesses	866
Stipulation re plaintiff's record of sales, 1903 to 1921	867
Stiulation re record	871
Stipulation re Defendants' Exhibits and Cross-exhibits 1 to 17	873

	Page
Amendment to bill of complaint and stipulation filing same	875
Stipulation re Plaintiff's Exhibit No. 12 (A-18 to A-24)	876
Stipulation re answer	878
Answer	879
Amendment to answer	896
Order setting time for taking depositions	900
Affidavit of Sebastion Hinton and Richard B. Cavanagh	902
Stipulation re depositions	904
Stipulation re record	906
Stipulation re plaintiff's record of sales, 1903 to 1921	907
Statement of evidence	911
Testimony of Ferdinand Bieringer	911
Haskell Sharf	937
Eleazer Lebewohl	954
L. G. Cauto	968
Harry Klein	984
Benjamin Hurvitz	1007
John A. Ratto	1026
Max Dublin	1035
Harry Stone	1056
Benjamin Lescovitz	1063
Hugh F. Wallace	1069
George O. Adams	1077
George C. Smith	1079
Aaron Ansel	1085
George Dougall	1089
Martin O. Connors	1096
Timothy James Dumas	1100
Philip H. Moran	1106
John J. Lecolst	1111
Thomas E. Blake (stipulated)	1114
Edward Adelman	
John T. Powers	1124
Dennis T. O'Callahan	1128
Thomas J. Maguire	1132
Peter Peters	1138
Louis Scheipers	1143
Aram Gulian	1148
Reporter's certificate	1153
Testimony of Samuel S. Broadbent	1155
Henry Freeman	1160
Andrew J. Wright	1164
Herbert R. Hooper	1174
William W. Provost	1182
Joseph Equi	1187
Ferdinand Rigali, Jr	1192
Gordon Michaels (stipulated)	1197
Samuel Rackmales	1201
Morris J. Goodman	1208

		Page
Testimony of	Carl W. Jacobson	1214
	Theodore Havelman	1221
	Elmer C. Kalss	1227
	Joseph H. Nelson	1232
	J. T. Woodall	1243
	Albert F. Schueler (stipulated)	1248
	William D. Lilly (stipulated)	1249
	Sol Levin (stipulated)	1250
	W. Friedman (stipulated)	1251
	William Waschler	1254
	Samuel B. Welsh	1260
	Benjamin Newman	1268
	Harry S. Sylk	1275
	David Ornstern	1283
	Edward G. Hoch	1288
	Fred J. Hahn	1296
	Franklin P. Stern	1300
	Louis Gray	1300
	Harry A. Linn	1315
	Daniel H. Harbot	1321
	Joseph Cohen	1326
	M. Podolnic (stipulated)	1333
	William Sobel (stipulated)	1334
	Walter I. Davidson (stipulated)	1335
	William Goldstein	1338
	Charles Tuckwell	1414
	Michael Spheeris	1429
	John W. Smith	1440
	Maurice J. Schimmel	1447
	Daniel Paicopoulos	1458
	Albert Marks	1470
	Frank Hopewell	1502
	Benjamin A. Mosher	1523
	I. J. Lindenbaum	1537
	John Glasspiegel	1550
	Fred W. Kemp (stipulated)	1566
	Robert A. Kiefer (stipulated)	1568
	Rudie Kortbein (stipulated)	1569
	J. E. Bernheimer (stipulated)	1571
	Ray P. Fleming (stipulated)	1574
	Ray Van Rosmalen (stipulated)	1575
	A. G. Vaclavic (stipulated)	1577
	E. F. Petersen (stipulated)	1580
	R. Zechel (stipulated)	1582
	H. A. Levenhagen (stipulated)	1583
	Jerome Meyer (stipulated)	1585
	Robert Lill (stipulated)	1587
	A. McEveney (stipulated)	1589
Stipulation re testimony		1591

Page

Testimony of Wade H. Brown 1592
Jacob Gay, Jr. 1622
Frank C. Degan 1633
Philip Ludwig Burgeson 1646
William G. Sues 1657
J. S. Weiner 1671
David Kossack 1680
William Getzelman 1688
B. Ganek 1706
John A. Weber 1712
Nathan Adelman 1721
Jacob Shanfield 1733
William Steidinger 1744
Carl A. Paulsen (stipulated) 1756
Frank Goldstein (stipulated) 1758
L. S. Jones (stipulated) 1760
Charlie Friedman (stipulated) 1762
D. H. Kropp (stipulated) 1764
D. A. Rogoff (stipulated) 1766
M. S. Winerlack (stipulated) 1768
O. H. Olsen (stipulated) 1770
A. Thompson (stipulated) 1772
A. Christianson (stipulated) 1774
C. Biasetti (stipulated) 1776
J. W. Corey (stipulated) 1778
A. Henderickx (stipulated) 1780
Morris Gold (stipulated) 1782
M. W. Mason (stipulated) 1783
A. W. Schreiber (stipulated) 1785
C. H. Kappmeyer (stipulated) 1787
Wm. T. Vanbactor (stipulated) 1789
Harry Bernard (stipulated) 1792
Jake Kurland (stipulated) 1793
C. P. Burdick (stipulated) 1795
R. A. Carter (stipulated) 1797
J. M. McGowan (stipulated) 1799
Norman A. Lynch (stipulated) 1801
James A. Henderson (stipulated) 1802
T. A. Walker (stipulated) 1804
H. C. Chandler (stipulated) 1805
John Gross (stipulated) 1808
D. W. Holbrook (stipulated) 1809
Dean S. House (stipulated) 1811
C. W. Kirby (stipulated) 1813
H. L. Grant (stipulated) 1815
I. H. Rider (stipulated) 1817
Allison James (stipulated) 1818
F. A. Smithdeal (stipulated) 1820
E. W. Hanron (stipulated) 1822

	Page
Testimony of E. I. Fater (stipulated)	1824
E. S. Gulyear (stipulated)	1826
M. E. Parthemas (stipulated)	1828
John H. Monteath (stipulated)	1830
L. J. Wilson (stipulated)	1832
Fred Hester (stipulated)	1835
J. R. Shedd (stipulated)	1837
Sam Carnaggio (stipulated)	1839
M. L. Moore (stipulated)	1841
S. A. Sabbagha (stipulated)	1842
R. L. Burnett (stipulated)	1844
A. B. Tomlinson (stipulated)	1846
J. F. Drake (stipulated)	1847
J. J. Bates (stipulated)	1849
R. L. Waldrop (stipulated)	1852
C. W. Ridgway (stipulated)	1854
P. R. Jameson (stipulated)	1856
John D. Ashmore (stipulated)	1858
J. O. Sloman (stipulated)	1860
T. J. Sayle (stipulated)	1862
F. C. Calder (stipulated)	1864
Roy McDonald (stipulated)	1867
W. E. Douglas (stipulated)	1869
A. R. Smith (stipulated)	1871
F. W. Geiss (stipulated)	1874
J. Blaufield (stipulated)	1876
C. F. Crawford (stipulated)	1878
George H. Bell (stipulated)	1880
Stipulation re testimony of certain witnesses	1881
Testimony of L. M. Lavin (stipulated)	1884
Emmet Howard (stipulated)	1886
J. E. Craven (stipulated)	1888
L. R. Bramblett (stipulated)	1890
Louis Evers (stipulated)	1892
F. Odell (stipulated)	1894
H. A. Taylor (stipulated)	1896
Charlie Bradshaw (stipulated)	1898
E. R. Turner (stipulated)	1900
Wm. H. J. Meyer (stipulated)	1902
W. P. Schaefer (stipulated)	1904
J. G. Block (stipulated)	1906
H. G. Saam (stipulated)	1908
J. E. Cobb (stipulated)	1910
H. R. Petty (stipulated)	1912
A. De King (stipulated)	1915
W. B. Zulwood (stipulated)	1917
Bertha Rosenfield (stipulated)	1920
J. L. Shinfessel (stipulated)	1921
Stipulation re testimony of certain witnesses	1923

Page

Testimony of P. J. Rosswog (stipulated) 1925
M. Borenstein (stipulated) 1928
A. J. Fleischauer (stipulated) 1931
A. Gorenstein (stipulated) 1933
Henry Rivlin (stipulated) 1936
Chas. F. Smith (stipulated) 1938
J. E. Detwiler (stipulated) 1940
Louis Huck (stipulated) 1942
A. Petty (stipulated) 1944
A. Kidner (stipulated) 1946
Jos. H. Rosswog (stipulated) 1948
M. J. Farrell (stipulated) 1950
Wm. C. Dickel (stipulated) 1952
S. Samuels (stipulated) 1954
Max Seltzman (stipulated) 1956
A. W. Meyers (stipulated) 1958
M. J. Murray (stipulated) 1960
Stipulation re testimony of certain witnesses 1962
Testimony of Aleck Bolton (stipulated) 1964
J. Elmer Freese (stipulated) 1966
Thomas P. Hayes (stipulated) 1968
J. F. Reinacker (stipulated) 1970
E. B. Potts (stipulated) 1972
W. J. Kaiser (stipulated) 1974
E. Sayer (stipulated) 1975
P. P. Naufel (stipulated) 1978
L. M. Dorsey (stipulated) 1980
William J. Dolan 1985
William H. Norton 1993
John Racow 2012
Philip Gerardi 2023
Benjamin Saletan 2030
Joseph A. Tevlin 2036
B. T. Miller (stipulated) 2043
Max Seltzer (stipulated) 2045
Arthur Lennox (stipulated) 2047
Morris Stein (stipulated) 2049
H. Clymer (stipulated) 2051
B. H. Pierce (stipulated) 2053
I. Kaufman (stipulated) 2055
C. R. Densmore (stipulated) 2057
H. Liebowitz (stipulated) 2057
Stipulation re testimony of certain witnesses 2059
Testimony of Maxwell C. Durham 2061
Barnett Dickstein 2070
Paul Schwartz 2080
Stipulation re Plaintiff's Exhibit No. 2 2088

Page

Testimony of William J. Coughlan 2090
R. F. Stahl (stipulated) 2096
Agnes R. McKay (stipulated) 2098
A. Wolinsky (stipulated) 2100
Sam Sukloff, Jr. (stipulated) 2102
C. C. Gillespie (stipulated) 2105
Isadore Tagum (stipulated) 2107
Harry Silverman (stipulated) 2109
Mrs. N. Frantz (stipulated) 2111
Meyer Levine (stipulated) 2113
John K. Stevenson (stipulated) 2115
William Silver (stipulated) 2117
Trace Caldwell (stipulated) 2117
L. Wolfson (stipulated) 2119
Josephine Garbarino (stipulated) 2121
—— Restivo (stipulated) 2123
William Doll (stipulated) 2125
W. J. Costello (stipulated) 2127
A. B. Welsh (stipulated) 2129
Stipulation re testimony of certain witnesses 2131
Testimony of A. H. Gotch (stipulated) 2134
Mrs. H. Fineson (stipulated) 2137
James P. Sheehan (stipulated) 2139
A. M. Seligson (stipulated) 2140
W. A. Clark (stipulated) 2142
C. F. Tarlov (stipulated) 2144
Proceedings before United States Patent Office 2150
Answer to notice of opposition 2150
Statement of evidence 2155
Testimony of Walter H. Lipe .....
Thomas Lynch 2175
Clarence Lindholm 2179
J. Wesley Wood 2183
W. C. Arkell 2187
Guy W. Sharpe 2197
Stipulation re invoice of American Tobacco Co 2203
Notice of taking testimony 2206
Testimony of Mrs. Matilda Wedel 2208
R. J. Yunkers 2218
Joseph Fleming 2224
Walter Peabody 2229
Ludwig Nurnberg 2234
Harry F. Stickney (stipulated) 2239
Louis Worthen (stipulated) 2240
Notice of opposition 2243
Stipulation re filing of testimony 2247
Notice of taking testimony 2248
Statement of evidence 2251
Stipulation of facts 2251

Page

Testimony of David Haines Ball (stipulated) 2253
S. E. Spence (stipulated) 2257
Benjamin I. Belt (stipulated) .....
Alfred W. Haywood (stipulated) 2263
Jacob Levy (stipulated) 2264
Monroe W. Rothschild (stipulated) 2266
Jesse R. Taylor (stipulated) 2267
J. Lewis Orrick (stipulated) 2269
W. H. Nichol (stipulated) 2275
Charles C. St. Clair 2280
William M. Gormly (stipulated) 2282
H. H. Arnold 2291
T. F. Coyle (stipulated) 2292
H. O. Evans (stipulated) 2294
Herbert C. Boykin 2303
Ralph Bowman 2315
Wade Sheltman 2325
Albert P. Gans 2339
James F. Summers 2354
Notice of taking testimony 2376
Testimony of Jacob Levy 2378
Stipulation re invoice of American Tobacco Co. 2386
Colloquy between court and counsel 2388
Statement of evidence 2445
Testimony of John M. Halter 2445
William H. Maichle 2451
Lawrence R. Atkinson, Jr 2458
William A. Charles 2464
William L. Miller 2468
Norman S. Berry 2478
James F. Masterson 2483
G. Frank Disbrow 2491
Frank Arnold, Jr 2499
Colloquy between court and counsel 2502
Stipulation re certain exhibits 2505
Colloquy between court and counsel 2507
Stipulation re facts, etc 2510
Testimony of Richard J. Boylan (stipulated) 2512
Edwin Clark Brenn (stipulated) 2515
George T. Minnigerode (stipulated) 2516
Offers in evidence 2517
Testimony of James T. Newton 2518
Howard C. Bailey 2524
William R. Perkins 2528
Hugh Peters 2539
Philip V. R. Van Wirth 2549
David H. Ball 2553
Benjamin Lloyd Belt 2586
Thomas J. Maloney 2622
William R. Perkins (recalled) 2638

Page

Colloquy between court and counsel 2641
Opinion, Lynch, J 2645
Decree 2676
Assignments of error 2678
Petition for appeal 2683
Order allowing appeal 2684
Bond on appeal 2684
Plaintiff's præcipe for transcript of record 2686
Citation and service 2687
Order waiving equity rule No. 75 and approving transcript 2688
Defendant's præcipe for transcript of record and amendment thereto 2690
Clerk's certificate 2692
Proceedings in United States circuit court of appeals, third circuit .. 2693
Argument and submission 2693
Opinion, Davis, J 2694
Judgment 2704
Mandate 2705
Clerk's certificate 2707
Plaintiff's Exhibit No. 1—Package of Beech-Nut cigarettes 2708
Plaintiff's Exhibit No. 2—Photograph, West Haven drug store window display 2710
Note re Plaintiff's Exhibit No. 3 2712
Plaintiff's Exhibit No. 11—Allied Tobacco Industries Exposition letter 2712
Plaintiff's Exhibit No. 12—Scrap-book of circulars, letters, etc., A to A-24, inclusive 2714
Plaintiff's Exhibit No. 13—Photograph, Pennell's cigar store window display 2762
Plaintiff's Exhibit No. 14—Receipt signed "E. L. Larson" 2764
Plaintiff's Exhibit No. 15—Photograph, collection of Beech-Nut Packing Company products, 1922 2766
Plaintiff's Exhibit No. 16—Portion of shipping carton used by Beech-Nut Packing Company 2768
Plaintiff's Exhibit No. 17—P. Lorillard Company Beech-Nut cigarettes carton 2768
Plaintiff's Exhibit No. 18—Publication Bon Jour of December 4 and 5, 1891 2770
Plaintiff's Exhibit No. 19—Photograph, scrap-books of Beech-Nut Packing Company periodical advertising, 1911-1915 2772
Plaintiff's Exhibit No. 27—Beech-Nut chewing-gum display box 2774
Plaintiff's Exhibit No. 28—Board, Beech-Nut labels displayed before the public, 1891-1921 2777
Plaintiff's Exhibit No. 31—Imperial Packing Company box of 1891 .. 2780
Plaintiff's Exhibit No. 32—Collection of Lorillard posters and signs .. 2782
Plaintiff's Exhibit No. 35—Summary of Beech-Nut Packing Company products 2784
Plaintiff's Exhibit No. 36—Advertisement of Beech-Nut cigarettes, New York Evening Sun 2815
Plaintiff's Exhibit No. 38—Berry photograph of Auster window display, Baltimore 2816

Page

Plaintiff's Exhibit No. 40—The National Financial News of May 28, 1923 2818
Plaintiff's Exhibit No. 41—Certified copy, decision of examiner of interferences, opposition No. 2805 2821
Plaintiff's Exhibit 42—Certified copy, decision of Assistant Commissioner of Patents, opposition No. 2805 2830
Beech-Nut Exhibit—Certified copy, certificate of incorporation of Beech-Nut Packing Company 2835
Beech-Nut Exhibit—Stationery of 1892, Imperial Packing Company .. 2839
Beech-Nut Exhibit—Correspondence 2841
Beech-Nut Cross-exhibit No. 1—P. Lorillard Company "Polar Bear" scrap tobacco bag 2850
Beech-Nut Cross-exhibit No. 1-A—Luhrman & Wilbern "Polar Bear" scrap tobacco bag 2851
Beech-Nut Cross-exhibit No. 2—P. Lorillard Company "Scrap Iron" scrap tobacco bag 2854
Beech-Nut Cross-exhibit No. 2-A—Luhrman & Wilbern "Scrap Iron" scrap tobacco bag 2855
Beech-Nut Cross-exhibit No. 2-C—P. Lorillard Company "Scrap Iron" scrap tobacco bag, bearing words "Stock owned by P. Lorillard Co." in rubber stamp 2858
Beech-Nut Cross-exhibit No. 2-D—P. Lorillard Company "Scrap Iron" scrap tobacco bag, bearing words "Stock owned by P. Lorillard Co." printed 2859
Beech-Nut Cross-exhibit No. 3—P. Lorillard Company "Old Nut" scrap tobacco bag 2861
Beech-Nut Cross-exhibit No. 4—P. Lorillard Company "Bag Pipe" scrap tobacco bag 2863
Note re Beech-Nut Cross-exhibit 2864
Beech-Nut Cross-exhibit—Trade-mark registration No. 89,613 of December 31, 1912 2867
Defendant's Cross-exhibit No. 1—Package of Beech-Nut scrap tobacco 2870
Defendant's Cross-exhibit No. 2—Package of Beech-Nut chewing gum. 2872
Defendant's Cross-exhibit No. 5—Advertisement of Beech-Nut cigarettes, Boston Herald of August 18, 1921 2874
Defendant's Cross-exhibit No. 6—Package of Beech-Nut peppermints. 2876
Defendant's Cross-exhibit No. 8—Beech-Nut bacon label 2878
Defendant's Exhibit No. 10—P. Lorillard Company order blanks A, B, and C 2880
Defendant's Exhibit No. 11—Photograph West Haven drug store display 2882
Defendant's Cross-exhibit No. 16—Beech-Nut Packing Company's Erie brand label 2882-9
Defendant's Cross-exhibit No. 17—Beech-Nut Packing Company's holly brand label 2884
Defendant's Exhibit No. 18—Pamphlet entitled "Correspondence—Beech-Nut Packing Company and P. Lorillard Company in re 'Beech-Nut' Trade-mark" 2886

Page

Defendant's Exhibit No. 30—Newton's list of trade-mark registrations 2924
Defendant's Exhibit No. 34—Patent Office pamphlet showing trade-marks classification 2941
Defendant's Exhibit No. 35—List of brands 2942
Defendant's Exhibit No. 36—Assignment, American Tobacco Company to P. Lorillard Company, December 1, 1911 2956
Defendant's Exhibit No. 37—Package of Bagley's "Hazel Nut" tobacco 2960
Defendant's Exhibit No. 45—Lorillard specimen wrapper design for Beech-Nut cigarettes 2962
P. Lorillard Co. Exhibit No. 1—Statement of sales of Beech-Nut tobacco products by Luhrman & Wilbern Tobacco Co. and P. Lorillard Co. from 1904 to 1919 2965
Note re P. Lorillard Co. Exhibit No. 2 2970
P. Lorillard Co. Exhibit No. 5—Luhrman & Wilbern "Beech-Nut" tobacco bag 2971
P. Lorillard Co. Exhibit No. 6—Package of Lorillard's Beech-Nut cigarettes 2973
P. Lorillard Co. Exhibit No. 7—Letter, August 25, 1916, from Walcutt Brothers Co. to P. Lorillard Co 2975
P. Lorillard Co. Exhibit No. 8—Order for Beech-Nut cigarette shells. 2976
P. Lorillard Co. Exhibit No. 9—"Broecker" correspondence 2977
P. Lorillard Exhibit No. 10—"Schutz" correspondence 2980
P. Lorillard Co. Exhibit No. 14—Harry Weissinger Tobacco Co. "Beech-Nut" tobacco bag 2981
Notes re P. Lorillard Co. Exhibits 16 and 17 2983
P. Lorillard Co. Cross-exhibit No. 20—Certified copy, certificate of incorporation of Imperial Packing Company 2983
P. Lorillard Cross-exhibit No. 21—Trade-mark registrations No. 19,838, No. 24,978, No. 35,371, and No. 36,444 2987
P. Lorillard Co. Cross-exhibit No. 22—Beech-Nut Packing Company's "Beech-Nut Cigarettes" label 2999
P. Lorillard Co. Exhibit A—Book showing revenue stamps used on tobacco brands, 1904-1906 3001
P. Lorillard Co. Exhibit B—Book showing revenue stamps used on tobacco brands, 1906-1910 3009
P. Lorillard Co. Exhibit C—Sales sheets showing shipments Beech-Nut, 1904-1910 3019
P. Lorillard Co. Exhibit D—Memorandum book of shipments 3023
P. Lorillard Co. Exhibit E—Copies of Beech-Nut invoices, P. Lorillard Co. 3031
P. Lorillard Co. Exhibit F—Portion of the original Weissinger "Beech-Nut" tobacco wrapper 3049
P. Lorillard Co. Exhibit H—Weissinger formula book 3050
P. Lorillard Co. Exhibit I—Orders to Summers from Weissinger 3050
P. Lorillard Co. Exhibit J—Letters produced by Summers 3051
P. Lorillard Co. Exhibit K—Box list 3054
Clerk's certificate 3055
Order allowing certiorari 3056

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

IN EQUITY.

TRADE-MARK.

BEECH-NUT PACKING COMPANY

v.

P. LORILLARD COMPANY.

DOCKET ENTRIES.

June	17,	1921. Bill of Complaint filed.
"	"	" Subpœna issued.
"	22,	" Subpœna returned, served June 20 and filed.
July	6,	" Stipulation extending time to Answer filed.
Aug.	13,	" Answer filed.
Sept.	19,	" Depositions on behalf of plaintiff filed.
"	24,	" Depositions on behalf of plaintiff filed (4).
"	"	" Certificate of Examiner filed.
"	28,	" Stipulation extending time to reply filed.
Oct.	10,	" Stipulation and Order allowing Pltff. to file Answer to Counterclaim filed.
"	"	" Answer to Defendant's Counterclaim filed.
"	14,	" Stipulation extending time to take testimony filed.
"	25,	" Depositions on behalf of plaintiff filed.

Oct.	27, 1921.	Depositions on behalf of plaintiff filed.
Nov.	12, "	Depositions on behalf of plaintiff filed.
"	16, "	Stipulation extending time for taking Depositions filed.
"	26, "	Depositions on behalf of plaintiff filed.
Dec.	13, "	Order apportioning times for taking Depositions, &c.
Jan.	3, 1922.	Depositions on behalf of plaintiff filed.
"	5, "	Depositions on behalf of plaintiff filed.
"	9, "	Depositions on behalf of plaintiff filed.
"	17, "	Cause placed on Calendar.
Feb.	16, "	Deposition of Frank M. Fairfield on behalf of plaintiff, filed.
Mar.	30, "	Depositions on behalf of plaintiff filed (2).
"	31, "	Deposition of Francis E. Barbour on behalf of plaintiff filed.
Apr.	3, "	Depositions on behalf of Plaintiff filed.
"	" "	Depositions on behalf of Plaintiff filed.
"	7, "	Depositions on behalf of Plaintiff filed.
"	3, "	Continued for Jan. Term.
"	24, "	Stipulations as to Exhibits filed (4).
June	15, "	Stipulation and Depositions of Geo. B. Roach & Bryan O. Foster, filed.
"	" "	Depositions on behalf of Plaintiff filed.
Sept.	11, "	Continued for April Term.

Nov.	8, 1922.	Depositions on behalf of defendant filed.
"	9, "	Depositions on behalf of defendant filed.
"	" "	Depositions on behalf of defendant filed.
"	6, "	Continued for Sept. Term.
Jan.	15, 1923.	" " Nov. "
Apr.	2, "	" " Jan. "
June	16, "	Stipulation & Order fixing time to take depositions filed.
July	27, "	Depositions on behalf of defendant filed (2).
Aug.	13, "	Depositions on behalf of defendant filed (2).
"	30, "	Depositions on behalf of Defendant filed (4).
Sept.	10, "	Continued for Apr. Term.
"	21, "	Depositions on behalf of defendant filed.
Oct.	30, "	Testimony on behalf of defendant filed (2).
"	" "	Appearances for Plaintiff filed.
"	" "	Stipulation re Record filed
"	" "	" " " "
"	" "	Admission of Genuineness of Exhibits filed.
"	" "	Trial before the Court.
Oct.	31, "	Amendment to Bill of Complaint filed.
"	" "	Amendment to Answer filed.
"	" "	Stipulation as to Exhibits filed.
"	" "	" " " " "
"	" "	Trial continued.
Nov.	1, "	" " Ordered adjourned to day to be fixed.
Oct.	31, "	Affidavits for Defendant filed (3).

Oct. 31, 1923. Stipulations filed (3).
Jan. 8, 1924. Trial continued.
" 9, " " " Decision reserved.
May 7, " Opinion filed.
June 17, " Final Decree dismissing Bill without Costs, filed.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original docket entries on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Trenton, in said District, this 17th day of December, nineteen hundred and twenty-four.

(Seal)

GEORGE T. CRANMER,
Clerk, District Court, United States.
By R. S. CHEVRIER,
Deputy.

IN THE

DISTRICT COURT OF THE UNITED STATES

DISTRICT OF NEW JERSEY.

BEECH-NUT PACKING COMPANY,
Plaintiff,

vs.

P. LORILLARD COMPANY,
Defendant.

In Equity No. 3056.

Bill of Complaint.

Beech-Nut Packing Company, a New York corporation, having its principal place of business and doing business at Canajoharie, New York, brings this its bill of complaint against P. Lorillard Company, a New Jersey corporation, having its principal place of business and doing business in the City and State of New York.

And plaintiff says:

1. Beech-Nut Packing Company is a corporation of New York, having its principal place of business in Canajoharie, New York. P. Lorillard Company is a corporation of New Jersey, having its principal place of business in the City and State of New York. The amount in controversy herein is more than five thousand dollars ($5,000.00), irrespective of interests and costs.

2. Plaintiff's predecessor, Imperial Packing Company, a corporation of New York, inaugurated its business prior to 1892 or thereabouts. For the purpose of identifying goods made by it and distinguishing the same from all other goods, plaintiff's predecessor, prior to 1892, adopted and has ever since used continuously, the trade-mark "BEECH-NUT"; and a trade-mark or distinctive badge, comprising the collocation of the trade-mark "BEECH-NUT," with other distinctive and conspicuous features; and particularly has adopted a label, comprising a red and white border, within which is an outline oval (generally in blue), within which outline oval appears the word "BEECH-NUT" (generally in blue) curved about within the upper part of the oval, below which word appears a pictorial representation of a beech-nut cluster, located in the center of the outline oval, with symmetrically arranged small type printing on either side of said pictorial representation; while the name of the particular product to which the label relates is applied symmetrically with the name "BEECH-NUT" on the lower part of the label, all as more perfectly presented by the two specimen labels attached hereto as Beech-Nut Packing Company Exhibit A.

3. In 1899 or thereabouts, plaintiff, desirous of acquiring, developing, and extending the business of the Imperial Packing Company; and particularly having in mind the addition from time to time of successive new items each different specifically from preceding items of its manufacture; and therefore particularly desirous that the reputation of those goods be synonymous with the reputation of their maker; and that it be known to the public in a distinctive and personal sense, discarded the name "Imperial Packing Company" and adopted as the distinctive part of its corporate name the trade-mark "BEECH-NUT." Then and ever thereafter, plain-

tiff, "Beech-Nut Packing Company," has successfully striven to cause the trade and the public to recognize and accept, and the trade and public have recognized and accepted the label, Exhibit A, as not only the trade-mark by which the desired manufacturer of this or that goods may be identified, but also and more particularly as the distinctive autograph or personal signature of the Beech-Nut Packing Company (appearing in unmistakable form on any and all of scores of items), and as indicating the personal responsibility of the known Beech-Nut Packing Company for any goods so marked.

4. In 1899 was formed plaintiff corporation "Beech-Nut Packing Company," which by purchase acquired all of the assets, trade-marks and good-will of "Imperial Packing Company," plaintiff's predecessor, and continued the business, established prior to 1892 by said Imperial Packing Company.

5. Plaintiff's predecessor, Imperial Packing Company, then dealing in certain meat products, shortly after 1891 began a rapid extension of the items of its manufacture; and plaintiff from the time of its acquisition of the business has persistently and rapidly continued that extension. The business of plaintiff by reason of the expenditures, care, skill and industry of plaintiff increased with great rapidity, so that prior to the acts herein complained of, plaintiff's trade-mark, trade name, and distinctive badge and autograph were familiar to and highly regarded by the public, and on sale largely, in stores dealing in package consumable products such as general stores, grocery stores, drug stores, tobacco stores, news stands, and the like; its business aggregated many millions of dollars every year, and comprehended a very large number of packaged products of widely varying character, such as chewing gum, ham, peanut butter, jellies, and scores of

others. Plaintiff has since added many new products to its line, as for instance ginger ale and tin foil, and has always expected and now expects and intends, in the rapid expansion of its business, to continue so to do, all without reference to specific similarities or differences between the various items included in plaintiff's line. Plaintiff's goods and those of its predecessor have always been identifiable by the trade-mark, trade name, distinctive badge, and autograph (Exhibit A', *supra*).

6. Plaintiff's business has for many years prior to the acts herein complained of been in large measure dependent upon the standing in the mind of the public of its trade-mark "BEECH-NUT," and that of its trade name, badge and autograph (Exhibit A'). The aforesaid trade-mark, badge and autograph, Exhibit A', except for variations in size, name of particular product and other immaterial variations, has been displayed conspicuously by plaintiff without exception upon all of the widely varying kinds of packaged consumable goods plaintiff has from time to time put upon the market. Plaintiff in the expansion of its business has expended more than two millions of dollars in advertising, including substantially every known kind of advertising, such as advertising in periodicals and newspapers, upon billboards, by display cards, circulars and other ways. The aforesaid advertising has in particular always featured and has forcibly impressed upon the mind of the public the trade-mark and trade name "BEECH-NUT" and the distinctive badge and autograph of plaintiff (Exhibit A'); as by its presence on any consumable product indicating that that product, so marked, was of plaintiff's manufacture, and of the same high standard of excellence as that of all other products similarly marked, regardless of specific difference be-

tween the widely varying items from time to time offered by plaintiff.

7. By reason of the foregoing, of the care, skill and industry and expenditures of plaintiff; and by reason of the high regard enjoyed by plaintiff's trade-mark and trade name "BEECH-NUT," distinctive badge and autograph (Exhibit), it came about (long prior to the beginning of the acts herein complained of) that the trade and public of the United States recognized the label Exhibit as plaintiff's distinctive badge and as plaintiff's personal autograph; and as indicating that any consumable packaged product bearing aforesaid badge, trade-mark and trade name and appearing upon the shelves of a retailer alongside other products bearing the same badge, was of the same origin as those other products and of the same high standard of excellence. Each new product so marked was long prior to 1915, and thereafter, and is now, received with immediate and marked favor by the public, by reason of the public's gratification and satisfaction with the previous products, similarly identified, by reason of the high regard the public had for plaintiff, and without such sales resistance as meets the ordinary merchandizing of a new product. By maintaining its standards of quality, at the cost of the most indefatigable and zealous effort, plaintiff has been and is enabled to maintain a large and growing demand for the goods of its manufacture, identified as of its manufacture by the trade-mark, badge and autograph, Exhibit .

8. The outline oval, containing the word "BEECH-NUT" and the pictorial representation of a beech-nut cluster, has been recognized and registered in the United States Patent Office as plaintiff's trade-mark and protected therein by registration grant 89,613, registered December 31, 1912, a copy of said registration being af-

fixed hereto and marked Exhibit ~~B~~ 4; said registration specifies about sixty-seven products of widely varying character (some thereof being edible and others not, but all being packaged consumable products), as those upon which as early as 1912 the aforesaid trade-mark had appeared. The said trade-mark was so registered under due form of law largely so that the public and other manufacturers might be informed of the rights of plaintiff in the premises, and of the many items of wide variety, upon which plaintiff then had employed and was employing said trade-mark, and of the fact that some or all of said items distinguished to be of plaintiff's manufacture would be likely to be found offered for sale in any store dealing in packaged consumable products designed to gratify the taste or satisfy the appetite of the purchasing public.

9. Defendant, well knowing the premises, and contriving to injure plaintiff, to cramp the legitimate expansion of its business, and divert from its profits gains and advantages which otherwise would accrue to plaintiff, to the irreparable and vast damage of plaintiff has infringed plaintiff's trade-mark, appropriated plaintiff's trade name and forged plaintiff's autograph; and has been guilty of unfair competition in trade against plaintiff. These acts and doings of defendant have been wilfully and fraudulently performed in spite of plaintiff's remonstrance and request that they be discontinued; and defendant now threatens and intends not only to continue but to aggravate its injury to plaintiff and will do so unless prevented by this court.

10. Thus defendant in the District of New Jersey, and elsewhere throughout the United States, without leave or license from plaintiff and against its protest, has been and is engaged in the manufacture and sale (in commerce among the several states) of a product

known as *"Beech-Nut" Scrap Tobacco*, a cheap tobacco made of "scrap" for tobacco chewing, upon which product, as packaged for the consumer and the retailer, is prominently displayed a fraudulent imitation of the distinctive label of plaintiff (Exhibit 1); a specimen of said imitative label appears affixed hereto as Exhibit 2; to the confusion of the trade and the public, who are likely to, and in fact have generally believed that the so-called "BEECH-NUT" Scrap Tobacco is another extension of plaintiff's line, and a product made by plaintiff. Defendant in so doing, and in its sales effort with respect to the so-called "BEECH-NUT" Scrap Tobacco, has been guilty of trade-mark infringement and of unfair competition in trade and has promoted and caused confusion in the trade to its own illegitimate profit and to the vast and irreparable loss, damage and injury of plaintiff.

11. Plaintiff (and its predecessor) by thirty years of cumulative, persistent, indefatigable effort of an organization now numbering many hundreds of individuals, and by the expenditure of more than two millions of dollars in advertising, has established its label, Exhibit 1, as indicating plaintiff's manufacture wherever it appears, thereby denoting the highest quality that can be obtained, with respect to cleanliness and general supreme desirability of any consumable product bearing that label. This reputation of plaintiff, associated with the aforesaid label, is nowhere better established than among the most refined and prosperous of the female members of the public. Among these persons, as well as to a substantial extent among the public in general, chewing tobacco is regarded with disfavor. Recognition as a manufacturer of chewing tobacco (particularly a cheap scrap tobacco) is not compatible with the standing plaintiff has achieved either in the minds of

its female customers or in the minds of the public. Yet such recognition of plaintiff as a manufacturer of cheap chewing tobacco has been and will be the inevitable result of defendant's imitation of plaintiff's label, Exhibit A. Furthermore, such recognition has and will jeopardize plaintiff's standing with a considerable body of plaintiff's trade (*i. e.,* retailers and jobbers), both through prejudice, among members of that trade, against chewing tobacco, and also through a lowered respect for plaintiff's intelligence which has been and will be the result of plaintiff's being believed in its trade to have embarked on the manufacture of cheap chewing tobacco, in spite of the totally inconsistent and opposite standing and reputation of plaintiff. Plaintiff's position substantially at the top of a highly competitive industry, is a fragile and precarious one, requiring intense, persistent, and indefatigable effort for its maintenance; and has been and will be irreparably damaged by the injuries just referred to.

12. Defendant, desirous of aggravating its injury to plaintiff, has recently begun a campaign of poster and billboard advertising which blatantly displays the label used by defendant (Exhibit B). This advertising has been and is likely to be generally attributed to plaintiff. This advertising in effect conspicuously forces upon the attention of the public (including plaintiff's female customers) what purports to be the fact that plaintiff is manufacturing cheap chewing tobacco. The said blatant billboard advertising of defendant is likely to counteract and destroy the good-will and reputation, for many years laboriously built up and maintained with zealous care, indefatigable effort and at enormous expense by plaintiff.

13. Defendant further aggravating its injury hereinabove complained of and desiring still further wrong-

fully to exploit the good-will of the purchasing public toward any packaged consumable product bearing plaintiff's trade-mark, trade name and autograph, without leave or license from plaintiff, but over its protest and against its will intends, is prepared, and threatens to flood the market (and engage in commerce among the several states) with a so-called "BEECH-NUT" cigarette, upon the retail package of which is displayed prominently (as shown in Exhibit 3 hereto attached), a close imitation of plaintiff's trade-mark, trade name, distinctive badge, and autograph. In so doing defendant threatens, and the result of such acts and doings will inevitably be, to cause the public to believe that the cigarettes whose packages are so marked are made by plaintiff, and to buy the same in that belief, to the illegitimate profit of defendant and the loss of plaintiff. These acts constitute threatened trade-mark infringement and threatened unfair competition in trade toward plaintiff.

14. Plaintiff (and its predecessor) in the legitimate extension of its lines for the past thirty years or thereabouts, has in rapid succession added from time to time new packaged consumable products of widely varying character, all however sold under the same trademark, trade name and autograph. In its national, persistent, long continued and enormous advertising, utilizing practically every known means of appealing to the trade and the public, through which advertising in part plaintiff's business has been developed, plaintiff has conveyed for many years to the public the impression of "quality" as associated with any packaged consumable product which bore plaintiff's label, Exhibit A. Thus the term or slogan "Beech-Nut Quality" has been used very largely by plaintiff in advertising both verbatim and by words containing inevitable inference of

the same meaning. And this slogan has been and is recognized by the public, when associated with the name "Beech-Nut," in general as denoting plaintiff's products, regardless of the particular character of any specific goods within the field of packaged consumable products. Thus, furthermore, as a part of plaintiff's sales efforts, by enormous national advertising and otherwise, in the legitimate and continuous actual and prospective expansion of its business by the inclusion of new items, plaintiff has caused the public to believe that plaintiff would never put out a new product unless and until plaintiff had so mastered the art of making that product that the product was of "Beech-Nut Quality."

15. Defendant, desirous still further of promoting confusion in the trade and of illegitimately converting to its own uses the good-will and reputation of plaintiff, has caused to be printed upon its imitative cigarette wrapper, approximately a million of which defendant has had printed and is ready to launch onto the market (Exhibit 3), a panel containing the inscription:

> "Cigarettes of Beech-Nut Quality have never before been offered to the Public";

thereby and in conjunction with the imitation of plaintiff's distinctive badge and autograph still further working to promote the belief, on the part of the public, that defendant's cigarettes are merely another of the widely varying additions to plaintiff's line which have appeared before the public in rapid succession for substantially thirty years. Defendant is thus guilty of threatened unfair competition in trade with plaintiff, and of illegitimately preparing to appropriate the good-will of plaintiff's business to promote the sale of its own goods, offered to the public in false and misleading dress.

16. Defendant, desirous still further of promoting confusion in the trade, and of converting to its own uses the good-will of plaintiff, has sold and offered for sale in commerce among the several states, large quantities of cigarettes bearing a close and fraudulent imitation of plaintiff's trade-mark, trade name and autograph, as exhibited in Exhibit E hereto attached, and has advertised said cigarettes extensively by advertising of a misleading character; said cigarettes have largely been purchased by persons who believed that they were of plaintiff's manufacture; all of which defendant persists in doing in spite of requests by plaintiff that it desist, and will continue to do in large and increasing measure unless prevented by this court. These acts and doings of defendant constitute trade-mark and trade name infringement and unfair competition in trade, and work irreparable injury to plaintiff.

17. Packaged tobacco and cigarettes are both within the legitimate field of expansion of plaintiff's business. Defendant by imitating plaintiff's trade-mark, trade name and autograph is attempting illegitimately to limit and shut off the expansion of plaintiff's business, as well as to damage and injure plaintiff as previously stated.

18. By reason of its acts and doings, defendant has gained large profits; those profits are largely, if not altogether, the result of defendant's conversion and exploitation of plaintiff's good-will, and unwarranted use of plaintiff's trade-marks, trade name and autograph; and of defendant's unfair competition; these profits therefore belong to plaintiff. The aforesaid profits are distinct and separable from the damage done plaintiff by defendant.

Plaintiff therefore prays the court:

First: That an injunction issue out of this court,

enjoining defendant, its officers, agents, employees, confederates and associates from

(*a*) Using, selling or offering for sale tobacco products under the trade-mark "BEECH-NUT" in any form;

(*b*) Displaying the name "BEECH-NUT" in its advertising;

(*c*) Displaying the imitative badge or label, Exhibit 2, either in that form or in colorable imitation thereof, on any of its goods or advertisements;

(*d*) Using, selling, or offering for sale cigarettes under the imitative label Exhibit 3, or under the name "Beech-Nut";

(*e*) Using in association with the name "Beech-Nut" the slogan "Beech-Nut Quality" in any form; and

(*f*) Enjoining defendant to deliver up and destroy all the infringing label tags, cartons, advertisements, placards, signs and other display devices containing the infringing mark.

Second: That the cause be referred to a Master to take an accounting to determine the profits defendant has made out of its infringement and unfair competition, and the damages suffered thereby by plaintiff; and that plaintiff recover said profits and threefold damages from defendant.

Third: That plaintiff recover its cost herein as taxed by the clerk.

Fourth: For such other and further relief as the court may deem it proper to grant.

And forasmuch as your orators can have no adequate relief save in this court, to the ends therefore that defendant may, if it can, show why your orators should not have the relief hereby prayed, and may (but not under oath—answer under oath being waived), ac-

cording to the best and utmost knowledge, information and belief of its officers, full, true and perfect answer make to the premises and to all of the several matters hereinbefore stated and charged as fully and particularly as if severally and separately interrogated as to each and every of said matters.

May it please your Honors to grant unto plaintiff a writ of subpoena *ad respondendum* issued out of and under the seal of this court, directed to said defendant, P. Lorillard Company, at New York, New York, commanding it by a certain day and under a certain penalty to be and appear in this Honorable Court, then and there to answer to the premises, and to stand to and abide by such order and decree as may be made against it.

Plaintiff will ever pray.

BEECH-NUT PACKING COMPANY,
By F. E. BARBOUR.

OFFIELD, POOLE & HINTON,
Solicitors for Plaintiff.

JAMES R. OFFIELD,
CHARLES H. POOLE,
SEBASTIAN HINTON,
PHILIP B. ADAMS,
Allendale, N. J., or 21 Park Row, New York City.
Of Counsel.

State of New York, County of Montgomery, ss:

F. E. Barbour, being first duly sworn, says that he is vice-president of Beech-Nut Packing Company, plaintiff herein; that he has read the bill of complaint and inspected the exhibits therein referred to, and that the statements in the bill of complaint are true of his own knowledge, except such statements as

in the bill of complaint are said to be made on information and belief; and as to such statements he believes the same to be true.

F. E. BARBOUR.

Subscribed and sworn to before me this 27th day of May, A. D. 1921.

E. W. SHINEMAN,
Notary Public.

EXHIBIT A.1

BEECH-NUT BRAND
U. S. INSPECTED AND PASSED BY DEPARTMENT OF AGRICULTURE EST. No 323.
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
BEECH-NUT PACKING CO.
CANAJOHARIE, N.Y. U.S.A.
HAM

MINT FLAVORED
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
CHEWING GUM
ALWAYS REFRESHING
You will like Beech-Nut Mints and Fruit Drops in handy pocket packages.
MINT FLAVORED
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
CHEWING GUM
ALWAYS REFRESHING
COPYRIGHT 1916 BY BEECH-NUT PACKING CO., CANAJOHARIE, N.Y. AND BROOKLYN, N.Y., U.S.A.

EXHIBIT B.2

FULL WEIGHT
10¢
BEECH-NUT
CHEWING TOBACCO
MADE UNDER SPECIAL PROCESS
USED IN THE WORLD'S LARGEST
SCRAP TOBACCO FACTORY
MIDDLETOWN, OHIO.
SHADE GROWN BLEND
FACTORY NO. 10. FIFTH DISTRICT OF NEW JERSEY
NOTICE—THE MANUFACTURER OF THIS TOBACCO HAS COMPLIED WITH ALL THE
REQUIREMENTS OF LAW. EVERY PERSON IS CAUTIONED UNDER THE PENALTIES
OF LAW, NOT TO USE THIS PACKAGE FOR TOBACCO AGAIN.
-LON-

EXHIBIT C. 3

CIGARETTES of
BEECH-NUT Quality
have never before been
offered to the public.
GUARANTEED BY
P. Lorillard Co.
ESTABLISHED 1760.
BEECH-NUT
PERFECT
CIGARETTES

EXHIBIT P.4

UNITED STATES PATENT OFFICE.

BEECH-NUT PACKING COMPANY, OF CANAJOHARIE, NEW YORK.

TRADE-MARK FOR CERTAIN FOODS.

89,613. Registered Dec. 31, 1912.

Application filed March 22, 1909. Serial No. 41,324.

STATEMENT.

To all whom it may concern:

Be it known that BEECH-NUT PACKING COMPANY, a corporation duly organized under the laws of the State of New York, and located and doing business at Canajoharie, county of Montgomery, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, the annular band being red, for cured ham, bacon, beef, codfish, and herring, sausage, Camembert cheese, pimento-cheese, Roquefort-type cheese, peanut-butter, canned beans, canned bacon and beans, canned beans with tomato sauce, canned bacon and beans with tomato sauce, canned beans and selected pork, malt vinegar, cider vinegar, olive-oil, gelatin, tomato catsup, prepared mustard, strawberries, raspberries, and cherries preserved in syrup, grape, quince, fig, peach, blackberry, raspberry, strawberry, cherry, and plum jams, blackberry, pineapple, huckleberry, cherry, and ginger pear preserves, cranberry sauce, olives, orange, grape-fruit, rhubarb, and lime-fruit marmalades, spiced plums, preserved Persian and Fard dates and figs, quince, apple, black-currant, grape, crabapple, and red-currant jellies, peppermint, lime, wintergreen, clove, cinnamon, lemon, hoarhound, and anise cut candies, wintergreen, mint, and vanilla cream candies, and chewing-gum, all in Class 46, Foods and ingredients of foods.

The trade-mark has been continuously used in the business of said corporation, and in the business of its predecessor, the Imperial Packing Company, since the latter part of the year 1899.

The said corporation is the owner of the following trade-mark registrations in the United States Patent Office:—Imperial Packing Company, No. 19,838, July 7, 1891; Imperial Packing Company, No. 24,978, July 3, 1894; Beech-Nut Packing Company, No. 35,731, Jan. 8, 1901; Beech-Nut Packing Company, No. 36,444, May 21, 1901.

The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown, and by branding the goods, or the boxes or cases in which the said goods or packages are shipped, with an impression showing the said trade-mark.

BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL,
President.

DECLARATION.

State of New York county of New York ss.

BARTLETT ARKELL, being duly sworn, deposes and says that he is the president of the corporation applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the

right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations, and particularly with Great Britain and France; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

BARTLETT ARKELL.

Subscribed and sworn to before me, a notary public, this 25th day of September, 1912.

[L. S.] S. V. MORRIS,
Notary Public, 121, New York County.
Register's No. 3236.

EXHIBIT B. 5

BEECH-NUT
PERFECT
CIGARETTES
BEECH-NUT
Cigarettes
"Mildest of all"
Perfect Quality
Delicious Taste
P. Lorillard Co.
ESTABLISHED 1760

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } In Equity No. 3056.

Stipulation.

It is stipulated by and between the parties, through their respective counsel, that plaintiff's time for pleading to the answer and answering to the counterclaim may be extended an additional twenty days beyond the thirty days extension now appearing by stipulation in the record, or until October 15, 1921, and that the plea to the answer and answer to the counterclaim when filed may be filed *nunc pro tunc* as of the date August 16, 1921, to take precedence over the testimony taken in this case.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Beech-Nut Packing Co.
MEYERS, CAVANAGH, WHITEHEAD & HYDE,
Counsel for P. Lorillard Company.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } In Equity No. 3056.

Stipulation.

It is stipulated by and between the parties hereto that the answer to the counterclaim in the above entitled suit, attached hereto, may be filed as of the date

of August 16, 1921, to take precedence over the testimony herein taken, as per the stipulation of August 16, 1921, appearing in the record of said testimony and the stipulation of September 26, 1921.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Beech-Nut Packing Co.
MEYERS, CAVANAGH, WHITEHEAD & HYDE,
Counsel for P. Lorillard Company.

Approved:
J. L. BODINE,
U. S. District Judge.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Answer to Defendant's Counterclaim.

Plaintiff answering defendant's counterclaim, or so much thereof as it is advised is material and necessary to be answered, answering says:

I. (Paragraph 20 of Answer.) Plaintiff denies that defendant is the owner of the trade-mark "Beech-Nut" for tobacco products of all kinds, including cigarettes, and that for many years prior to the acts of plaintiff referred to, this defendant and its predecessors in business had and has manufactured and marketed tobacco products under the trade-mark "Beech-Nut" in vast quantities of a value running into millions of dollars. Plaintiff denies that the alleged predecessors were predecessors of defendant with respect to the alleged trade-mark "Beech-Nut." Plaintiff says that the first considerable quantity of Beech-Nut Tobacco ever manu-

factured either by plaintiff or its alleged predecessors, and the first quantity of value even comparable with the sum of a million dollars was sold by defendant subsequently to the beginning of the year 1915. Plaintiff admits that the value of the subject-matter in controversy is in excess of five thousand dollars ($5,000.00), but denies that the trade-mark "Beech-Nut" is defendant's trade-mark for tobacco or any other product. Plaintiff denies that the trade and public in general or that the tobacco trade, or the tobacco using public has ever recognized the trade-mark "Beech-Nut" for tobacco products to be that of defendant. Plaintiff denies that by reason of the long experience and great care of defendant in its tobacco business and the superior quality and character of its tobacco products and particularly its tobacco products sold under its trade-mark "Beech-Nut," such "Beech-Nut" tobacco products of defendant had become widely known in the community and throughout the various states of the United States and have commanded and still command an extensive sale throughout the various states of the United States; plaintiff asserts that the aforesaid sales are due to the use of plaintiff's trade-mark and trade name and the imitation of plaintiff's label by defendant and not at all to anything else contributed by defendant. Plaintiff admits that the sale of the aforesaid tobacco products has been a source of great profit to this defendant.

Plaintiff denies that this defendant or its predecessors ever enjoyed a long and quiet use of the trade-mark "Beech-Nut" for tobacco products. Plaintiff denies that, well knowing the premises and with the preconceived intention to injure the defendant and with the purpose to defraud it, and with the purpose to deprive this defendant of any legitimate benefits and profits resulting from the alleged reputation acquired by its

"Beech-Nut" tobacco products and with the intent to acquire for itself the benefits and profits of defendant's reputation and with the intent to assist others to palm off on the public tobacco products, particularly cigarettes, under the name "Beech-Nut," not manufactured or sold by the defendant and in wilful disregard of defendant's rights in the premises, that it has recently but prior to the filing of the bill of complaint and the answer, to-wit, since about June or July, 1919, manufactured or caused to be manufactured and endeavored to sell within the District of New Jersey and elsewhere in the United States, and now threatens to sell within the District of New Jersey and elsewhere, an inferior grade of cigarettes under the trade-mark "Beech-Nut" with the intent to deceive and defraud the public, to injure the reputation of defendant and particularly in connection with its Beech-Nut tobacco products, such as scrap tobacco and cigarettes and to reap and receive for this plaintiff's own benefits and profits, the gains lawfully due defendant. Plaintiff denies that any act or deed done by plaintiff is an infringement or threatened infringement of any right of defendant in the premises or of any right in defendant in its alleged trade-mark "Beech-Nut" as applied to tobacco products.

II. (Paragraph 21 of the Answer.) Plaintiff denies that in pursuance of an unlawful policy of infringement or of threatened infringement of defendant's rights in the premises, this plaintiff with full knowledge of the fact that defendant or its predecessors had for many years manufactured and marketed tobacco products under defendant's trade-mark "Beech-Nut," manufactured and shipped or caused to be manufactured and shipped an inferior grade of cigarettes, packaged as described in the aforesaid paragraph of the counter-

claim. Plaintiff denies that cigarettes so packaged were shipped into the District of New Jersey and attempted to be sold therein. Plaintiff admits that certain cigarettes made for it did not bear plaintiff's alleged label, Plaintiff's Exhibit A, but states that they did bear plaintiff's trade-mark "Beech-Nut." Plaintiff denies that such cigarettes presented such a cheap appearance that if permitted to be sold they would and will operate to the injury and damage of defendant's reputation, particularly with relation to its "Beech-Nut" tobacco products. Plaintiff admits that it filed in the United States Patent Office an application for registration of the trade-mark "Beech-Nut" for cigarettes as described in the counterclaim, but denies that such application was filed in pursuance of any unlawful policy or with full knowledge of defendant's alleged prior adoption or exclusive right in the trade-mark "Beech-Nut" for tobacco products. Plaintiff admits that defendant filed opposition, that it filed answer, that testimony was taken, as stated in the counterclaim, but denies that defendant has any rights in the premises.

III. (Paragraph 22 of the Answer.) Plaintiff denies that the alleged acts, threats and intention of plaintiff are in disregard of defendant's rights in the premises or that they will have the effect to and will encourage others to interfere with defendant's alleged trade-mark "Beech-Nut" for tobacco products or to disregard its rights, or that it will result in any irreparable damage and injury and loss to defendant, except such damage, injury and loss as may be involved in preventing defendant from continuing to perpetrate a fraud and injury on plaintiff and the public.

Plaintiff claims the right to merchandise packaged consumable products such as cigarettes under its own trade-mark "Beech-Nut," and particularly under its own

label and autograph, used by it for many years on scores of packaged consumable products, if it should see fit at any time to do so.

Plaintiff, having therefore fully answered to the aforesaid counterclaim and to so much thereof as it is advised is material and necessary to be answered, prays that the counterclaim may be dismissed, together with the prayer therein for relief, and that plaintiff be with respect to such counterclaim hence dismissed with its costs in this behalf most wrongfully expended.

BEECH-NUT PACKING COMPANY,
By OFFIELD, POOLE, HINTON & SCOTT,
Attorneys for Plaintiff.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before L. W. DePass, a notary public within and for the County of Suffolk, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at the Chamber of Commerce building, Boston, Massachusetts, and the Touraine Hotel, Boston, Massachusetts, beginning the sixteenth day of August, A. D. 1921, at 10 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard Company.

HARRY S. COHEN, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Harry S. Cohen; 236 Chestnut Street, Chelsea, Massachusetts; age, 19.

Q. 2. What is your occupation?

A. Salesman.

Q. 3. Where are you employed?

A. L. K. Liggett, 15 Huntington Avenue, Boston, Mass.

Q. 4. And what products do you sell?

A. Cigars, cigarettes, tobacco and that line.

Q. 5. Are you employed behind the cigar counter in the Liggett store?

A. I am.

Q. 6. Is that a drug store?

A. Drug store; yes.

Q. 7. I show you a package of cigarettes which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you sold these cigarettes over your counter? If so, please state when you first began selling them.

A. Why, we began about the early part of April, I believe.

Q. 8. 1921?

A. 1921.

Q. 9. Will you state when you began selling these cigarettes, or offering them over your counter, you heard any remarks, comments, inquiries or the like from the public over the counter about these cigarettes?

A. They would say if Beech-Nut gum is as good as the cigarettes, they would buy them.

Q. 10. Well, Mr. Cohen, which of these products were on sale first, the gum or the cigarettes?

A. The gum.

Q. 11. Was the gum a new product, or were the cigarettes a new product?

A. The cigarettes.

Q. 12. Had the public been buying the gum?

A. They were.

Q. 13. Please state whether or not Beech-Nut gum was a good seller in your store.

A. It was a good seller.

Q. 14. Was this true prior to the appearance of the cigarettes?

A. I think so.

Q. 15. Will you listen to the reading of your previous answer: "They would say if Beech-Nut gum is as good as the cigarettes they would buy them." Is that what you meant?

A. No; that was an accidental mistake. What I meant is that they would say, "If the Beech-Nut cigarettes are as good as the Beech-Nut chewing gum, then they will buy the cigarettes."

Q. 16. Please state any other remarks that you heard over the counter when the cigarettes were first offered.

A. Well, people wanted to know whether the Beech-Nut gum manufacturers were the same people that put out the cigarettes.

Q. 17. Will you state what proportion of your customers made these kind of remarks, if you can remember, when the cigarettes were first offered?

A. Well, two-thirds of the people would make them like that.

Q. 18. Did you ever have people come into your store and ask for Beech-Nut?

A. Yes.

Q. 19. And what would you do?

A. I would ask them whether they wanted the cigarettes or the gum.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 20. (By Mr. Cavanagh.) How old did you say you were, Mr. Cohen?

A. 19.

X-Q. 21. How long have you been acting as a salesman?

A. About two years.

X-Q. 22. How long have you been with L. K. Liggett & Company?

A. The same number of years.

X-Q. 23. How long have you been selling the tobacco line with Liggett?

A. About eighteen months.

X-Q. 24. Did you start in directly in the tobacco line when you went to work, or did you have some other line first?

A. Some other line.

X-Q. 25. What was that?

A. Jewelry.

X-Q. 26. Jewelry?

A. Well, that was with my father.

X-Q. 27. So when you went to work with Liggett & Company, you started right behind the cigar and tobacco counter?

A. No, I was in the soda department for a short while.

X-Q. 28. And subsequently you went to selling the tobacco line behind the counter?

A. Yes.

X-Q. 29. Now, how many people are employed in this store where you are in Liggett's, 15 Huntington Avenue?

A. Well, there are about twelve.

X-Q. 30. And how many are there behind the cigar and tobacco counter?

A. Well, there is myself and others that help me out when I am away.

X-Q. 31. You mean relief?

A. Relief.

X-Q. 32. You say you sell all sorts of cigars, cigarettes and tobacco?

A. We do.

X-Q. 33. You are familiar with the various lines?

A. I am.

X-Q. 34. Do you know who makes the Beech-Nut cigarette?

A. So far as I know, the Lorillard Company.

X-Q. 35. That is known as Lorillard's brand?

A. Yes.

X-Q. 36. Do you know who makes the Egyptian Deity cigarette?

A. It is the same people, I believe, or S. Anargros.

X-Q. 37. Do you sell scrap tobacco, chewing tobacco?

A. Yes.

X-Q. 38. What kind?

A. B. L., and Climax—plug, that is.

X-Q. 39. I show you a package of tobacco which is known as scrap tobacco and which is in this case as Defendant's Cross-Exhibit No. 1. Did you ever see a package of tobacco like that?

A. I have seen it, yes.

X-Q. 40. Whose tobacco is that?

A. Lorillard's.

X-Q. 41. That is known in the tobacco market as Lorillard's tobacco?

A. Yes.

X-Q. 42. Who makes Beech-Nut chewing gum that you sell?

A. The Beech-Nut Packing Company, I think. I don't know just who makes that. So far as I know it is not the same people who put out the cigarettes.

X-Q. 43. Reverting to this package of scrap tobacco, Defendant's Cross-Exhibit No. 1, which I showed you a moment ago, is there anything on that package to indicate that it is Lorillard's?

A. Yes.

X-Q. 44. What is that?

A. That name on the package (indicating).

X-Q. 45. And what is that name?

A. Lorillard.

X-Q. 46. Now, I think you said, Mr. Cohen, that Beech-Nut gum was on the market before Beech-Nut cigarettes. How do you know this?

A. So far as I know.

X-Q. 47. That is simply your personal opinion?

A. Yes.

X-Q. 48. I think you also said that when the Beech-Nut cigarette was first put on sale in Liggett's store, at 15 Huntington Avenue, two-thirds of the customers asked if it was the same people that put out Beech-Nut cigarettes and the gum?

A. Yes.

X-Q. 49. Did you count, or keep track of the number of people that asked you that?

A. I could tell pretty plainly from the customers who would mention the fact.

X-Q. 50. How did you know that practically two-thirds of them mentioned it?

A. Practically every one that came into the store mentioned it.

X-Q. 51. You said two-thirds. How did you reach this conclusion?

A. Well, some would not say it.

X-Q. 52. Did you count them?

A. No, I didn't; it is just my estimate.

X-Q. 53. So you really don't know whether it was two-thirds or not?

A. Well, I could truthfully say it was about that number.

X-Q. 54. You didn't count them, did you?

A. No; you can't count them; you could not possibly do that, you know.

X-Q. 55. At Liggett's store, do you sell Beech-Nut gum?

A. We do.

X-Q. 56. Do you sell it personally?

A. I do.

X-Q. 57. I hand you a small package of gum, which is in this case as Defendant's Cross-Exhibit No. 2. Will you tell me what that is?

A. That is the Beech-Nut gum.

X-Q. 58. What is the color of that label?

A. Yellow.

X-Q. 59. And what is the color of the cigarette label, the background of it?

A. Why—

X-Q. 60. The Beech-Nut cigarette label, the background of it.

A. Red.

X-Q. 61. You would not confuse those two colors, would you, yellow and red?

A. No.

Mr. Cavanagh: I think that is all.

Redirect Examination.

R-D. Q. 62. (By Mr. Hinton.) Over what counter in your store do you sell the gum?

A. The candy counter.

R-D. Q. 63. Do you sell that gum personally?

A. Well, when I relieve the candy girl, when she goes out to lunch, I hop over to the candy counter.

Mr. Hinton: That is all.

(Signature waived.)

ROBERT SKENE, JR., a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, being first duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Robert Skene, Jr.; Boston, Massachusetts; 50 years of age; New England representative for Arkell & Smiths Company, Canajoharie, New York.

Q. 2. What does Arkell & Smiths do?

A. They manufacture paper and cotton sacks for flour and feed.

Q. 3. State what, if any, connection you have with the Beech-Nut Packing Company.

A. I have no direct connection with the Beech-Nut Packing Company, but Mr. Arkell, who is president of the Arkell & Smiths Company, is also president of the Beech-Nut Packing Company, and I am intimately acquainted with the whole Arkell family and other officers of the Beech-Nut Packing Company and have been intimately associated with them for 25 years—these people.

Q. 4. Are you known among your friends in Boston as being in some way connected or familiar with the Beech-Nut Packing Company?

A. Everybody here, around the Chamber especially, persistently associates me with the Beech-Nut Company. They seem to think that I have something to do with it in some way, all the time.

Q. 5. By "Chamber," you mean the Chamber of Commerce?

A. Yes, Chamber of Commerce.

Q. 6. I show you a package of Beech-Nut cigarettes,

Plaintiff's Exhibit No. 1 in this case. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

A. Yes, I have seen these. I first saw them at the cigarette stand here in the Chamber of Commerce.

Q. 7. When was that?

A. In the spring of this year.

Q. 8. About what time?

A. The early part of this year.

Q. 9. Were they on sale at that stand when you first saw them?

A. Yes, sir.

Q. 10. Will you please state whether you had heard anything about these cigarettes prior to the time that you actually saw them offered for sale?

A. On the floor of the Chamber quite a number of people came to me and said: "I see that your people are getting out a new cigarette, the Beech-Nut cigarette." And so many persisted in this, making this inquiry of me, "Are you getting out a new Beech-Nut cigarette," that I inquired about where they could be found and I went down to the cigar stand and got a package.

Q. 11. When you first saw these cigarettes, by whom did you think they were made?

A. I thought it was a Beech-Nut Packing Company product.

Q. 12. What made you think that?

A. Well, the Beech-Nut hyphenated, just the same as the Beech-Nut Packing Company do, and the form of the label, and the cluster under the "Beech-Nut" and the whole color scheme, the whole general form of the label.

Q. 13. Now, you stated you went down and bought a package of these cigarettes. Then what did you do?

A. Of course, I examined it and found that the name Lorillard Company was on them.

Q. 14. And what did you then conclude, Mr. Skene?

A. So then I was not sure whether it was a Beech-Nut product or not, but I thought perhaps Lorillard might be putting it out for the Beech-Nut people, and I wrote down to Canajoharie to inquire before I gave any positive information to my friends about it one way or the other.

Q. 15. And then what happened?

A. The Beech-Nut people wrote me that it was not their product, and that they had nothing to do with it. And from that time I informed all friends who made inquiries of me, and who had spoken to me about it, that it was not our product at all.

Q. 16. You said that several of your friends had spoken to you about these cigarettes. Will you state, if you remember, and as carefully as you can, exactly what these people said to you?

A. Well, there were so many different forms that it would be hard, but generally it was "I see that the Beech-Nut people are getting out a cigarette," or, "I see that you have a new brand of cigarettes," or, "Why don't you send us some of your Beech-Nut cigarettes?"

Q. 17. Can you, Mr. Skene, give me the names of any of your friends in the Boston Chamber of Commerce, whom you can remember, who definitely made remarks of that character to you when the cigarettes came out?

A. Well, Fred Godfry—

Q. 18. Will you please also state what these people do, so far as you know?

A. Fred Godfry, John F. Lapham, Dick Pope, Warren Torrey, John King, Billy Wise—is that enough?

Q. 19. I would like to have you mention all you can.

A. Fred Lamb, and a great many others. These

gentlemen are in the flour and grain business, and all of them have offices in the Chamber of Commerce building.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 20. (By Mr. Cavanagh.) I understand that you are connected with Arkell & Smiths, which in turn is connected with the Beech-Nut Packing Company; is that right?

A. No, not connected with the Beech-Nut Packing Company.

X-Q. 21. Explain their relation.

A. Mr. Arkell, president of the Arkell & Smiths Company, is president of the Beech-Nut Packing Company.

X-Q. 22. Have you been using any of the Beech-Nut Packing Company products?

A. Well, I have been using them along for years.

X-Q. 23. What are those products in general; how would you classify them?

A. Well, they run all the way from Beech-Nut bacon and ham to chewing gum and peanut butter and preserves and jams, and now they are making ginger ale and spaghetti—I don't know how you would class it.

X-Q. 24. Are they food products?

A. Well, yes, in a measure, but I don't know that you would call chewing gum a food product.

X-Q. 25. Do you use tobacco?

A. I do; yes.

X-Q. 26. Are you familiar with the names of any of the big tobacco companies?

A. Oh, I am with the Lorillard name and the American Tobacco Company, and Liggett.

X-Q. 27. What Liggett concern do you know?

A. I just know the Liggett concern in a general way, not especially in regard to the product.

X-Q. 28. Does your work bring you in contact with the tobacco dealers or the tobacco using public?

A. No, sir.

X-Q. 29. When you examined this Beech-Nut package of cigarettes, Plaintiff's Exhibit No. 1, you found the name P. Lorillard Company on it, did you?

A. Yes, down below in small type.

X-Q. 30. Just as it is on the Beech-Nut package of cigarettes, Plaintiff's Exhibit No. 1?

A. Yes, sir.

X-Q. 31. And you didn't find the name Beech-Nut Packing Company anywhere on that package, did you?

A. No, sir.

X-Q. 32. Have you ever examined any of the Beech-Nut Company packages?

A. Well, you mean—you don't mean the packages, you mean—

X-Q. 33. I mean the packages, the same as you looked at this, the Lorillard cigarette package.

A. You don't mean the contents of the package, you mean the outside?

X-Q. 34. Yes, the outside, or dress.

A. Oh, I have seen it so many times that its general form and style is familiar to me, that is all.

X-Q. 35. Does the name Beech-Nut Packing Company appear upon packages of goods put up by this concern?

A. I don't really know.

X-Q. 36. You never looked at a package close enough to find out?

A. No; I have not had occasion to examine them; I have always accepted their packages as Beech-Nut packages without examining them closely.

X-Q. 37. You don't know whether it was made by the Beech-Nut Packing Company or some other concern; is that it?

A. Well, I felt pretty fully assured that it was, that is all. I would not know from examining the name, no—just the general form of Beech-Nut label.

X-Q. 38. So you might take the product of any other concern for that package so far as that name of Beech-Nut is concerned?

A. Yes, if it had Beech-Nut name and label on it, I would take it without examining it very closely.

X-Q. 39. Without ascertaining whether or not their name appeared on it?

A. Yes.

X-Q. 40. I understand you have used tobacco have you?

A. Yes, sir.

X-Q. 41. Do you use chewing gum?

A. Yes.

X-Q. 42. If you went into a store and asked for a package of chewing gum, would you accept a package of tobacco in place of it?

A. No, I should not.

X-Q. 43. You would think a man was crazy who would do that, wouldn't you?

A. No; I might have some reason for it—for accepting it.

X-Q. 44. Supposing you wanted a package of Beech-Nut chewing gum, and nothing else, would you accept a package of cigarettes in place of the chewing gum?

A. I would not accept any other package of gum, for that matter. I have often refused any other kind of chewing gum—if they tried to pass me other gums, I would not have it.

X-Q. 45. Will you just answer my question?

A. Naturally I would not take anything else in place of it, any more than I would take any other article when I asked for something else in any store.

X-Q. 46. So you never would, in your own mind, as a person of intelligence—you would never confuse tobacco with chewing gum, would you?

A. No.

X-Q. 47. When you examined this package of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1, and saw the name P. Lorillard Co. on it, didn't that indicate to you that that package was made by P. Lorillard tobacco people?

A. Yes.

X-Q. 48. Did you ever know the Beech-Nut Packing Company to put out any tobacco product?

A. No.

X-Q. 49. Did you ever see Beech-Nut scrap tobacco?

A. No; I don't recall it. I may have seen the word years ago.

X-Q. 50. Well, I show you a package of it that is in this case as P. Lorillard's Cross-Exhibit No. 1. Did you ever see that package?

A. No.

X-Q. 51. Are you related to any of these gentlemen to whom you referred as having asked you about Beech-Nut cigarettes?

A. No, sir; or to any of the Beech-Nut people.

X-Q. 52. But you are employed by a concern in which Mr. Arkell is an officer, and Mr. Arkell is also an officer of the Beech-Nut Packing Company?

A. Yes.

X-Q. 53. Who is the Beech-Nut Packing Company representative in this section?

A. I don't know; I think his name is Hubbard; I understand his name is Hubbard, but I don't know.

X-Q. 54. So you don't handle yourself any of the Beech-Nut Packing Company products?

A. No, sir.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 55. (By Mr. Hinton.) Mr. Skene, I wish you would state, if you can remember, after you purchased this package of Beech-Nut cigarettes, and upon examination thereof, as you have testified, found the name P. Lorillard Company on there, what did you conclude?

A. Either that they were being manufactured for the Beech-Nut people by Lorillard, or being distributed by P. Lorillard Company.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 56. (By Mr. Cavanagh.) Upon what did you base that conclusion?

A. Because of the practice in my business. We get out a great many brands of flour, and we put on who they are manufactured for, or distributed by. It may be that two or three men, different men, use the same flour, but this name indicates who it is distributed by, or how it is put out; but the brand is a well known brand.

R-X Q. 57. Now, just on this point, will you give an example of one such product, the name?

A. Well, take King Arthur flour, on that it says distributed by Sands, Taylor & Wood; that is a well known brand in New England, one of the most popular brands we have, and a fine flour. That flour is made by the Northwestern Consolidated Milling Company.

R-X Q. 58. Now, what other concerns distribute King Arthur flour?

A. Why, nobody; but I know it is sold by a great many people.

R-X Q. 59. And can you give me the name of a flour, for example, which is distributed under the same name by different concerns?

A. No, I can't, offhand.

R-X Q. 60. As I understand it, this flour, King Arthur, has the name of the distributor of it?

A. Yes, sir.

R-X Q. 61. What was the name?

A. Sands, Taylor & Wood.

R-X Q. 62. So Sands, Taylor & Wood have their own name on it, and they are the ones that put the flour on the market?

A. Yes.

R-X Q. 63. Wouldn't you take the name on the package as the name of the party that manufactured the flour?

A. For a long time they didn't have their name on it, only Minneapolis, Minnesota, and that is where the mill was.

R-X Q. 64. Minneapolis, Minnesota, was the only name on it?

A. Yes, sir.

R-X Q. 65. And now they put their own name on?

A. Yes, sir.

R-X Q. 66. So that the name of a concern on a package would indicate the party who puts it on the market?

A. Not necessarily, no.

R-X Q. 67. Well, you saw P. Lorillard's name on this Beech-Nut cigarette, and could you possibly conceive that this was put out by the Beech-Nut Packing Company, if their name was not on it. That is what I am trying to get at.

A. Because I knew P. Lorillard was manufacturing to-

bacco, but I could not conceive that he would use the Beech-Nut label.

R-X Q. 68. Then, the only thing that made you think it was manufactured by the Beech-Nut Packing Company was the words "Beech-Nut" on it?

A. The Beech-Nut, and form of label. The oval form of the label, and the cluster, and the color scheme.

R-X Q. 70. What color scheme?

A. Well, in the form of the label and the red right around it.

X-Q. 71. You mean this red background?

A. No, I mean the label itself.

R-X Q. 72. You don't mean the red background?

A. No, that is the color. I am talking about the label.

R-X Q. 73. Just the oval part?

A. Yes.

R-X Q. 74. You knew that the Lorillard Company put out tobacco and cigarettes, did you not?

A. Yes; I believed they did.

R-X Q. 75. And you never knew the Beech-Nut Packing Company to put out tobacco and cigarettes?

A. No; it was a new matter, so far as I was concerned.

R-X Q. 76. I show you a sheet marked for identification as Defendant's Cross-Exhibit No. 3. Do you recognize that label?

A. Yes.

R-X Q. 77. What is it?

A. It is a Beech-Nut label.

R-X Q. 78. Now, calling your attention to the beech-nut in the center of it, is it like the beech-nut on the Lorillard label?

A. No, but very similar, I would say.

R-X Q. 79. What is the difference?

A. Well, why, in a general way, we would call each of these a cluster, an interior cluster.

R-X Q. 80. The beech-nut is a single beech-nut, isn't it?

A. Yes.

R-X Q. 81. With green leaves?

A. Yes.

R-X Q. 82. Extending over it?

A. Yes.

R-X Q. 83. And the Lorillard label shows just two separate beech-nuts, red and gold; is that right?

A. Yes, sir.

R-X Q. 84. And there is a red oval line around the beech-nut, isn't there?

A. Yes, sir.

R-X Q. 85. And there is no such line around the Lorillard beech-nut, is there?

A. No, sir.

R-X Q. 86. On the wide red band on the label of the Beech-Nut Packing Company, Defendant's Cross-Exhibit No. 3, you find, do you not, at each end a beech-nut imposed on three leaves?

A. Yes.

R-X Q. 87. And you don't find that on the Lorillard cigarette package, do you?

A. No.

R-X Q. 88. And you find on this Beech-Nut Packing Company label, Defendant's Cross-Exhibit No. 3, "Beech-Nut Packing Company, Canajoharie, N. Y., U. S. A.," do you not?

A. Yes, sir.

R-X Q. 89. Do you find that on the Lorillard package?

A. No, sir.

R-X Q. 90. So there is quite a difference?

A. But, nevertheless, the general impression would come to anybody, especially to me, that that is a Beech-Nut label.

R-X Q. 91. But I am asking you, there are quite a few differences?

A. Yes, in these small details that you refer to.

R-X Q. 92. Did you ever know of any Beech-Nut Packing Company's goods to be put out in a label or package with red radiating lines like that—as shown by Lorillard scrap tobacco package, and marked herein Defendant's Cross-Exhibit No. 1?

A. I don't recall it, unless it was in the peanut bar they got out. I think it had a stripe on it, something like that.

Mr. Hinton: The examination in connection with the Defendant's Cross-Exhibit No. 1, Lorillard's Scrap Tobacco, is objected to as outside of the scope of the direct examination.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

ROBERT SKENE, JR.

A. W. GODFREY, a witness produced on behalf of the Beech-Nut Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Alfred W. Godfrey, and I am mill representative, selling mill feeds and flour; my legal residence is Lowell, Mass., and my place of business is 201 Chamber of Commerce, Boston.

Q. 2. Did you give your age?

A. 44.

Q. 3. Do you trade on the floor of the Chamber of Commerce, Boston, Mr. Godfrey?

A. I do.

Q. 4. I show you a package of cigarettes which is in

evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen those cigarettes before, and, if so, when and where did you first see them?

A. I saw them first on the counter of the cigar stand in the Chamber of Commerce Building.

Q. 5. And when was that?

A. Some time last spring, I should say. I have no definite date in mind.

Q. 6. When you first saw these cigarettes, by whom did you believe that they were made?

A. It came to my mind that they were put out by the Beech-Nut people that put out all the other Beech-Nut goods that I had ever seen.

Q. 7. You may state, if you will, what it was that led you to that belief.

A. The label was such that immediately it brought to my mind the Beech-Nut Packing Company's goods, manufactured at Canajoharie, New York.

Q. 8. Do you now believe that they are made by the Beech-Nut Packing Company?

A. I have been informed that they were not.

Q. 9. When did you first learn that this product was not made by the Beech-Nut Packing Company, and how did you find out?

A. Why, on seeing the package, I immediately got hold of my friend, Mr. Skene, and asked him how long they had been putting out cigarettes by the Beech-Nut people, knowing he was intimately acquainted with them, and he professed absolute ignorance of putting them out. And in due course, I don't know whether it was that day or the next day, but very soon after, I went downstairs and purchased a package of them to see what there was in them, and upon looking them over I saw Lorillard's name on it, and I think it was sometime after that, after talking with Mr. Skene about it, and asking if Lorillard

were putting the cigarettes out for them, and he said he didn't know anything about it, and he came back afterwards and told me, sometime afterwards, that they were not putting them out, he had inquired; and that is how I gained my information, which I supposed was good information.

Q. 10. You used the expression in your last answer that Lorillard was putting the cigarettes out for "them." Who did you mean?

A. Why, the Beech-Nut people, the Beech-Nut Packing Company, whatever their title is, up to Canajoharie.

Q. 11. Will you please state how these cigarettes impressed you, if you remember, in respect to quality, price, and so on, in connection with the many Beech-Nut products with which you have been familiar?

A. Well, I might state it in this way; that my knowledge of the Beech-Nut products had left the impression in my mind that they put out a strictly high-grade class of goods, and you never would expect to buy a Beech-Nut product at a cheap price; that you paid the full value indicated by the high-priced product that they put out. And I noticed they were selling the lowest-priced cigarettes for the number of cigarettes put out that I knew of. In other words, they were selling for 15 cents cigarettes which generally, to my mind, was being sold by everybody else at 20 cents. I won't state it was the cheapest cigarette, but that was the impression that came into my mind. In other words, that they were not the same priced cigarette, according to numbers delivered, that other people were asking 20 cents for the same number of supposedly the same grade of cigarette.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 12. (By Mr. Cavanagh.) Are you familiar with the products put out by the Beech-Nut Packing Company?

A. To some extent.

X-Q. 13. Will you name those products?

A. You mean, can I name all the products that they put out?

X-Q. 14. Yes.

A. No, I can't name them all, because I would probably slip some that I have known about that I don't remember now, but I do know that they put out food products and chewing gum, and such things as that. I have seen them constantly in the different stores. To name them all over, I would not attempt to name all I have seen.

X-Q. 15. Did you ever know the Beech-Nut Packing Company to put out tobacco products?

A. I never heard of it, or thought of it until I saw this label.

X-Q. 16. So you never knew they put out a tobacco product?

A. No; I didn't know all they put anyway.

X-Q. 17. But you didn't know that anyway?

A. No.

X-Q. 18. If you went into a store and wanted a package of chewing gum, would you take a package of Beech-Nut cigarettes in the place of that gum?

A. No sane man would.

X-Q. 19. When you examined the cigarette package, Beech-Nut Exhibit No. 1, you found the name P. Lorillard Co. on it, didn't you?

A. May I ask you what time I examined it—just now?

X-Q. 20. No, when you said you made your examination of it and bought it and looked at it.

A. I didn't say I bought it and looked at it. I said I saw it, I saw the Beech-Nut label on it. I definitely stated I didn't buy it until afterwards.

X-Q. 21. When you did buy it, you examined it carefully, didn't you?

A. Because I had the question raised whether it was put out by the Beech-Nut Packing Company, but I don't know when it came into my mind.

X-Q. 22. When you made your examination, then, you found the name P. Lorillard Co. on it?

A. When I read the package all over I found the name of P. Lorillard Co. on it.

X-Q. 23. You knew that P. Lorillard Co. was a large tobacco manufacturer?

A. I simply knew that P. Lorillard Co. had been in the tobacco business, but in regard to their size, I couldn't state.

X-Q. 24. It is a well known tobacco concern, is it not?

A. Not very well known to me, but I knew that name had been in the tobacco business, because my father sold tobacco at one time years ago; that is how I knew, not because of its market value in the trade.

X-Q. 25. Do you smoke?

A. Very limited.

X-Q. 26. Do you smoke?

A. Mostly cigarettes; I never smoke cigars.

X-Q. 27. What brand of cigarettes do you smoke?

A. Well, I smoke several different brands, mostly 20 in the package, such as Fatimas, Lucky Strike, and any of those in that class, Chesterfields, and any of those like that. I am not a crank on cigarettes, or who makes them.

X-Q. 28. What do you pay for Lucky Strike cigarettes?

A. 25 cents.

X-Q. 29. How many in a package?

A. Twenty cigarettes, if my memory is correct.

X-Q. 30. Do you know what Piedmonts sell for?

A. No, I don't. I believe that I bought one package of Piedmonts once, and didn't like them.

X-Q. 31. Do you know what Mecca cigarettes sell for?

A. I know that they were at one time put up in smaller packages and sold for less money; I just know of it, I never had a package in my hand.

X-Q. 32. Do you know what Helmar sells for?

A. The what?

X-Q. 33. Helmar.

A. Why, 20 or 25 cents, and ten in a box, isn't it?

X-Q. 34. What do the Egyptian Deities sell for?

A. The what?

X-Q. 35. The Egyptian Deities.

A. I don't know.

X-Q. 36. Do you know what Sweet Caporals sell for?

A. No.

X-Q. 37. So, then, as a matter of fact, in this question of comparison you made, you can't really say how the price of Beech-Nut cigarettes compares with the other cigarettes on the market?

A. I didn't ever say so.

X-Q. 38. I ask you; I ask you now.

A. I distinctly stated that I didn't compare it with everything in the market. I compared it with those that I considered a similar package.

X-Q. 39. Then you don't know that the cigarettes I mentioned, which you said you didn't know the price of, you don't know how those brands compare with the Beech-Nut cigarettes, do you?

A. I don't know how they compare with them enough to make a definite statement of price. I do have an impression in my mind as to where they would be classified with the other cigarettes.

X-Q. 40. You mean with the other cigarettes that you know of?

A. That you have mentioned.

X-Q. 41. How would you say that the quality, price and other factors of the Beech-Nut cigarette compares with the Sweet Caporal cigarette?

A. The smoking value or price value?

X-Q. 42. The price and quality.

A. I think I told you I didn't know the price of Sweet Caporal, didn't I?

X-Q. 43. Did you ever see the Beech-Nut scrap tobacco?

A. Never.

X-Q. 44. The Beech-Nut scrap tobacco put out by Lorillard?

A. I never saw it.

X-Q. 45. You never saw a package like that before?

(Mr. Cavanagh refers to Defendant's Cross-Exhibit No. 1.)

A. No, I never saw it.

Mr. Cavanagh: That is all.

Mr. Hinton: Deposition closed.

ALFRED W. GODFREY.

ARTHUR A. SKINNER, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, residence and occupation?

A. Arthur A. Skinner; 38 years old; residence, Reading, Mass.; occupation, grain broker.

Q. 2. Do you trade on the floor of the Boston Chamber of Commerce, Mr. Skinner?

A. Yes.

Q. 3. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

A. Why, I first saw them, probably, Oh, somewhere in the spring. In fact, I bought a package downstairs.

Q. 4. When you first saw these cigarettes by whom did you believe they were made?

A. Why, I assumed that they were made by the Beech-Nut people, the gum people, the people that make candy and gum, and so forth.

Q. 5. You may state, if you will, what led you to that belief.

A. Why, because I had seen so much of the Beech-Nut gum, and if you knew the gum you would naturally think the Beech-Nut cigarettes were made by the same people.

Q. 6. Did you continue to believe that the Beech-Nut people put out these cigarettes after you bought them?

A. Why, yes; I never knew any different. I didn't know who made them, I assumed they were made by the same people, so far as I knew.

Q. 7. When were you first informed that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Why, I never knew any different; in fact, I guess you were the first one that told me.

Q. 8. And when was that?

A. That was day before yesterday.

Mr. Hinton: That is all the direct examination.

Cross-Examination.

X-Q. 9. (By Mr. Cavanagh.) Do you smoke, Mr. Skinner?

A. Yes

X-Q. 10. Do you smoke Beech-Nut cigarettes?

A. Why, I have smoked them. I smoke the Lucky Strike mostly. I smoke anything, for that matter, pipe and cigars.

X-Q. 11. About how often have you smoked these Beech-Nut cigarettes?

A. Why, I don't think I ever bought but two packages. When they first came out a fellow had them on the floor, and I bought a package—in fact, two packages.

X-Q. 12. Did you ever hear of the P. Lorillard people?

A. The tobacco people, yes.

X-Q. 13. How long have you known those people?

A. Oh, I couldn't say off-hand. I have seen their ads, you know; I would not know, a number of years, possibly.

X-Q. 14. You know that they are well known tobacco manufacturers?

A. Why, I have seen their names times enough on things.

X-Q. 15. Mr. Skinner, if you went into a store and asked for a package of Beech-Nut chewing gum, would you be confused or deceived into taking a package of Beech-Nut cigarettes?

A. If I went for gum?

X-Q. 16. Yes.

A. I would expect to get gum.

X-Q. 17. You would not take Beech-Nut cigarettes, or any tobacco product in place of the gum?

A. No, sir.

X-Q. 18. When you purchased the package of Beech-Nut cigarettes like this Plaintiff's Exhibit No. 1, to which you have referred, did you examine the wrapper of it?

A. No, I took them out and smoked them.

X-Q. 19. Will you examine that and tell me what that name is on there?

A. P. Lorillard Co.

X-Q. 20. Well, that is not the name of the Beech-Nut Packing Company, is it?

A. No, sir.

X-Q. 21. Will you examine that package to see if you can find the name of the Beech-Nut Packing Company on it?

A. I do not find it.

X-Q. 22. So when you purchased those cigarettes, after you examined them, you would have seen that name, P. Lorillard Co. on it, would you not?

A. Oh, yes, if I examined them closely, but I didn't notice the cigarettes. I am not particularly interested in who makes them. I open them and smoke them. Of course, I don't know who makes the Fatimas, or the Camel, but I do know who makes Lucky Strike, because I smoke so many of them.

X-Q. 23. You never really take the trouble to examine them?

A. No.

Mr. Cavanagh: I think that is all.

Mr. Hinton: I have no redirect examination.

Deposition closed.

ARTHUR A. SKINNER.

JOHN J. KING, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. J. J. King; 707 Chamber of Commerce, Boston, Mass.; grain broker; age, about 27.

Q. 2. Do you trade on the floor of the Boston Chamber of Commerce, Mr. King?

A. Yes, sir.

Q. 3. I show you a package of cigarettes which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you whether or not you ever saw these cigarettes before, and, if so, when and where did you first see them?

A. I have seen them at the Chamber of Commerce cigar stand.

Q. 4. When was that?

A. Oh, it was some little time ago, I don't know just how long. To tell you frankly, I never paid much attention to them anyway.

Q. 5. When you first saw these cigarettes by whom did you believe that they were made?

A. I understood they were a Beech-Nut product. The only Beech-Nut product I knew was bacon, and so forth.

Q. 6. Will you tell us what you mean by a Beech-Nut product?

A. Why, something put out by the people who put out peanut butter, bacon, and so forth.

Q. 7. Please state, if you know, what it was that led you to that belief.

A. Why, I simply thought that. I only knew that there was only one Beech-Nut Company, and that was the people that put out the other stuff.

Q. 8. Did you ever smoke any of these cigarettes?

A. One or two.

Q. 9. When did you first find out, if you did find out, that these cigarettes were not the product of the Beech-Nut Packing Company?

Mr. Cavanagh: That is objected to.

Mr. Hinton: Question withdrawn.

Q. 10. Do you now believe that these cigarettes are the product of the Beech-Nut Packing Company?

A. No.

Mr. Cavanagh: Objected to as leading.

Q. 11. When did you first find that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Upon talk with Colonel Skene, about two months ago.

Q. 12. Is Colonel referred to Robert Skene, Jr.?

A. Yes.

Q. 13. Did he give you this information before or after you had smoked these Beech-Nut cigarettes, do you remember?

A. I believe it was after.

Q. 14. Did you subsequently purchase any of these cigarettes?

A. No.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 15. (By Mr. Cavanagh.) Have you ever purchased any Beech-Nut cigarettes?

A. No, sir.

X-Q. 16. Never bought any?

A. Not of the Beech-Nut.

X-Q. 17. Did you ever carefully examine that package of Beech-Nut cigarettes, marked Plaintiff's Exhibit No. 1?

A. Why, never carefully, no. I have seen them at a distance, that is all.

X-Q. 18. You find the name, P. Lorillard Co. on that package, do you not?

A. Yes.

X-Q. 19. Did you ever hear of P. Lorillard Co.?

A. Yes.

X-Q. 20. They are big tobacco people, are they not?

A. I understand so.

X-Q. 21. Well, you know they are in the tobacco business?

A. Yes.

X-Q. 22. Do you find the name Beech-Nut Packing Company on that package?

A. No, sir; I don't see it anywhere.

X-Q. 23. So, if you had looked at this package you would have considered that it was put up by Lorillard Company, wouldn't you?

A. Yes, sir.

X-Q. 24. If you went into a store and asked for a package of Beech-Nut chewing gum, could you be deceived into taking a package of Beech-Nut cigarettes in place of the Beech-Nut chewing gum?

A. Probably not; unless I didn't examine the package closely.

X-Q. 25. Well, I mean if you wanted chewing gum, if you wanted to chew some gum at that time, and wanted a package of chewing gum, would you take a package of Beech-Nut cigarettes in place of it?

A. Oh, no.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 26. (By Mr. Hinton.) If you went to a store and wanted to buy Beech-Nut chewing gum, would you take Beech-Nut mints, or Beech-Nut ham, or Beech-Nut bacon in place of it?

A. I might take the mints, I don't think I would take the ham.

Mr. Hinton: Nothing further.

Deposition closed.

JOHN J. KING.

RICHARD E. POPE, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Richard E. Pope; 44; Marblehead, Mass.; grain merchant.

Q. 2. Where is your business, Mr. Pope?

A. In the Chamber of Commerce.

Q. 3. Do you trade on the floor of the Boston Chamber of Commerce?

A. Yes, constantly.

Q. 4. Mr. Pope, I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when and where did you first see them?

A. Well, I would not remember the exact date. I bought some here in the building, I remember, when they were first put on sale.

Q. 5. Could you tell me the approximate date?

A. Well, three or four months ago, I guess.

Q. 6. Was it in the spring or summer?

A. It was in the spring.

Q. 7. Would you be able to say it was early or late spring?

A. No, I could not.

Q. 8. When you first saw these cigarettes, Mr. Pope, by whom did you believe they were put out?

A. The people who put out Beech-Nut bacon—I don't know who they are.

Q. 9. Did you buy a package of these cigarettes with that belief?

A. I did, yes, naturally.

Q. 10. Do you now believe that the people who put out Beech-Nut bacon put out these cigarettes?

A. No, I know they don't.

Q. 11. When and how, if you remember, were you first informed that these people did not put out these cigarettes?

A. Why, in conversation with Mr. Skene, he told me that they did not make them, which was a surprise to me.

Q. 12. Is the Mr. Skene you have referred to, Mr. Robert Skene, Jr.?

A. Yes.

Q. 13. Who does business in this building, and on the floor?

A. Yes.

Q. 14. Mr. Pope, will you state, if you are able to, why you believed that this was a product of the same people who put out the bacon, if you remember?

A. Well, because of the extreme popularity of the Beech-Nut bacon, it was a likely brand to attract popular attention. Therefore I supposed they were using it with a cigarette, as they had with their other products. It was a perfectly natural conclusion, I should say, that was.

Q. 15. Are you familiar at all with the label or dress of Beech-Nut products, such as the bacon, and other products?

A. I don't know that I am; no, I am not. I don't carry them about in my pocket as I would cigarettes, naturally. Well, I do know them in a way. If I saw Beech-Nut bacon in a shop, I would recognize it without reading the label.

Q. 16. Are you familiar with the general appearance of the Beech-Nut label; I don't mean the technical details of the label, but the general appearance of the label, sufficiently so you would recognize it if you saw it?

A. I could not describe it.

Mr. Hinton: That is all.

—in fact, I was rather friendly with him, he used to come out to the house to spend the evening, and I most always took lunch with him two or three times during the week he was here, and he sent me down a case of Beech-Nut products, and, of course, I naturally was interested in the Beech-Nut products, more so than others would be on account of knowing him as well as I did.

Q. 7. You stated that when you first saw these cigarettes you believed that they were put out by the Beech-Nut Packing Company?

A. I believed they were sold by them, yes.

Q. 8. Yes. Did you receive that impression from looking at the cigarettes?

A. No, I received the impression from the brand entirely. I didn't look at the package to see who made it; in fact, I didn't know for quite a while.

Q. 9. Do you now believe that these cigarettes are put out by the Beech-Nut Packing Company?

A. No, I don't believe they are now, because I have been told they were not.

Q. 10. Do you remember who it was that told you they were not?

A. Why, no; I don't know whether I found out by looking at the package, or through Colonel Skene. I had more or less jollying with him about them—about everyone did who knew him—and I can't say exactly when I knew.

Q. 11. Is this Mr. Skene you refer to Mr. Robert Skene, Jr., who does business in this building?

A. Yes, he is.

Q. 12. What kind of jollying was this that you refer to?

A. Why, we merely mentioned the fact that they had gone into the tobacco business, and they were not making a very good cigarette, something like that. Perhaps it started in a jolly, with some truth to it.

Q. 13. If I understand you, you are not able to state now whether Mr. Skene advised you or not?

A. Oh, he has advised me, but whether he advised me first, I couldn't say; I don't remember.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 14. (By Mr. Cavanagh.) Do you know the P. Lorillard Company?

A. Yes.

X-Q. 15. What kind of business are they in?

A. In the tobacco business, manufacturers of both smoking tobacco and chewing tobacco and cigarettes.

X-Q. 16. You have known that concern for years, haven't you?

A. Yes.

X-Q. 17. Whose name appears on that package, Plaintiff's Exhibit 1?

A. Lorillard's name appears on it.

X-Q. 18. That would indicate to you that that was their package?

A. Yes.

X-Q. 19. Did you ever know the Beech-Nut Packing Company to put out any tobacco product?

A. No, sir.

X-Q. 20. You never heard of their doing so?

A. No, sir.

X-Q. 21. If you went into a store and wanted a package of chewing gum, to chew at that time, could you be deceived into taking a package of Beech-Nut cigarettes, if you asked for chewing gum?

A. Not if I asked for chewing gum, no.

Mr. Cavanagh: That is all.

Recess until 2:30 P. M.

Deposition closed.

JOHN F. LAPHAM.

Afternoon session.

THOMAS F. MALONEY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Thomas F. Maloney; 61 White street, Roxbury, Mass.; salesman.

Q. 2. Your age.

A. 28.

Q. 3. Where do you do business?

A. Chamber of Commerce.

Q. 4. Chamber of Commerce Building, Boston, Massachusetts?

A. Yes.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you seen these cigarettes before, and if so, will you please state when and where you first saw them?

A. Why, I saw the cigarettes in the hands of another fellow at one time, and the next time I bought cigarettes I bought them myself. I don't know exactly at what store.

Q. 6. When you saw and bought these cigarettes, by whom did you believe they were put up?

A. Why, not having any interest in it, I naturally associated the name of Beech-Nut with the ham products, and so forth.

Q. 7. Did you continue to believe this after you had bought and smoked the cigarettes?

A. Surely; I didn't give it any thought.

Q. 8. Do you now believe that these cigarettes are put up by the same people who put out the gum?

A. No, I know differently than that.

Q. 9. Will you state how and when you first learned that these cigarettes were not put out by the people who put out the gum?

A. The first I knew of it was when you came around the other day and told me about it. I don't know what that day was, Thursday or Friday—Thursday, I think it was.

Mr. Hinton: I think that is all.

Cross-Examination.

X-Q. 10. (By Mr. Cavanagh.) Where did you buy these Beech-Nut cigarettes, marked Plaintiff's Exhibit No. 1?

A. At a smoke store; I think it was on State street, I am not sure. It might have been down on the counter here in this building.

X-Q. 11. Did you examine the package to see if the Beech-Nut Packing Company's name appeared on it?

A. No, sir.

X-Q. 12. Then you didn't deliberately buy this as a product of the Beech-Nut Packing Company?

A. I did not, no.

X-Q. 13. Will you tell me whose name does appear on that?

A. P. Lorillard Co. I never heard of them before I saw it there—P. Lorillard Co., no.

X-Q. 14. If you went into a store, Mr. Maloney, and asked for a package of Beech-Nut chewing gum, would you be deceived or confused into taking a package of cigarettes for a package of chewing gum?

A. Sure.

X-Q. 15. By what?

A. Deceived? I would not be deceived, surely not.

X-Q. 16. You would know the difference between tobacco and chewing gum?

A. Surely, yes.

X-Q. 17. And between cigarettes and chewing gum?

A. Sure I would.

Mr. Cavanagh: I think that is all.

Mr. Hinton: That is all.

Deposition closed.

THOMAS F. MALONEY.

It is stipulated by and between the parties hereto. through their respective counsel, that if Mr. GEORGE CATLIN were called he would testify as follows:

My name is George Catlin, and I am a member of the firm of Catlin & Company, brokers. I trade on the floor of the Boston Chamber of Commerce. I first saw Beech-Nut cigarettes, similar to Beech-Nut Exhibit No. 1, on the cigar stand in the Chamber of Commerce Building. Boston, early in the spring of 1921; when I first saw these cigarettes I believed that they were made by the Beech-Nut people, the same people that make the other Beech-Nut products, like the ham, chewing gum, and so forth. I never bought a package of these cigarettes, but have smoked them when my friends had them. I continued to believe that these cigarettes were made by the Beech-Nut people until I was told, on August 12, 1921, by Mr. Hinton, that they were not a product of the Beech-Nut Packing Company. My reason for believing that these cigarettes were the product of the Beech-Nut Packing Company was the name "Beech-Nut," and the appearance of the package.

On cross-examination it is agreed that he would testify as follows:

As above stated, I have never purchased any of these cigarettes, but have smoked some given to me by my friends. I did not examine the package, and therefore I

didn't know that the name, "P. Lorillard Co." appeared thereon, as I now see by examining this package, Plaintiff's Exhibit No. 1. If I went into a store and asked the salesman for a package of Beech-Nut chewing gum, a product of the Beech-Nut Packing Company, I would not be confused or deceived into accepting a package of cigarettes like this Plaintiff's Exhibit No. 1, in the place and stead of a package of chewing gum.

W. G. TORREY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you state your name, age, residence and occupation?

A. W. G. Torrey; 509 Chamber of Commerce Building; residence, 56 Crescent avenue, Revere, Massachusetts; occupation, miller representative; age, 49.

Q. 2. Is the Chamber of Commerce you refer to the Chamber of Commerce in Boston, Massachusetts?

A. Yes.

Q. 3. Do you trade on the floor of the Boston Chamber of Commerce?

A. Yes, sir.

Q. 4. I show you a package of Beech-Nut cigarettes, which is in evidence in this case as Beech-Nut No. 1. Have you ever seen this cigarette before? If so, when and where did you first see them?

A. Why, I think I first saw them probably at the cigar stand on the street floor of the Chamber of Commerce.

Q. 5. When was that?

A. That I cannot say, some time last year, as I remember.

Q. 6. Do you mean during the year 1920?

A. I should say during the year 1920; it might have been before that—just as soon as they came out, I know, and were for sale, I saw them.

Q. 7. When you first saw these cigarettes, by whom did you believe that they were put out?

A. The Beech-Nut Packing Company, Arkell & Smiths Company—we say Arkell & Smiths, because they are familiar to us, thinking they are the same concern that handle the Beech-Nut lines.

Q. 8. You have referred to the Beech-Nut products. Will you give an illustration of what you mean by Beech-Nut products?

A. Why, we have a number of them that we use at home; I guess Beech-Nut bacon is one, and—I can't say right off-hand what they are; we have different things; I think they are jellies and jams, and things of that sort, if they make them.

Q. 9. Will you state, if you can remember, and if you know, why you believed that these cigarettes were a product of the Beech-Nut Packing Company when you saw them?

A. They are the only people that I ever connected the name with.

Q. 10. Have you a general familiarity with the label which has appeared on various products of the Beech-Nut Packing Company?

A. Yes.

Q. 11. Did the dress of this package of cigarettes, by dress, it's general appearance, have anything to do with your believing that it was a product of the Beech-Nut Packing Company?

A. The name was the first thing that led me to think it was theirs, because I never connected the name with any other concern than the Beech-Nut people in Canajoharie. I have traveled through there many times and have seen their sign, and knew the members of the concern.

Q. 12. The last question is repeated.

A. Yes.

Q. 13. Will you explain what you mean?

A. Well, the brand on the cigarettes led me to believe that it was one of the products of the Beech-Nut Packing Company.

Q. 14. Will you tell me, please, Mr. Torrey, whether you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No, I do not.

Q. 15. Will you state, if you can remember, when and how you first found out that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Why, I think after buying packages of them I discovered some tobacco company's name on the package, and, as I recall, I spoke of the matter to Mr. Skene, who represents Arkell & Smiths here, who are the same people as the Beech-Nut people, I spoke to him about it—I don't know that he knew it at the time until we talked the matter over, that there was such a cigarette on the market, and then I learned it had nothing to do with the Beech-Nut Company.

Q. 16. Did Mr. Skene tell you this, do you remember?

A. In conversation with him, I think he told me that they didn't.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 17. (By Mr. Cavanagh.) You say you have got packages of these cigarettes?

A. When they were first on sale here.

X-Q. 18. When you examined the package, what name did you find on it?

A. P. Lorillard Company.

Mr. Hinton: Witness examines package before answering the question.

X-Q. 19. What did that indicate to you?

A. That P. Lorillard were the manufacturers.

X-Q. 20. You don't find the name Beech-Nut Packing Company on that package, do you?

A. No.

X-Q. 21. If you went into a store and asked for a package of Beech-Nut Packing Company's chewing gum, would you be confused or deceived into taking a package of these Lorillard cigarettes for the chewing gum?

A. No.

X-Q. 22. You consider them an entirely different article?

A. Why, I would not accept these cigarettes for chewing gum, if that is what you mean.

X-Q. 23. Yes, that is what I mean.

A. No.

X-Q. 24. Before you saw these cigarettes you never knew that the Beech-Nut Packing Company put out any tobacco product, did you?

A. No.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 25. (By Mr. Hinton.) Do you smoke Camel cigarettes?

A. Occasionally.

R-D. Q. 26. Can you tell me what is written on the package of Camel cigarettes, underneath the picture of the camel?

A. No.

R-D. Q. 27. Have you smoked the Fatima cigarette?

A. Yes; smoking one now.

R-D. Q. 28. Can you tell me what is written on the bottom of the package of Fatima cigarettes?

A. Nothing but the name "Fatima," I think, and the appearance of the package.

R-D. Q. 29. Mr. Torrey, I show you a package of Camel cigarettes, on which appears in bold-faced type, certain printing underneath the picture of the camel. Will you tell me which appears the most conspicuous to you, that bold-faced printing, or the name "P. Lorillard Co.," and on Beech-Nut Exhibit No. 1, as that name shows through the wax paper wrapper?

A. Will you repeat that question?

R-D. Q. 30. The last question is repeated.

A. The printing on the package of Camels. The reason I asked to have it repeated, I thought you asked me about the name of the makers of it.

R-D. Q. 31. Now, will you examine a package of Fatima cigarettes, which you have just pulled out of your pocket; do you find the name of the manufacturer at the bottom of this cigarette package?

A. Yes.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 32. (By Mr. Cavanagh.) Comparing this package of Beech-Nut cigarettes, Plaintiff's Exhibit 1, with the glasé wrapper removed, doesn't the words "P. Lorillard Co." appear to you just plainly on that package as the printing on the Camel package of cigarettes?

A. No.

R-X Q. 33. Then, in your opinion, the contrast of black on red is as distinct as brown upon yellow; is that right?

A. The printing at the bottom on the package of Camel cigarettes is much clearer, to me, than the printing on the bottom of the package of Beech-Nut cigarettes.

R-X Q. 34. But you have no trouble in reading that name, "P. Lorillard Co.," on there, have you?

A. No.

Deposition closed.

W. G. TORREY.

It is stipulated by and between the parties hereto, as follows:

That if Mr. W. J. BUCKLEY were called that he would testify as follows:

I am of lawful age, and am employed by the Southworth Company, brokers, who have offices here in the Chamber of Commerce Building, Boston, Massachusetts.

I first saw cigarettes similar to Beech-Nut Exhibit No. 1 on the cigar stand in the Chamber of Commerce Building, Boston, Massachusetts; subsequently I remember that my friend, Thomas Maloney, who is employed in the same building, bought a package of these cigarettes and he had them on the table at lunch. I smoked some of the cigarettes. When I first saw the Beech-Nut cigarette, and when I smoked them, I believed that they were a product of the Beech-Nut Packing Company, the same people who make the ham, bacon, chewing gum, and other products. I continued to believe that these cigarettes were the product of the Beech-Nut Packing Company until Mr. Hinton told me, on August 12, 1921, that they were not.

And on cross-examination it is agreed that the witness will testify as follows:

That I had no discussion with Mr. Maloney or anyone else as to whether or not these Beech-Nut cigarettes, like Plaintiff's Exhibit No. 1, were put out by the Beech-Nut Packing Company or not; I did not pay any particular attention to the package, but now that it is called to my

attention, I see that the words P. Lorillard Co. appear upon this Beech-Nut package of cigarettes (Plaintiff's Exhibit No. 1), and I do not find anywhere on the package the name of the Beech-Nut Packing Company. I have not myself purchased any of these Beech-Nut cigarettes.

If I went into a store and asked for a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, I would not be confused or deceived into taking a package of Beech-Nut cigarettes, taking it for or accepting it in the place and stead of a package of Beech-Nut chewing gum.

MARGARET M. HUNT, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, residence and occupation.

A. Margaret M. Hunt, 662 Columbia Road, Dorchester, Massachusetts.

Q. 2. And you are of legal age?

A. Yes.

Q. 3. What is your occupation?

A. Clerk here at the cigar stand.

Q. 4. This cigar stand is in the Chamber of Commerce Building, Boston, Massachusetts?

A. Yes.

Q. 5. Do you sell over the counter here cigarettes similar to Beech-Nut Exhibit 1, which I now show you, and if so, how long have you sold them?

A. Yes; I could not really state how long we have had these cigarettes. Did you say they came out in April?

Q. 6. Would it be the spring or summer of 1921, or what?

A. You better make it in April. I don't think we have had them any longer than that time.

Q. 7. When you first sold these cigarettes, by whom did you believe they were made?

A. Why, I thought the Beech-Nut people put them out.

Q. 8. When and how did you first find out, if you found out, that the Beech-Nut people did not put them out?

A. I asked Mr. Steare about them, and he said, "No, they don't put them out." That is all.

Q. 9. When you first sold these cigarettes over the counter here, did you hear any remarks or inquiries from people over the counter, if you can recall?

A. No, I just passed them out, that is all.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 10. (By Mr. Cavanagh.) Do you have anything to do with the purchasing of the goods here?

A. No, Mr. Schroder does that. I don't do the buying at all. Mr. Schroder does all the buying.

X-Q. 11. Will you tell me what name is on that package of cigarettes (showing witness package of cigarettes)?

A. What name is on there?

X-Q. 12. Yes.

A. "P. Lorillard Co.," not and company, just "P. Lorillard Co."

X-Q. 13. You never took P. Lorillard Co.'s cigarettes for any product of the Beech-Nut Company, did you?

A. No.

X-Q. 14. If a person came and asked you for a pack-

age of Beech-Nut chewing gum, would you try to sell him a package of Lorillard cigarettes?

A. We don't do that at all; we give them what they ask for.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 15. (By Mr. Hinton.) When you were questioned by Mr. Cavanagh when you were handed this package of Beech-Nut cigarettes, did you make out the name yourself, or did you ask somebody else here to help you read it?

A. I just asked Mr. Schroder, and he said it was "P. Lorillard Co."

Recross-Examination.

R-X Q. 16. (By Mr. Cavanagh.) When you spoke about the date when you first got these cigarettes here, you asked Mr. Hinton what the date was?

A. Yes, because I didn't buy them, you know. I don't do any of the buying here at all, and I can't recall just when we got them in here.

Mr. Hinton: The record shows that I certainly did not tell the witness anything during the examination.

Mr. Cavanagh: That is all.

Deposition closed.

MARGARET M. HUNT.

Further taking of depositions adjourned to Wednesday, August 17, 1921, at 10 o'clock A. M.

BOSTON, MASS., 10 A. M., Wednesday, Aug. 17, 1921.

Met pursuant to adjournment.

LEO LEWIS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. What is your name?

A. Leo Lewis.

Q. 2. Please state your name, residence and occupation.

A. Leo Lewis; home address, 9 Dewey street, Roxbury, Mass.; business address, 42 Huntington avenue, Boston; occupation, cigar clerk.

Q. 3. That is, Huntington avenue, Boston, Mass.?

A. That is Boston, yes.

Q. 4. And what kind of a store are you a clerk in?

A. Cigar store.

Q. 5. That is located at the Huntington address that you just gave?

A. 42 Huntington avenue.

Q. 6. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. State whether or not you are selling these cigarettes over the counter, and if so, how long you have sold them.

A. Why, I have been selling Beech-Nut cigarettes ever since they have been on the market, that is, some time in March or April. I don't know just when they came out, but ever since they have been on the market.

Q. 7. That is, March or April, 1921?

A. 1921; yes, sir.

Q. 8. Will you state when you first saw these cigarettes and first sold them over the counter, by whom you believed they were made?

A. Why, I believed they were made by the Beech-Nut Products.

Q. 9. That is, the Beech-Nut Packing Company?

A. Yes.

Mr. Cavanagh: I object; it is leading.

Q. 10. How long did you continue to believe this, and how were you first advised differently, if at all?

A. Why, about the first or second day—it was either the first or second day that I was selling them, the salesman from the Lorillard Company came in; of course, I knew him well, the salesman, and he had the cigarettes, and of course he gave me a package of cigarettes. Of course that is when I knew they were Lorillard cigarettes, either the first or second day, the second day, I think—we had just got them in, and he came the next day.

Q. 11. Had you sold these over the counter before this salesman came in?

A. Yes, I had.

Q. 12. Had you in the first of your selling these cigarettes over the counter heard comments or remarks from the public over the counter about these cigarettes; if so, will you please state what those remarks or comments were?

A. Why, yes; when they first came out, at the start, they asked me if the cigarette was as good as the gum. In other words, if the cigarettes were as good as the gum, they were pretty good.

Q. 13. How frequently did you hear remarks of that character?

A. Oh, why, pretty near every day; that is, for about two or three weeks, that is, when the cigarette was new, when I was pushing the cigarette.

Q. 14. Well, what I want to get at, Mr. Lewis, is

whether you heard a good many of these remarks, or a few, or what?

A. Yes, I have heard a good many of these remarks.

Q. 15. Did people ever come into your store and say, "Give me a package of Beech-Nut"?

A. Yes.

Q. 16. And what did you do then?

A. Why, I often asked them if they wanted the gum or the cigarettes. As the cigarette was new, I didn't know what they wanted.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 17. (By Mr. Cavanagh.) How long have you been in the cigar store business—the tobacco business?

A. A year ago last June.

X-Q. 18. Are you in business for yourself, or do you work for somebody else?

A. Somebody else.

X-Q. 19. What is the name of the concern?

A. Schryder Segar Company.

X-Q. 20. Where is that store located?

A. 42 Huntington avenue, Boston.

X-Q. 21. How many men are employed in that store?

A. Two; that is, myself and another man—oh, by the company, do you mean?

X-Q. 22. No, where you work.

A. Two men, myself and another one.

X-Q. 23. How large is that store there, a large store?

A. Why, it is about as large as this room here, I should think.

X-Q. 24. Is it a corner store?

A. No.

X-Q. 25. In the middle of the block?

A. Well, yes, in the middle of the block, yes; where the Hotel Oxford is.

X-Q. 26. Is it a residential neighborhood or business section?

A. Why, it is residential and business.

X-Q. 27. It is not like the center of Boston?

A. No.

X-Q. 28. It is more of a residential neighborhood?

A. It is more of a residential neighborhood.

X-Q. 29. You say you have been in business over a year?

A. Yes.

X-Q. 30. I presume you have made some study of the various concerns in the tobacco business?

A. Some of them, yes.

X-Q. 31. Would you name some of the larger tobacco manufacturers?

A. Why, the American Tobacco Company is about the largest, I think.

X-Q. 32. What other concerns?

A. Schenasi Brothers; and there is J. P. Lorillard, if I am not mistaken.

X-Q. 33. What other concerns? Did you ever hear of Liggett & Myers?

A. Yes.

X-Q. 34. Did you ever hear of R. J. Reynolds & Company?

A. Yes.

X-Q. 35. What cigarette does Reynolds put out?

A. Camels.

X-Q. 36. What cigarette does Liggett & Myers put out?

A. They put out Condax cigarettes.

X-Q. 37. What others?

A. I think they put out Fatimas and Chesterfields.

X-Q. 38. What cigarette does American Tobacco Company manufacture?

A. He puts out "111." He puts out the Pall Mall.

X-Q. 39. What cigarette does the Lorillard Company put out?

A. Beech-Nut.

X-Q. 40. What else?

A. Murads.

X-Q. 41. What else?

A. I don't know; I am not sure whether they make the Helmars or not.

X-Q. 42. I show you a package of Beech-Nut cigarettes in this case as Plaintiff's Exhibit No. 1. Would you tell me what name that has on there?

A. P. Lorillard Co.

X-Q. 43. Is that the J. P. Lorillard Company you meant when you named one of the big tobacco manufacturers?

A. Yes.

X-Q. 44. When this cigarette first came to your attention, or reached your store, did you notice the name on it?

A. No, sir.

X-Q. 45. You didn't take the trouble to examine the package?

A. No, I don't think I did.

X-Q. 46. If you had examined that package, would you have known it was not made by the Beech-Nut Packing Company?

A. If I had examined it, yes.

X-Q. 47. You don't find the Beech-Nut Packing Company's name on it, do you?

A. No, I don't find it on it.

X-Q. 48. But you do find "P. Lorillard Co." on there?

A. Yes.

X-Q. 49. And that indicates to you that it is a product of P. Lorillard Company, doesn't it?

A. Yes.

X-Q. 50. Did you ever sell anybody Beech-Nut chewing gum, made by the Beech-Nut Packing Company, for and in the stead, or in the place of the Beech-Nut cigarette made by P. Lorillard Company?

A. No; I never sold chewing gum in the place of cigarettes.

X-Q. 51. If a man came into your place and asked you for a package of Beech-Nut chewing gum, made by the Beech-Nut Packing Company, you would not try to sell him a package of Lorillard's cigarettes?

A. No, certainly not.

X-Q. 52. Do you think a man would be crazy to do that?

A. Why, a man would be crazy, who was in the tobacco business.

X-Q. 53. I hand you a package which is in this case, a package of scrap tobacco which is in this case as Defendant's Cross-Exhibit No. 1. Do you recognize that package?

A. Yes.

X-Q. 54. Have you sold that tobacco?

A. I do.

X-Q. 55. Is that a good seller?

A. It is.

X-Q. 56. Whose tobacco is that; who makes it?

A. Why, on the package it says, "P. Lorillard Co."

X-Q. 57. How do you know, by the name of the package?

A. Yes.

X-Q. 58. You have sold that since you have been in the business?

A. Yes.

X-Q. 59. You would not think that the Beech-Nut Packing Company made that tobacco, would you?

A. No.

X-Q. 60. I show you a carton, or a package, and ask you if you recognize that.

A. I do.

X-Q. 61. Will you tell me what that is?

A. That is made by Lorillard; is that what you mean?

X-Q. 62. Yes.

Mr. Cavanagh: The package submitted to the witness, which is a sealed carton, "Lorillard Beech-Nut Perfect Cigarettes," is offered in evidence, and is marked Defendant's Cross-Exhibit No. 4.

X-Q. 63. You would not take that package to be any of the Beech-Nut Packing Company's product, would you?

A. I would not take it to be after I knew, but, as I said before, I didn't know what they were.

X-Q. 64. I mean that package now.

A. Oh, now, no.

X-Q. 65. And you saw that name Lorillard on it?

A. Yes.

X-Q. 66. Did you ever have any customer come into your store and say, "I want a package of Beech-Nut cigarettes made by the Beech-Nut Packing Company"?

A. No, I don't reall it just in that way.

X-Q. 67. And if any customer did ask you that question, you would not try to sell him Lorillard's cigarettes, if he wanted a cigarette of the Beech-Nut Packing Company?

A. Why, no. I would tell him who they were made by, if they did.

X-Q. 68. Yes. The Lorillard salesman that calls at your store, who is he?

A. I can't recall his name.

X-Q. 69. Can you describe him?

A. Yes; I only knew that he was head fellow from out of town; he don't belong here at all. I think he came from New York; he is a big, heavy, stout fellow—big, stout fellow.

X-Q. 70. You don't recall his name?

A. He is the head—I believe he is the head of the whole organization. I believe he is from New York.

X-Q. 71. You have never made an attempt to sell Lorillard's products in the place of Beech-Nut Packing Company products, have you?

A. Never.

Mr. Cavanagh: I think that is all.

Redirect Examination.

R-D. Q. 72. (By Mr. Hinton.) Do you remember, Mr. Lewis, when you first observed the name Lorillard on Beech-Nut scrap tobacco which was shown you this morning by Mr. Cavanagh in cross-examination?

A. Do I remember? Just what do you mean, the name?

R-D. Q. 73. Do you remember when you first noticed the name Lorillard on Beech-Nut scrap tobacco?

A. I just noticed it this morning, today.

R-D. Q. 74. Just when Mr. Cavanagh showed you this package?

A. Yes, sir.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 75. (Mr. Cavanagh.) You never sold that package believing you were selling the Beech-Nut Packing Company's product, did you?

A. Why, I didn't give it a thought, that way; I never have. I never took particular notice.

R-X Q. 76. You sold it as a tobacco product, did you?

A. Yes.

R-X Q. 77. And you had the big cartons in the store filled with these small packages, did you?

A. Yes, sir.

R-X Q. 78. And they have printing all over them?

A. We don't get the big cartons up there. You see the store I work in buys through wholesalers, jobbers. In other words, when we order for our store we get small packages.

R-X Q. 79. Packages of this size?

A. No; there are two dozen, I think in a little square carton.

R-X Q. 80. Who do you buy your tobacco from?

A. From Berrenger-Hanauer Company.

R-X Q. 81. So you don't buy direct from the manufacturer?

A. No, sir.

R-X Q. 82. You simply get it from a jobber, a wholesaler?

A. Yes, sir.

R-X Q. 83. If you took the trouble to look at that package you would know it was a Lorillard product, wouldn't you?

A. If I had, yes.

Mr. Cavanagh: That is all.

Mr. Hinton: I haven't any more. That is all, Mr. Lewis.

Deposition closed.

Signature waived.

R. W. BLANCHARD, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. R. W. Blanchard; age, 30; residence, 1 Valley Road, Swampscott, Massachusetts; salesman.

Q. 2. For whom are you employed, Mr. Blanchard?

A. The Beech-Nut Packing Company.

Q. 3. How long have you been employed by the Beech-Nut Packing Company, and what did you do before that?

A. I have been employed by the Beech-Nut Packing Company since February, 1, 1921. Previous to that I sold tobacco and cigars.

Q. 4. What territory do you cover for the Beech-Nut Packing Company?

A. Essex County, Massachusetts.

Q. 5. What towns does that include, big towns?

A. That includes Lynn, Salem, Beverly, Peabody, Lawrence, Haverhill and Gloucester.

Q. 6. I show you a package of cigarettes which are in evidence in this case as Beech-Nut Exhibit No. 1. Have you seen these cigarettes before?

A. I have.

Q. 7. When you first saw these cigarettes, by whom did you believe that they were put out?

A. The Beech-Nut Packing Company.

Q. 8. State, if you remember, what you did when you first saw the cigarettes.

A. I inquired, and I found out that they were made by P. Lorillard Co.

Q. 9. Why did you make these inquiries?

A. Because I was having so many questions asked me as to whether they were made by my concern or not, and I wanted to find out for my own information.

Q. 10. When these cigarettes first came out in this territory, did you hear any comments or remarks, or inquiries, or the like, in the course of your work for the Beech-Nut Packing Company about these cigarettes? If so, will you please state what they were?

A. I had innumerable inquiries as to the cigarette. Dozens asked me when we came out with a cigarette; others asked what we were coming out with next, and a lot of people have said to me, "If your cigarette is as good as your chewing gum, it ought to be a good seller."

Q. 11. Will you give me an instance of remarks that you have heard by people about the Beech-Nut cigarettes?

A. Well, I can state an incident that happened in Lawrence, Mass.

Q. 12. How long ago?

A. About six weeks ago.

Q. 13. Please state the incident.

A. I entered a grocery store in Lawrence, Mass., and shortly after my entering the store a gentleman came in and inquired if they had marmalade. The clerk reached up on the shelf and took down a jar of Beech-Nut orange marmalade. He turned to me—I was standing near the—

Q. 14. Did the clerk say anything to the gentleman that you heard?

A. He told him—

Mr. Cavanagh: That I object to as calling for hearsay and not the best evidence.

Mr. Hinton: We are trying to get at the conversation and not trying to prove the truth or falsity of what the clerk said.

Q. 15. Proceed.

A. The clerk made a remark such as this: He said, "Here is the Beech-Nut man now." The gentleman turned to me, and he said, "If your marmalade is not any better than your cigarettes, I don't want it." I turned to the gentleman, and I told him that we had absolutely nothing to do with the cigarette. After I made that remark to him he purchased the marmalade and paid for it and went on his way.

Q. 16. Did you make any effort to get the name of the customer?

A. I did not.

Q. 17. Can you give the name of the clerk who was trying to sell this marmalade?

A. Mr. John J. Creevan, 34 Amesbury Street, Lawrence, Mass.

Q. 18. Well, give me some more inquiries, remarks, and so on, that you heard, if you can.

A. I entered a store in West Lynn, Mass., owned by Mr. C. A. Wilkins, and we got into conversation over the cigarette, and he informed me that P. Lorillard Co. controlled the Beech-Nut Packing Company. In fact he convinced me to believe it myself.

Q. 19. Did you have any more of these incidents that you can recall definitely?

A. Last Thursday morning, August 11th, I entered the same store of Mr. Wilkins, in West Lynn, Mass., and Mrs. Wilkins says, "You are the Beech-Nut man. Can you tell me something: Are the Beech-Nut cigarettes put out by the Beech-Nut Packing Company? I have had innumerable inquiries as to whether they were, and I would like to know so as to tell my trade, when they ask me."

Q. 20. All right. Give me any others.

A. On the afternoon of the same day, August 11, Mr.

Dennis Callahan, who is connected with a Salem wholesale jobbing house, asked me if the Beech-Nut Packing Company made the Beech-Nut cigarette.

Q. 21. Are you sure that that is what Mr. Callahan asked you exactly? I want you to state these things as accurately as possible.

A. I think he asked me if the P. Lorillard Co. didn't own the Beech-Nut Packing Company.

Q. 22. You have testified that you have been a tobacco salesman until recently in this territory?

A. Yes, sir.

Q. 23. Can you tell me whether there is much of a market through this country for scrap chewing tobacco?

A. To tell you the truth, I never have seen scrap tobacco until last Thursday, and I saw it in two stores —just two.

Q. 24. I am talking about the market for scrap tobacco as compared with plug chewing tobacco.

A. There is very little market for it in Essex County.

Mr. Hinton: That is all. You may cross-examine.

Cross-Examination.

X-Q. 25. (By Mr. Cavanagh.) Mr. Blanchard, how long were you in the tobacco business?

A. A little over a year.

X-Q. 26. At what period?

A. Oh, 1920.

X-Q. 27. Just give me when you started and when you left the business.

A. Why, I started along in July, 1919, and I worked at it until about the middle of August, 1920.

X-Q. 28. What concern were you with?

A. Rosenthal Brothers & Bendetson.

X-Q. 29. Where are they located?

A. 121 North street, Boston.

X-Q. 30. What was the nature of their business?

A. They are wholesale tobacco jobbers.

X-Q. 31. And you sold tobacco in Boston for them?

A. I sold cigars in Essex County and part of Middlesex County.

X-Q. 32. On the road throughout that territory?

A. Yes.

X-Q. 33. Did you sell chewing tobacco?

A. No, sir; nothing but cigars.

X-Q. 34. Didn't sell cigarettes?

A. Very, very seldom. I had two or three concerns in Salem, and I handled them myself, but my regular line was to sell cigars.

X-Q. 35. Did you ever make any particular study of the tobacco business; that is, do you know how the different brands and blends are made and brought out?

A. I don't know as I do, particularly.

X-Q. 36. About how many customers or stores were embraced in your territory when you were working for this concern—just approximately?

A. Oh, approximately? The customers I had?

X-Q. 37. Yes.

A. Hundreds of them. I could not state just exactly.

X-Q. 38. Well, approximately.

A. It was about a five weeks' trip going around the circuit, so you see I called on hundreds of customers.

X-Q. 39. Retail stores?

A. Retail stores, yes.

X-Q. 40. Did you ever hear of the "Polar Bear" scrap tobacco?

A. No, sir.

X-Q. 41. Did you ever hear of "Honest" scrap?

A. No, sir.

X-Q. 42. Did you ever see that package in your trips around? I call your attention to Lorillard's Beech-Nut scrap tobacco, in this case as Defendant's Cross-Exhibit No. 1.

A. Not until last Thursday had I ever seen a package of Beech-Nut scrap tobacco.

X-Q. 43. You don't chew tobacco, do you?

A. No, sir.

X-Q. 44. Did you ever see any of the Beech-Nut Packing products with those red radiating lines on it, like that—these red lines here?

A. No, sir.

X-Q. 45. At what store was it that you have stated the customer made some remark about the marmalade—is that what it was?

A. Lawrence, yes.

X-Q. 46. And went on and said if it was not any better than the Beech-Nut cigarette, he didn't want it—where was that?

A. 34 Amesbury street, Lawrence, Mass.

X-Q. 47. What is the party's name?

A. James J. Creevan.

X-Q. 48. You say you don't recall the name of that customer?

A. I do not.

X-Q. 49. I notice that you are smoking a cigar now. You smoke, don't you?

A. Yes, cigars entirely.

X-Q. 50. Did you ever smoke a cigarette?

A. Some.

X-Q. 51. You know different people have different tastes and different favorites in cigars and cigarettes, do you not?

A. Yes.

X-Q. 52. One man may praise one brand a lot and another man may say this is no good?

A. Yes.

X-Q. 53. It is all a matter of individual taste, isn't it?

A. Yes, sir.

X-Q. 54. And that package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1, which Mr. Hinton showed you, you noticed that name on there, didn't you?

A. I do now.

X-Q. 55. What is that name?

A. P. Lorillard Co.

X-Q. 56. You know the Lorillard Company is a large tobacco concern?

A. I know that.

X-Q. 57. Manufacturers and sellers of tobacco?

A. Yes.

X-Q. 58. You never heard of them making any food products, did you?

A. Not that I can recall.

X-Q. 59. Then, to anyone who had been in the tobacco business, the name "P. Lorillard Co." on that tobacco package would indicate to them that it was a P. Lorillard Company package, wouldn't it?

A. It would to me.

X-Q. 60. When you were in the tobacco business you would not sell the P. Lorillard products to a man who asked for Beech-Nut Packing Company cigarettes, would you?

A. No.

X-Q. 61. What was the name of the party who asked if the Beech-Nut Packing Company was controlled or owned by the P. Lorillard Co.?

A. Mr. C. A. Wilkins, West Lynn, Mass.

X-Q. 62. What did you tell him?

A. I told him that I didn't know.

X-Q. 63. Well, do you know who does control the Beech-Nut Packing Company?

A. I know it is a stock company.

X-Q. 64. But you don't really know anything about the ownership of it, do you?

A. Why, I can't say that I do.

X-Q. 65. What business is this Dennis Callahan in?

A. Wholesale tobacco business.

X-Q. 66. What is his address?

A. Washington street, Salem, Mass. I just don't know the number.

X-Q. 67. What was it he wanted to know from you last week?

A. If P. Lorillard Company owned the Beech-Nut Packing Company.

X-Q. 68. When you were on the road selling cigars did you sell any products of the P. Lorillard Company, any tobacco products, any cigars or cigarettes, or anything like that?

A. I did.

X-Q. 69. What did you sell?

A. Muriel cigars.

X-Q. 70. I show you a small tin package, and ask you if you recognize that?

A. "Between the Acts."

X-Q. 71. Yes. What is it?

A. It is a little cigar.

X-Q. 72. A little cigar?

A. Yes, sir.

X-Q. 73. Did you ever sell them?

A. Yes, sir.

X-Q. 74. Do you know who makes that?

A. I didn't until just now.

X-Q. 75. Who does make it, as indicated to you by the box?

A. P. Lorillard Co.

X-Q. 76. You didn't handle little cigars, or all tobacco cigarettes when you were selling, did you?

A. Yes; "Little Bees."

X-Q. 77. Whose brand is that, do you know?

A. You have got me, I couldn't tell you.

X-Q. 78. Neither can I.

A. I never noticed.

X-Q. 79. If you went into a store and asked for a package of Beech-Nut chewing gum, a product of the Beech-Nut Packing Company, would you be confused or deceived into taking cigarettes like that, Plaintiff's Exhibit No. 1, the Beech-Nut cigarette?

A. No, not for the chewing gum, I would not.

X-Q. 80. In other words, an unscrupulous dealer could not fool you into taking cigarettes for chewing gum, could he?

A. No.

Mr. Cavanagh: I guess that is all.

Mr. Hinton: I have nothing further.

Deposition closed.

R. W. BLANCHARD.

O. A. HUBBARD, a witness called on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. O. A. Hubbard; home address, 51 Morrison road, Braintree, Mass.; business address, 743 Main street, Cambridge, Mass. That is the service station of the Beech-Nut Packing Company. I am division manager for the Beech-Nut Packing Company; my age is 51.

Q. 2. How long have you been with the Beech-Nut Packing Company, Mr. Hubbard?

A. Nineteen years.

Q. 3. At the beginning of that time, what was the principal product of the Beech-Nut Packing Company?

A. They only had two products when I went to work for them; the whole line has come out practically in that time.

Q. 4. What has been your experience in selling these Beech-Nut Packing Company products, as they came out?

A. It has always been a very easy matter to introduce anything with the Beech-Nut label on.

Q. 5. What is the situation with respect to Beech-Nut gum; is that easy to sell, or difficult to sell?

A. It is a good deal easier to sell than to get. There has hardly been a time in the last seven or eight months that we could fill our orders. In fact, for the last few months, since the first of January this year, we haven't been allowed to take on new customers; and the old ones have been supplied from one-half to one-third what they ought to have.

Q. 6. Where is Beech-Nut gum sold to the public, in what kind of stores, or over what counters?

A. Almost all stores, drug stores, delicatessen stores, tobacco stores, and these little fruit stands—most every stand of every kind, candy counters, where mints and confections are sold.

Q. 7. I show you a package, which is in evidence in this case as Beech-Nut Exhibit No. 1, being a package of Beech-Nut cigarettes. Do you remember when these cigarettes came out in this territory, and if so, when was it?

A. It was sometime the latter part of March or April, I don't remember the exact date.

Q. 8. 1921?

A. Yes, sir.

Q. 9. When you first saw this package, by whom did you believe that these cigarettes were being put out?

A. Well, the first time I saw it, several called my attention to it, and I bought a package, and I saw the name P. Lorillard Co. on it on close examination.

Q. 10. The last question is repeated.

A. I thought it was a new Beech-Nut product, until I bought a package.

Q. 11. Why did you buy this package and make a close examination of it?

A. Well, I thought it strange that there would be a new product come on the market without my hearing it, or their sending me samples, and I thought the only way to determine it was to buy a package and examine it.

Q. 12. When these cigarettes were first offered in this territory, did you hear any comments or remarks in the course of your work for the Beech-Nut Packing Company; if so, please state the nature of those remarks which were made to you, and the extent to which they were made?

A. Well, I heard innumerable remarks and statements made, and questions asked of me regarding this product from our jobbers and customers and friends and acquaintances. I didn't keep any track of the number, but it must have gone into the hundreds.

Q. 13. What was the nature of those remarks?

A. Well, they asked about the new product, and said if it was going to be as good as the gum, they thought it would sell, and how long had they been putting it up, and to what extent were we going into it, whether we were going to make cigars, or what the end would be.

Q. 14. In your last answer you said that people asked you how long "they" had been putting it out. Who did you mean by "they"?

A. By "they" they referred to the Beech-Nut Packing Company.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 15. (By Mr. Cavanagh.) Mr. Hubbard, do you today have charge of handling of a complete line of products put up by the Beech-Nut Packing Company?

A. In this division; yes, sir.

X-Q. 16. You handle the complete line?

A. Yes.

X-Q. 17. Do you handle any of the Mohawk brand of goods?

A. Very little.

X-Q. 18. They have a Mohawk brand of goods?

A. Yes.

X-Q. 19. Can you name any other brand than the Mohawk?

A. The Erie, that is still another brand they have.

X-Q. 20. Have they any others that you know of?

A. That don't bear the Beech-Nut label, you mean?

X-Q. 21. Yes, other brands.

A. No, I don't recall any.

X-Q. 22. What is the nature of the products that you handle?

A. Well, they are very largely food products, with the exception—I don't know whether you would hardly list gum as a food product. I don't know just what category that would belong to—I don't know about that; but of course it is very largely food products.

X-Q. 23. You never knew in your nineteen years' experience of the Beech-Nut Packing Company handling tobacco or cigarettes?

A. I heard they put out some cigarettes. I have never seen a package in this territory.

X-Q. 24. Did you ever sell a package of Beech-Nut cigarettes put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 25. Did you ever sell any tobacco product of the Beech-Nut Packing Company?

A. No, sir.

X-Q. 26. Did you ever receive any instructions from the Beech-Nut Packing Company that they were going to put out cigarettes or any other tobacco product?

A. No, sir.

X-Q. 27. Do you smoke?

A. Yes, sir.

X-Q. 28. What do you smoke?

A. Pipe mostly.

X-Q. 29. Did you ever smoke cigarettes?

A. Why, yes; but I am not any judge of them, and I probably never smoked three packages in my life.

X-Q. 30. Where did you first purchase this package of Lorillard Beech-Nut cigarettes?

A. Well, I am not sure that I purchased it. I think a man by the name of Phillip Dimodica gave me a package. I am pretty positive that he gave me this package; that I had two packages—one, I know Mr. McKay, the buyer at the South Station restaurant, brought in and gave me, at the time we had a sales meeting at the South Station, and he brought this package in, and I am pretty sure that Dimodica, the candy manufacturer, gave me this other package. I would not swear that I purchased that, I don't think I did. I believe that he passed me this package, this first one I saw.

X-Q. 31. Have you purchased any Beech-Nut Lorillard cigarettes since that time?

A. No.

X-Q. 32. When you took this first package in your hand and examined it, you saw the name P. Lorillard Co. on it?

A. I did.

X-Q. 33. That indicated to you that that was their product?

A. It did; just as soon as I got the package and examined it, and saw the name, "P. Lorillard Co." on it, I was satisfied then.

X-Q. 34. You knew it was not a Beech-Nut Packing Company product?

A. Yes, sir.

X-Q. 35. And you knew it was a product of the P. Lorillard Co.?

A. I did, when I saw the package.

X-Q. 36. Did you ever know of any person who went into a store and asked for cigarettes made by the Beech-Nut Packing Company and were handed cigarettes like this P. Lorillard Co. package?

A. I don't think so.

X-Q. 37. You don't know that you ever did, do you?

A. I don't know that I do.

X-Q. 38. You never heard of any such person?

A. One that went in and asked for Beech-Nut cigarettes?

X-Q. 39. Beech-Nut cigarettes of the Beech-Nut Packing Company, and were passed the Lorillard cigarette?

A. No, I can't say that I do.

X-Q. 40. As I understand it, you handle the Beech-Nut gum?

A. Yes, sir.

X-Q. 41. Did you ever know of any person who went into a store, or other establishment, wanting and asking for Beech-Nut chewing gum of the Beech-Nut Packing Company, and was confused and deceived into taking a package of the Lorillard cigarettes?

A. No, sir.

X-Q. 42. Well, if you went into a store and wanted a package of chewing gum or any other Beech-Nut product with which you were familiar could you be confused or deceived into taking a package of Lorillard Beech-Nut cigarettes?

A. I don't think so.

X-Q. 43. Well, you know you would not, don't you?

A. Yes.

X-Q. 44. I show you a package of Beech-Nut scrap tobacco, which is in evidence in this case as Defendant's Cross-Exhibit No. 1. Did you ever see a package like that before?

A. Today is the first time I ever saw it.

Mr. Hinton: This is objected to as outside of the line of direct examination.

Mr. Cavanagh: The witness has testified that he is familiar with the various products that are sold in tobacco stores, so far as concerns the Beech-Nut Packing Company, and I simply want to test his knowledge in this direction.

X-Q. 45. Did you know of any Beech-Nut Packing Company product having these red radiating lines on the package?

A. No, but there is a certain similarity, as compared with some of our labels—similar labels, but they are a little different; they might be blue or they might be red, those lines running around.

X-Q. 46. Did you ever know them to use any red radiating lines like these?

A. No, not that same kind.

X-Q. 47. If you saw a package with red radiating lines on it, similar to these, would you think it was a Beech-Nut Packing Company product?

A. If I saw the "Beech-Nut" and the nuts on there, I should want to look at it again.

X-Q. 48. If you looked at it again, examined it closely, would you take that for a Beech-Nut Packing product?

A. No, I would not now. Still, if I was around a store and I saw that "Beech-Nut" and the nuts there, I should want to look at it a second time.

X-Q. 49. And then, after you had looked at it, you would say it was not a Beech-Nut Packing Company product, but a Lorillard, would you not?

A. After I looked at it, yes.

Mr. Cavanagh: I guess that is all.

Mr. Hinton: That is all.

The further taking of testimony was adjourned to Worcester, Massachusetts, at 10 o'clock A. M., Thursday, August 18, 1921.

Deposition closed.

O. A. HUBBARD.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that the exhibits in this case may be retained in the custody of the counsel offering the same, to be produced at the trial, subject to inspection by either side.

It is further stipulated that exhibits such as packages of cigarettes, which may be destroyed by repeated handling, may from time to time be replaced by new and identical packages, marked with the original exhibit numbers.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that in order to expedite the taking of testimony, and in appreciation of the difficulty of obtaining the attendance of a Master in small towns, and so forth, any and all formalities in the taking of the foregoing depositions are hereby waived, and it is agreed that the said depositions shall have the same weight and effect as though taken by a duly authorized Special Examiner.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that in order to suit the engagements of counsel and expedite the prosecution of the case, plaintiff's time for pleading to the answer, and the answer to counterclaim therein contained, may be extended thirty days.

It is further stipulated that the plea to the answer and the answer to the counterclaim may be filed *nunc pro tunc,* as of the date of August 16, 1921, to take precedence over the testimony herein taken.

This stipulation is made to suit the engagements of counsel, and to permit certain testimony to be taken in New England during the month of August, 1921, at a time most convenient for both counsel.

I, L. W. DePass, a notary public within and for the County of Suffolk, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Harry S. Cohen, Robert Skene, Jr., A. W. Godfrey, Arthur A. Skinner, John J. King, Richard E. Pope, John F. Lapham, Thomas F. Maloney, W. G. Torrey, Margaret Hunt, Leo Lewis, R. W. Blanchard and O. A. Hubbard, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Boston, Massachusetts, beginning August 16, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party hereto was represented by Richard B.

Cavanagh during the taking of said testimony; that the testimony was taken at the Chamber of Commerce Building, Boston, Mass., and at the Touraine Hotel, Boston, Mass., beginning at 10 A. M., August 16, 1921, and ending August 17th, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

L. W. DEPASS.

[SEAL.]

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Deposition taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, James E. Connor, a notary public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at No. 25 Central Square, Lynn, Massachusetts, on Friday, August 19, 1921, beginning at 10 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

CLARENCE A. WILKINS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, in pursuance to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, and occupation.

A. Clarence A. Wilkins; residence, 3 Myrtle Street; business at 623 Boston Street, Lynn, Mass.

Q. 2. And your occupation?

A. News dealer, stationery, and general variety store. I don't know just how you would class it.

Q. 3. Will you please state what you carry and offer to the public in your store, Mr. Wilkins?

A. Cigars, tobacco, confectionery, soda, ice cream, a few patent medicines, newspapers and periodicals of all sorts.

Q. 4. I show you a package of cigarettes, such as in evidence in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Will you please state whether you have sold these goods over your counter, and if so, approximately how long have you sold them?

A. Oh, since last spring—since the spring time, I won't say what time.

Q. 5. Now, Mr. Wilkins, can you tell me about the quantities of these cigarettes that you have personally sold over the counter, since last spring?

A. I cannot tell you the exact quantity, but I know I average about 400 cigarettes a week—well, that is a fair average, I should say. I may have sold more.

Q. 6. Can you tell me, Mr. Wilkins, whether or not the name of the manufacturer of these cigarettes appears on the package?

A. I cannot.

Q. 7. Since you have been selling these cigarettes over the counter, have you heard comments, inquiries, or the like, from your customers over the counter about these cigarettes? If so, will you please state the nature of those comments, inquiries and remarks?

A. Several times I have been asked if they were made by the same people who manufacture the Beech-Nut gum.

Q. 8. When you first saw these cigarettes, by whom did you think, yourself, that they were made?

A. The Beech-Nut products people, naturally.

Q. 9. And where are these Beech-Nut products people located, do you know?

A. I do. Canajoharie, New York. I have been down there and seen the factory.

Q. 10. Mr. Wilkins, do you recall ever having a conversation with Mr. Blanchard about the Beech-Nut cigarettes? If so, will you tell me in a general way, what the conversation was?

A. Why, if I remember it correctly, I think I asked him if they were—if the Beech-Nut product people were owned by the P. Lorillard Company.

Q. 11. Do you know what suggested that idea to your mind?

A. Well, nothing more than the specialty man of the Lorillard Company had been along and I had given him an order for cigarettes. That is how I found that they were manufactured by the Lorillard Company.

Q. 12. Now, what I want to get at is, why the idea came into your mind that the Lorillard Company owned or controlled the Beech-Nut Company; what was it that brought that idea to your mind, do you remember?

A. No special reason, only the reason that large manufacturing concerns do not use the same trade-marks, or apparently the same trade-marks, without having some understanding that one or the other of the companies is behind the other.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 13. (By Mr. Cavanagh.) Are you the owner of your business, Mr. Wilkins?

A. Yes.

X-Q. 14. How many people do you employ there?

A. At present only one. That is, the boy. My wife is my only help at present, outside of my boy.

X-Q. 15. Do you do a large business in tobacco, or is it a retail business?

A. Well, it is a retail—I don't know whether to call it a large business.

X-Q. 16. It is a retail business?

A. Yes.

X-Q. 17. And you sell various brands of tobacco products?

A. Yes, I do.

X-Q. 18. What do you sell?

A. I don't know that I can give you a list of the whole thing, but all the popular brands.

X-Q. 19. You sell cigars, do you not?

A. Yes, sir, I do.

X-Q. 20. Do you sell the Muriel cigar?

A. Not lately; I have sold it.

X-Q. 21. And you got that from Lorillard, did you?

A. I bought that through a jobber; I don't know really who it came through, I think J. P. Manning, Boston.

X-Q. 22. Do you sell chewing tobacco; do you sell Beech-Nut scrap tobacco?

A. No Beech-Nut scrap; I knew nothing about it until yesterday.

X-Q. 23. But you do sell the Beech-Nut cigarette?

A. I do.

X-Q. 24. And you buy that from P. Lorillard Co.?

A. I buy it through a jobber; the original order was given to the Lorillard salesman.

X-Q. 25. When was that?

A. Sometime in the spring, I couldn't tell you. I never saved the copy of the order.

X-Q. 26. And is that the first you knew of the Beech-Nut cigarette?

A. I had heard of it probably several days before, but I knew nothing about it.

X-Q. 27. I show you a package which is in evidence in this case as Plaintiff's Exhibit No. 1. Is the package of Beech-Nut cigarettes like I show you, similar to the Beech-Nut cigarette that you sell?

A. Yes.

X-Q. 28. Whose name is on that?

A. I don't know. I will have to look. I think it is Lorillard. I don't know that I ever saw that before; I don't know that I ever noticed that name was on the package. One thing I did notice, which was called to my attention, and that was comparing this here with the Beech-Nut gum label—seeing the difference in this part of the label. But that was some time ago.

X-Q. 29. I noticed when you handled this package just now you pointed to the name "P. Lorillard Co." on the panel on the back of the package, and then turned it over and referred to the label on the front of the package. Does the name P. Lorillard Co. appear on the front of the package?

A. I don't know; I can't see it over here.

X-Q. 30. Will you look at it closely and see?

A. It may be there, but I don't see it.

X-Q. 31. Have you any trouble with your eyes?

A. I can't see much of anything now (removing glasses). I couldn't recognize you.

X-Q. 32. Your eye sight is really defective?

A. Yes, sir; I can't see it now.

X-Q. 33. I notice you replaced your glasses and said you couldn't see it.

A. Yes; I couldn't see anything on there now, anyway, through that paper there.

X-Q. 34. Will you explain to me then how you can read that name—

A. That is plain enough.

X-Q. 35. —on the back of the package, but can't read the name "P. Lorillard Co." on the front?

A. That is on a white background, and shows up. And if there is anything there, it doesn't show, so I can see it, on there. Up here I can see it, but nothing

down there. If there is anything down there I can't see a thing.

X-Q. 36. You are color blind, are you?

A. Somewhat. On that white background, I have no trouble at all, but anything there on the dark background, I would not see it at all. Black on red is almost out of sight to me.

X-Q. 37. You know of P. Lorillard Company, do you not?

A. Oh, yes, I have bought their goods for years, but I never bought anything direct from them, as I know of.

X-Q. 38. And that is a high class, reputable tobacco concern, are they?

A. Well, I suppose they are, that their reputation is good.

X-Q. 39. You don't know anything to the contrary?

A. No, I don't know anything to the contrary.

X-Q. 40. No one ever told you that the P. Lorillard Company owned or controlled or had any relation to the Beech-Nut Packing Company, did they?

A. Oh, no; that is merely a matter of discussion. One or two persons and myself, possibly at times just got to wondering whether they were connected or not.

X-Q. 41. Did you ever hear any discussion regarding it by anybody else?

A. No; there has been nothing definite about it said before, but we might meet and talk about it.

X-Q. 42. In your business, if a person came into your store and asked for a package of cigarettes, made by the Beech-Nut Packing Company, would you sell him a package of Lorillard cigarettes in place of it?

A. I couldn't now, because I know; I might at sometime, but I wouldn't now.

X-Q. 43. Would you deliberately palm them off on him?

A. No.

X-Q. 44. If a person came into your store and asked you for Beech-Nut chewing gum, made by the Beech-Nut Packing Company, would you sell him a package of cigarettes for chewing gum?

A. No, sir. Further I should question the Beech-Nut Packing Company—it is Beech-Nut Products Company, isn't it, as I have seen it? I am not sure of that.

X-Q. 45. And if you went into a store yourself and wanted Beech-Nut chewing gum, could you be deceived or confused into taking a package of Lorillard Beech-Nut cigarettes for a package of chewing gum?

A. No, I don't think so.

X-Q. 46. You would think a man was crazy that would take a package of cigarettes for chewing gum, would you not?

A. I should think he would be.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 47. (By Mr. Hinton.) If you went into a store, Mr. Wilkins, and wanted to buy a pick, would you accept a shovel in the place of the pick?

A. I certainly should not.

R-D. Q. 48. Will you please read for me the matter appearing on the white panel on the back of the Beech-Nut cigarettes; see if you can read it?

A. "Beech-Nut cigarettes. Mildest of all. Perfect quality. Delicious taste. P. Lorillard Co. Established 1760."

R-D. Q. 49. Did you have any difficulty in reading that, "Established 1760," on that package?

A. Not at all.

R-D. Q. 50. You wear glasses, do you not?

A. At all times, except when I am asleep.

R-D. Q. 51. And when you told Mr. Cavanagh you

could not recognize him, then you had your glasses raised from your eyes?

A. Yes, sir.

Recross-Examination.

R-X Q. 52. (By Mr. Cavanagh.) And when you said you could not read the name, "P. Lorillard Co." on the front of the Beech-Nut package, when I, Mr. Cavanagh, was examining you, you had your glasses down, didn't you?

A. I did.

R-X Q. 53. So you were looking through your glasses?

A. Yes, sir.

R-X Q. 54. And when Mr. Hinton just had you read off at that matter so rapidly on the back of the package, he showed you a package from which the glacé or transparent tissue paper had been removed?

A. Yes.

R-X Q. 55. And when I showed you the package, the wrapper was on; is that right?

A. That is right.

R-X Q. 56. And when you read the name "P. Lorillard Co." on the package, when I questioned you, you were looking through the glacé wrapper?

A. I was.

R-X Q. 57. And your glasses were in position?

A. Yes.

R-X Q. 58. Now, did you ever purchase any tobacco products from the Beech-Nut Packing Company?

A. No, I never purchased anything in that line from the Beech-Nut Packing Company that I know of.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 59. (By Mr. Hinton.) I show you a package of cigarettes, Plaintiff's Exhibit No. 1 in this case, which has the glacé or wax paper wrapper on it, and I invite your attention to the white panel containing black printing on the back of that package. Can you read that?

A. Easily.

R-D. Q. 60. Can you read "Established 1760" at the bottom?

A. I can.

R-D. Q. 61. With difficulty, or easily?

A. No, easily enough.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 62. (By Mr. Cavanagh.) When you said you could not see me with your glasses off——

A. I said I could not recognize you.

R-X Q. 63. ——how far away was I sitting from you?

A. Four or five feet.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 64. Do you wear glasses all the time?

A. All the time.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

CLARENCE A. WILKINS.

ALFRED WILLIAM STURGIS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Alfred William Sturgis; grocer; 819 Boston street, Lynn; I live upstairs; 43 years old.

Q. 2. How long have you kept a grocery store at that location?

A. Six years.

Q. 3. Do you carry tobacco products in your grocery store?

A. Yes, sir.

Q. 4. I show you a package of cigarettes, which is in evidence in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Do you handle these cigarettes?

A. Yes, sir.

Q. 5. When you first saw these cigarettes, by whom did you believe they were made?

A. By the Beech-Nut Packing Company.

Q. 6. How long did you believe that these cigarettes were made by the Beech-Nut Packing Company; do you remember?

A. About ten minutes.

Q. 7. How did you find out that they were not?

A. Well, because I asked the salesman for the cigarettes, their agent, who takes the orders—they are shipped direct, you know, through the jobber, they are shipped direct from them to the store, but they put the bill through the jobber.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 8. (By Mr. Cavanagh.) I understand, Mr. Sturgis, that when you bought these cigarettes you bought them from some salesman?

A. Yes, sir; I bought them through, what do you call them—a fellow——

X-Q. 9. Agent or salesman or something like that?

A. Yes, sir; there is a special name for them. There is what they call the agent, they have the regular salesman for the jobber, but the salesman for the firm that manufactures.

X-Q. 10. What manufacturer was that?

A. Lorillard Company.

X-Q. 11. He was a Lorillard agent?

A. Yes, a Lorillard agent.

X-Q. 12. And he came to your store?

A. Well, he was agent for the——

X-Q. 13. Well—pardon me.

A. He was the agent for the one above, the jobber, what they call the agent in Boston, wherever it is, when they buy in bigger lots, you know.

X-Q. 14. And he came into your store and asked you for an order?

A. Well, he asked me if I wanted to buy some Beech-Nut cigarettes and other tobaccos, a combination, and I said yes.

X-Q. 15. You knew he was a Lorillard man?

A. Yes, sir.

X-Q. 16. And he told you that these cigarettes were not made by the Beech-Nut Packing Company?

A. No, he didn't tell me.

X-Q. 17. How did you find it out?

A. I asked him.

X-Q. 18. Asked him what?

A. I said, "I thought the Beech-Nut people made them," and he said, "No, we make them, the P. Lorillard Co."

X-Q. 19. And after he told you that, you gave him the order?

A. Yes.

X-Q. 20. And you bought P. Lorillard's goods because you had a sale for them?

A. Yes, sir; I bought these because of the demand for them; everybody was asking for Beech-Nut cigarettes.

X-Q. 21. And, as I understand it, you have always bought other Lorillard products?

A. Yes, sir.

X-Q. 22. Can you name some of them that you have bought; just name the brands?

A. The chewing tobacco—I don't know that I could call them all right off that they manufacture, but the brands I carry, Camels, Lucky Strike, Fatimas, Helmars, Sweet Caporal, large and small, and Perfections, and Beech-Nut, and the "111," that is about all I carry in the cigarette line, some made by one and some are made by another.

X-Q. 23. In carrying the Lorillard Beech-Nut cigarette, like this package, Plaintiff's Exhibit No. 1, you never told your customers that it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 24. And you would not tell them it was a product of the Beech-Nut Packing Company?

A. No; nobody asked that question. If anybody had asked that question I would have told them that they were not made by that company.

X-Q. 25. Who would you have told them they were made by?

A. Lorillard, but I would sell them just the same.

X-Q. 26. What kind of gum do you sell?

A. Beech-Nut and the——

X-Q. 27. Made by the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 28. If a person came into your store and asked you for a package of Beech-Nut chewing, made by the Beech-Nut Packing Company, would you sell him a package of Beech-Nut cigarettes in place of it?

A. No.

X-Q. 29. Would you think a person was crazy that would take a package of Beech-Nut cigarettes for a package of Beech-Nut chewing gum?

A. Yes, sir.

Mr. Cavanagh: That is all.

Deposition closed.

ALFRED WILLIAM STURGIS.

IDA W. WILKINS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, in pursuance of notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please give me your name, residence and occupation, Mrs. Wilkins?

A. Mrs. Ida W. Wilkins; 623 Boston street, West Lynn, Mass.; I am jack at all trades; I am postmistress part of the time, and housekeeper and storekeeper.

Q. 2. Are you the wife of Mr. C. A. Wilkins, who has testified in this case this morning?

A. I am.

Q. 3. Mrs. Wilkins, do you carry Beech-Nut cigarettes similar to the package I show you, which is in this case as Plaintiff's Exhibit No. 1?

A. Yes, sir.

Q. 4. Do you know how long you have sold these cigarettes in this store?

A. I don't know as I know; I think ever since they came out. I don't know how long that is.

Q. 5. Would that be this year or last?

A. Oh, yes, it would be this year, I should say. I don't do the buying, so I wouldn't understand about that as well as Mr. Wilkins.

Q. 6. When you first saw this brand of cigarettes, by whom did you believe that they were made?

A. Why, I believed that the Beech-Nut people made them.

Q. 7. Do you carry any of the products made by the Beech-Nut people?

A. Yes, the Beech-Nut gum; that is all.

Q. 8. Do you remember when Mr. Blanchard, the gentleman over there, came into this store last week, and whether or not you asked him anything when he came in?

A. Yes; I asked him if he was the Beech-Nut cigarette man, and if the Beech-Nut people put out the Beech-Nut cigarette.

Q. 9. I see. When, Mrs. Wilkins, were you first told or informed that the Beech-Nut people did not put out the Beech-Nut cigarette?

A. Well, that is the day Mr. Blanchard came, when I asked him, whatever day that was.

Mr. Blanchard (interrupting): It was Thursday, the 11th.

Q. 10. Mrs. Wilkins, have you heard over your counter any comments or remarks by your customers about these Beech-Nut cigarettes?

A. Yes, I have; several people have asked if the same people that made the gum made the cigarettes.

Mr. Hinton: I see. That is all.

Cross-Examination.

X-Q. 11. (By Mr. Cavanagh.) Who do you buy these Beech-Nut cigarettes from?

A. Well, I don't do the buying at all; Mr. Wilkins does the buying.

X-Q. 12. So you don't do the buying?

A. No, I don't do the buying. I don't know whether we get them from Manning or Tucker. We trade with both Manning and Tucker.

X-Q. 13. You have never taken any trouble to observe that package, have you?

A. No, only as I put it out, not to go through it closely, all the reading on it, and look at it.

X-Q. 14. Whose name is that written on it?

A. P. Lorillard Co., I see written on it.

X-Q. 15. So, if you had observed that package closely, you would have known that it was a P. Lorillard Co. cigarette?

A. Yes, sir; the Lorillard tobacco company.

X-Q. 16. Did you ever hear of the Beech-Nut Packing Company putting out any cigarettes at all?

A. No; I didn't know anything about it.

X-Q. 17. I understood you to say that you sell Beech-Nut chewing gum?

A. Yes, sir; lots of it.

X-Q. 18. If a customer came into this store and asked you for a package of Beech-Nut chewing gum, would you sell him a package of P. Lorillard's Beech-Nut cigarettes in place of the chewing gum?

A. Not if they asked for gum, but they say, "Give me a package of Beech-Nut"; that is what puzzles me. I had an instance of that, he said, "Give me a package of Beech-Nut," and I reached out for gum, and he said, "I meant cigarettes." So I went clear across the store

and got the cigarettes. They don't usually add on "cigarettes," they say, "Give me a package of Beech-Nut."

X-Q. 19. But if they wanted cigarettes, you would not sell them Beech-Nut chewing gum in place of them?

A. No.

X-Q. 20. And if they took the cigarettes in the place of gum, or they took gum in the place of cigarettes, you would think they were crazy, would you not?

A. Of course I should, and I should think that I was crazy to give it to them.

X-Q. 21. If a person came into this store and asked you for a package of cigarettes made by the Beech-Nut Packing Company, would you sell him Lorillard cigarettes?

A. I would not now, now that I know. I would say, "Well, I haven't got them, made by those people."

X-Q. 22. You never knew a person to come into this store and ask for cigarettes made by the Beech-Nut Packing Company?

A. No, I never knew of one.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 23. (By Mr. Hinton.) I call your attention to this oval device on the front of this package of cigarettes, containing the name, "Beech-Nut," and underneath it the beech-nut cluster. What manufacturer does that label suggest to you?

A. Why, the "Beech-Nut" suggests that the Beech-Nut Packing Company makes them, naturally, because they have other advertisements of the same kind, and it is so common, you know.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 24. (By Mr. Cavanagh.) Mrs. Wilkins, haven't you ever seen and sold other goods which had labels bearing an oval on them?

A. Oval?

R-X Q. 25. Yes, the shape of a ring, or ellipse.

A. You mean a cigarette?

R-X Q. 26. Anything.

A. No—I am trying to recall what others there are. I don't know really what others. There are circles, but I don't know about ovals.

R-X Q. 27. I notice in your case here a Proctor cigar box label. What is the shape of that label?

A. Well, it is not so long an oval as on the Beech-Nut; it is nearer round.

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 28. (By Mr. Hinton.) Mrs. Wilkins, would you ever confuse that Proctor cigar label which Mr. Cavanagh has called to your attention, with the Beech-Nut Packing Company label?

A. No.

R-D. Q. 29. It would be impossible, would it not?

A. I don't see how it would be possible. It has "Proctor" written across the label there. If it said "Beech-Nut," I might.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 30. (By Mr. Cavanagh.) Mrs. Wilkins, I show you a label of the Beech-Nut Packing Company, which has been marked in this case for identification Defendant's Cross-Exhibit No. —, and I show you a package of Beech-Nut cigarettes. Is that oval on the Beech-Nut

cigarette, outside of its elliptical shape, like that Beech-nut oval?

A. The gold on that ring here and the red lettering here, it is a little different, of course. The oval itself, you mean?

R-X Q. 31. You pointed to the "Beech-Nut."

A. Yes, sir—yes, it has all the Beech-Nut red, just the same.

R-X Q. 32. And how about the shape of the oval, the color of the oval?

A. It is white, and has not this interlining of red.

R-X Q. 33. And it has not the wide red band around it, has it?

A. No.

R-X Q. 34. And the Beech-Nuts are different?

A. Yes, the nut with the leaves on here, I should say they were just the same beech-nuts as these without the leaf, wouldn't you?

Mr. Cavanagh: That is all.

Redirect Examination.

R-D. Q. 35. (By Mr. Hinton.) Mrs. Wilkins, do you know whether all the labels used by the Beech-Nut Packing Company—I mean the regular Beech-Nut labels used by the Beech-Nut Packing Company, are all exactly alike, or do they vary?

A. I should say what I have used, that they are alike.

R-D. Q. 36. I mean in the small details?

A. I never examined them minutely, you know, because I have not had any occasion, so I couldn't say as to that.

Mr. Hinton: That is all.

Deposition closed.

(Mrs.) Ida W. Wilkins.

The further taking of depositions adjourned to Salem, Mass.

I, James E. Connor, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Clarence A. Wilkins, Alfred William Sturgis and Ida W. Wilkins were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Lynn, Massachusetts, on the 19th day of August, A. D. 1921; that each of the above named witnesses was by me duly sworn; that the testimony of said witnesses was taken in short-hand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at 25 Central Square, Lynn, Massachusetts, and 623 Boston street, West Lynn, Massachusetts, beginning at 10 o'clock A. M., August 19, 1921, and ending at 12 o'clock, noon; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested directly or indirectly in the matter in controversy.

JAMES E. CONNOR,
Notary Public.

[SEAL.]

My commission expires Sept. 2, 1921.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, J. F. Dalton, a notary public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at 127 Washington Street and 128 Washington Street, Salem, Massachusetts, on Friday, August 19, 1921, beginning at 2 o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

EDWARD MOSCOVITZ, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. 160 Lafayette Street, Salem, Mass.; I am clerk at Schrivers Cigar Company store.

Q. 2. And that store is located at what place?

A. 127 Washington Street, Salem, Mass.

Q. 3. Did you say what your age was?

A. I am 25 now.

Q. 4. How long have you been a clerk in this store?

A. I have been with them about nine months, with this company.

Q. 5. Did you sell tobacco products before that?

A. Yes; I had a store myself.

Q. 6. Is this a retail store?

A. Yes, wholesale and retail both. It is mainly retail, but we do sell wholesale.

Q. 7. I show you a package of cigarettes which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes, and ask you when you first saw these cigarettes, by whom did you think they were made?

A. By the Beech-Nut gum company.

Q. 8. Will you please state whether you now believe that these cigarettes were made by the Beech-Nut gum company?

A. No, I should say not, for the simple reason I inquired of the salesman of the Beech-Nut Company, and he explained to me that it is an entirely different company, and I know now that it is, that it is not concerned with the Beech-Nut gum company.

Q. 9. Did you have them on sale here at the time you inquired of this salesman?

A. Yes; we had them on sale already; that was the first or second week after we had them in.

Q. 10. And in that one or two weeks, had you sold these cigarettes over the counter?

A. Yes.

Q. 11. Yourself?

A. Yes.

Mr. Hinton: That is all the direct examination.

Cross-Examination.

X-Q. 12. (By Mr. Cavanagh.) How long have you been in the tobacco business altogether?

A. Well, I will tell you; I had a store myself about a year, and I have been with them about nine months, so I have been in the business about two years.

X-Q. 13. You know the P. Lorillard Company, do you?

A. Yes.

X-Q. 14. And you handle their goods?

A. Some of it, I do.

X-Q. 15. You sell the Beech-Nut cigarettes?

A. Yes.

X-Q. 16 Do you sell the Beech-Nut scrap tobacco?

A. Yes.

X-Q. 17. Whose tobacco is that?

A. I think it is made by the American Company, isn't it? It is made by the American Company, I think.

Mr. Hinton: Questions about the Beech-Nut scrap tobacco are objected to as outside the direct examination.

X-Q. 18. Does it say what company it is made by (passing package to witness)?

A. Is it made by the Lorillard Company?

X-Q. 19. Will you examine the package and see if you can tell who it is made by?

Mr. Hinton: It is noted that the witness is examining the package for nearly a minute.

A. Well, I don't know yet by whom it is made. I presume it is made by Lorillard.

X-Q. 20. Why do you presume it is?

A. Isn't that the company?

X-Q. 21. Why do you say you presume it is?

A. I mean that on there.

X-Q. 22. You mean that the name Lorillard is—

A. Yes; that is what it is, and I think it is made by this company.

X-Q. 23. Whose name is on that package of Beech-Nut cigarettes?

A. That is Lorillard Company. Now, I see it is made by the same company.

X-Q. 24. So you never really took the trouble to examine the cigarette package, that Beech-Nut cigarette package to know who it was made by?

A. No.

X-Q. 25. When you were under the impression that that cigarette was the Beech-Nut Packing Company product, you hadn't taken the trouble to examine the package to know?

A. No.

X-Q. 26. If a customer came into this store and asked you for a package of Beech-Nut chewing gum, would you sell him a package of these Lorillard cigarettes for chewing gum?

A. I say, when a customer comes in and says "Beech-Nut," I usually ask him what he wants, whether Beech-Nut cigarettes or gum.

X-Q. 27. (Question repeated.) And if he wanted Beech-Nut chewing gum, you would not sell him a package of Beech-Nut cigarettes?

A. Of course not.

X-Q. 28. You never did?

A. No, it never happened to me yet.

X-Q. 29. And you yourself would not go into a store, if you wanted a package of Beech-Nut cigarettes, and take in place of it a package of chewing gum?

A. No.

X-Q. 30. You would think a man would be insane or

crazy that would take a package of tobacco or cigarettes in the place of gum, would you not?

A. Yes, sure, I would.

X-Q. 31. Do you know any of the Lorillard agents that come here?

A. Some of their salesmen come in quite often. I know quite a number of them.

X-Q. 32. Who are they?

A. I couldn't tell their names. One fellow particularly comes in—he used to be here, but he was not for some time for a long while. I don't recall his name.

X-Q. 33. You don't recall his name?

A. No, I can't recall the names of them, but they come quite often in the store.

Mr. Cavanagh: That is all.

Deposition closed.

EDWARD MOSCOVITZ.

CHARLES E. GEARY, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Charles E. Geary.

Q. 2. Age.

A. 23.

Q. 3. Residence.

A. 11½ Hardy street.

Q. 4. Occupation.

A. I am clerk in here, that is all.

Q. 5. Is this a drug store that you are working in?

A. Yes.

Q. 6. Do you sell cigarettes and tobacco here?

A. Yes, sir.

Q. 7. Do you sell the Beech-Nut cigarette, similar to this package which I now show you, and which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. Yes.

Q. 8. When you first saw this cigarette, and sold it, by whom did you believe that they were made?

A. The Beech-Nut people.

Q. 9. Can you name any other products made by the Beech-Nut people that you sell here?

A. No, not outside of the gum.

Q. 10. How long did you continue to believe that these cigarettes were made by the Beech-Nut people?

A. Continuously, until I met you.

Q. 11. And do you remember what day that was?

A. A week ago last Wednesday, wasn't it?

Q. 12. Do you remember, Mr. Geary, when these cigarettes first came on the market, and were placed on sale in your store here?

A. About three or four months ago, I think.

Q. 13. And have you been since selling them over the counter?

A. I have.

Q. 14. Yourself, personally?

A. Yes, sir.

Mr. Hinton: That is all of the direct.

Cross-Examination.

X-Q. 15. (By Mr. Cavanagh.) You say you have been selling these cigarettes for the past three or four months, Mr. Geary?

A. Yes, about that time.

X-Q. 16. Whose name is that on the package I show you?

A. Lorillard.

X-Q. 17. Do you know what line of business P. Lorillard Company is in?

A. I think they are in the cigarette business.

X-Q. 18. Tobacco products?

A. Tobacco products, yes.

X-Q. 19. If you took the trouble to look at that package, you would know that P. Lorillard Company made it, would you not?

A. Naturally, if I had looked at it and saw it was marked with their name on it.

X-Q. 20. You never even took the trouble to look at that and see who made them?

A. No; I just passed them out.

X-Q. 21. Do you know who makes Anheuser beer, or did made it? Did you ever hear of Anheuser beer?

A. I have heard of it, yes.

X-Q. 22. I notice you have got in your window a can of Budweiser malt extract——

A. Yes.

X-Q. 23. ——as I call it. Would you sell a can of it?

A. Sure, I would.

X-Q. 24. I would like to buy a can, if you don't mind.

A. You would like to buy a can of it?

X-Q. 25. Yes, I would; I would like to purchase a can of it now, if you will get a can.

A. Of course we have it for sale. Why should I object to it? Do you really want to purchase it?

X-Q. 26. Yes, I really do. I want to buy a can. (Can produced.) This can bears the name "Budweiser Malt Syrup" on it, doesn't it?

A. Yes.

X-Q. 27. Inside of an oval. Can you tell who that is made and sold by?

A. No, I don't do the buying.

X-Q. 28. Whose name appears on it?

A. Budweiser Malt——

X-Q. 29. Malt Products Corporation?

A. Yes, sir.

X-Q. 30. The Anheuser-Busch name does not appear on that, does it?

A. No, I don't see it.

Mr. Hinton: Objected to as immaterial and irrelevant.

X-Q. 31. How much is that can?

A. $1.25.

X-Q. 32. Mr. Geary, if a person came into this store and asked you to sell them a package of Beech-Nut chewing gum, you would not sell them a package of Beech-Nut cigarettes, would you, in place of it?

A. In such a case I would remark about it, make the statement, which do they mean, Beech-Nut cigarettes or Beech-Nut gum—always did.

X-Q. 33. And you would not yourself, if you went into a store and wanted Beech-Nut cigarettes, you would not take a package of Beech-Nut chewing gum in place of it?

A. Naturally I would not, if I wanted the cigarettes, take the gum.

X-Q. 34. And you would think a person was crazy to take the cigarettes for gum, wouldn't you?

A. Why, sure.

Mr. Cavanagh: I think that is all. Oh, just one more question.

X-Q. 35. You would not mistake or confuse that can of Malt Syrup for a bottle of Budweiser beer, would you —Anheuser-Busch?

A. No, certainly not.

Mr. Hinton: Objected to as immaterial and irrelevant.

Mr. Cavanagh: That is all.

Deposition closed.

CHARLES E. GEARY.

The further taking of testimony was adjourned to Lawrence, Mass.

I, J. F. Dalton, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special examiner by consent of counsel, do hereby certify that the foregoing depositions of Edward Moscovitz and Charles E. Geary were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Salem, Massachusetts, on the nineteenth day of August, A. D. 1921; that each of the above named witnesses was by me duly sworn; that the testimony of said witnesses was taken in short-hand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at 127 Washington street and 128 Washington street, Salem, Massachusetts, beginning at 2 o'clock P. M., and ending at 3 o'clock P. M., August 19, 1921; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested directly or indirectly in the matter in controversy.

J. FRANK DALTON,

[SEAL.] Notary Public.

My commission expires Dec. 31, 1921.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, T. Edwin Andrew, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, at Room 303, Bay State Building, Lawrence, Massachusetts, on Friday, August 19, 1921, beginning at 4 o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

JAMES J. CREEVAN, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. John J. Creevan; age, 51; 203 Haverhill street, Lawrence, Massachusetts.

Q. 2. What is your occupation?

A. Salesman in a grocery store.

Q. 3. Where is that grocery located?

A. 34 Amesbury street, Lawrence, Mass.

Q. 4. Who is the proprietor?

A. M. J. Bailey.

Q. 5. Mr. Creevan, have you sold Beech-Nut products in this grocery store?

A. Yes, sir.

Q. 6. Have you seen Beech-Nut cigarettes similar to the package I now show you, which is in evidence in this case, as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. Yes, sir.

Q. 7. Mr. Creevan, can you relate an incident which happened in connection with these cigarettes in your store?

A. Yes, sir.

Q. 8. Will you please do so?

A. A man came in and asked for a jar of Beech-Nut marmalade; I told him it was the best marmalade we had in the shop, and I said, here is the Beech-Nut man right here now, and he will tell you all about it. The man said, "If it isn't any better than the cigarettes, it is no good."

Q. 9. What did the Beech-Nut man say?

A. I asked the Beech-Nut man if they didn't make the cigarettes, and he said, "No," so I sold the marmalade to the man then.

Q. 10. Now, this man was a customer, was he?

A. A customer, yes.

Q. 11. Did he ask for Beech-Nut marmalade, or just marmalade?

A. Marmalade.

Q. 12. What is the name of the Beech-Nut man who was there at the time?

A. The gentleman with you. I have forgotten your name.

Mr. Blanchard: Blanchard.

Q. 13. When you first saw these Beech-Nut cigarettes, by whom did you think they were put up?

A. By the Beech-Nut Company.

Q. 14. How long did you continue to believe that?

A. I believed that right along until this Mr. Blanchard told me that they did not.

Q. 15. Do you know why you believed that, Mr. Creevan?

A. Well, it had the same label, Beech-Nut label, as the advertising in the papers, and I knew they put out a line of gum, and lots of stuff, and naturally I thought it was the same label, they put up cigarettes, too.

Q. 16. You carry other marmalades in your store besides Beech-Nut marmalade?

A. Yes, sir.

Mr. Hinton: Direct examination closed.

Cross-Examination.

X-Q. 17. (By Mr. Cavanagh.) I understand, Mr. Creevan, you are engaged as a salesman in this store?

A. Yes, sir.

X-Q. 18. And you handle various lines of tobacco products?

A. No; no tobaccos.

X-Q. 19. You don't sell tobacco?

A. No, sir.

X-Q. 20. When did you first see this Beech-Nut cigarette package?

A. I saw it advertised in the papers, away back, perhaps, maybe three or four months, but I really forget how long since. It is advertised in the papers right here in the town.

X-Q. 21. Did you ever make inquiry or investigation to find out what concern actually manufactured the Beech-Nut cigarette?

A. No, sir.

X-Q. 22. You looked at that advertisement, did you?

A. I looked at the advertisement, yes sir. I may have spoken to some of the men that the Beech-Nut people were putting up cigarettes. I think I have made that remark.

X-Q. 23. Does that advertisement resemble the one you saw? I direct your attention to an advertisement on a page of the Boston Herald of August 18, 1921, and which is in this case marked for identification, Defendant's Cross-Exhibit No. 5. Does that look like the advertisement that you saw?

A. Yes, sir.

X-Q. 24. The name "P. Lorillard Co." appears on that advertisement, doesn't it?

A. Yes.

X-Q. 25. Do you notice the name Beech-Nut Packing Company on that advertisement in any place?

A. No.

X-Q. 26. Do you smoke?

A. No, sir; I don't smoke cigarettes, I smoke cigars and a pipe.

X-Q. 27. Did you ever buy a package of Beech-Nut cigarettes?

A. No, sir; never smoked a cigarette in my life.

X-Q. 28. Did you ever go into a store and ask for a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 29. Did you ever carefully examine a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 30. I show you this package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes; what name is on that package?

A. P. Lorillard Company.

X-Q. 31. If you saw that you would not think that it was a package put out by the Beech-Nut Packing Company, would you?

A. If I saw the name Lorillard on it, I would not.

X-Q. 32. Did you ever chew tobacco?

A. No, sir.

X-Q. 33. Did you ever see Beech-Nut scrap tobacco?

A. No, sir.

X-Q. 34. Like this package here that I show you?

A. I never did see one before.

X-Q. 35. You never saw that scrap tobacco?

A. No.

X-Q. 36. I understand that you have never sold tobacco?

A. In my present place of business?

X-Q. 37. Yes.

A. No, we have never kept tobacco there.

X-Q. 38. How long have you been in your present place?

A. I have worked at this Bailey store seventeen years.

X-Q. 39. If you went into a store and wanted a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, could you be deceived or confused into taking a package of cigarettes like this package of Lorillard cigarettes, for a package of chewing gum?

A. I don't think I would.

X-Q. 40. You would think anyone would be crazy that would take a package of cigarettes for a package of chewing gum, would you not?

A. I would naturally think that the Beech-Nut people put them up. Is that the way you want me to answer it?

X-Q. 41. No, my question is simply this: You would think a person, if they wanted to buy a package of chewing gum, that would allow anyone to pass off a package of Beech-Nut cigarettes on him, was crazy?

A. I think they would be.

X-Q. 42. You don't think a person would be deceived

into taking a package of chewing tobacco or cigarettes for chewing gum?

A. No.

X-Q. 43. When you spoke of this gentleman who wanted to buy the marmalade, you, of your own volition, recommended to him the Beech-Nut marmalade, didn't

A. Yes.

X-Q. 44. I understood you to say that you smoked cigars.

A. Yes.

X-Q. 45. And you know that every smoker has his favorite, and his own taste in regard to tobacco products, such as cigars?

A. Sure.

X-Q. 46. And that the cigars that you like the other fellow doesn't like, and *vice-versa?*

A. Very true.

X-Q. 47. And you find this in every line of business in regard to different articles, do you not?

A. Yes.

X-Q. 48. Different men probably have different preferences and tastes for goods of the same class?

A. Yes.

Mr. Cavanagh: I think that is all.

Redirect Examination.

R-D. Q. 49. (By Mr. Hinton.) Mr. Creevan, I don't think I asked you how long ago, approximately, was this incident of the man coming in and asking for marmalade. Do you remember?

A. About two months, I believe.

R-D. Q. 50. That would be in July or June?

A. It wouldn't be that long—it might be about July, I guess.

R-D. Q. 51. Do you remember when the Beech-Nut cigarettes first appeared in this territory?

A. Well, I have seen them advertised in the paper, the only way I knew about them.

R-D. Q. 52. Yes, but when, how long ago did you first see them advertised in this territory?

A. I really couldn't tell. It might be five or six months, but I would not be sure.

R-D. Q. 53. Now, you have said that you spoke to people and told them that the Beech-Nut people were putting out cigarettes. Were those people customers of yours in the store?

A. Yes, sir.

R-D. Q. 54. Mr. Creevan, can you tell me, recite to me a list of the products made by the Beech-Nut people, the whole list?

A. Well, I know quite a few of them. Marmalade, raspberry jam, strawberry jam, blackberry jam——

R-D. Q. 55. Well, to save time, I just wanted to know if you could give me the full list of the products or not. Just answer yes or no—all the products that they make.

A. No, sir.

Mr. Hinton: That is all.

Recross-Examination.

R-X Q. 56. (By Mr. Cavanagh.) You say you spoke to some men and told them that the Beech-Nut Company were putting out cigarettes. Were those customers?

A. Yes, sir.

R-X Q. 57. Upon what did you base that statement that these cigarettes were put out by the Beech-Nut Packing Company; you didn't make any investigation, did you?

A. No, sir, only the label.

R-X Q. 58. Did you look at the cigarette package itself?

A. I never saw the cigarette package until down here; you showed it to me.

R-X Q. 59. When was that?

A. About ten minutes ago, just as I came up.

R-X Q. 60. So the first time you saw a package of Beech-Nut cigarettes was today, August 19, 1921?

A. Yes, sir.

R-X Q. 61. And you say that this advertisement that you saw in this paper had P. Lorillard Company on it, and you don't find the name Beech-Nut Packing Company on it?

A. No.

R-X Q. 62. It was from that advertisement that you got the impression that the Beech-Nut Packing Company was putting the goods out; is that right?

A. Yes, sir.

R-X Q. 63. You never made a careful examination of the advertisement?

A. No, sir.

R-X Q. 64. Just glanced at it?

A. That is all.

R-X Q. 65. And never looked at the cigarettes until today?

A. No, sir.

Mr. Cavanagh: That is all.

Mr. Hinton: Deposition closed.

JAMES J. CREEVAN,
203 Haverhill St.,
Lawrence, Mass.

ROBERT JAMES WINTERS, a witness produced on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation?

A. Robert James Winters; age 26 years next birthday; residence 30 Salem Street, Andover, Mass.

Q. 2. Occupation?

A. Grocery clerk.

Q. 3. In what grocery store do you work?

A. M. J. Bailey's.

Q. 4. That is in Lawrence, Mass.?

A. 34 Amesbury Street, Lowrence.

Q. 5. Mr. Winters, have you ever before seen a package of Beech-Nut cigarettes, like a sample I now show you, Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes?

A. I have had a glimpse of them, just to look at them.

Q. 6. Have you seen the advertisement of this product that has appeared in this territory?

A. I have.

Q. 7. Have you ever smoked any of these cigarettes?

A. I have smoked one.

Q. 8. Where did you get that cigarette?

A. A friend of mine gave it to me. I asked him for a cigarette and he handed me one from a package.

Q. 9. He handed you a package of them?

A. He just took a package out, and I took a cigarette from his package.

Q. 10. By whom did you think these were made?

A. I assumed the Beech-Nut Packing Company.

Q. 11. How long did you entertain that belief?

A. Since I had smoked it. I think it was two or three months back.

Q. 12. Who would you think, if you just looked at that package, it was made by; would you think it was made by the Beech-Nut Packing Company?

A. I would, unless I examined it. For instance, as you hold it up, as it now is, I would naturally think it was a Beech-Nut Packing Company product.

Q. 13. When were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company; do you remember how you first found it was not?

A. Yes; I think it was when you were in the store. I don't remember just the date, the exact date.

Q. 14. That was last week, was it?

A. Yes, last week.

Q. 15. Did I tell you that the Beech-Nut Packing Company did not make these cigarettes?

A. Yes, sir.

Q. 16. Do I understand that up to that time you believed that they did?

A. I was under the impression that they did.

Mr. Hinton: That is all.

Cross-Examination.

X-Q. 17. (By Mr. Cavanagh.) Do you sell tobacco products?

A. No, sir.

X-Q. 18. Cigarettes, cigars, chewing gums?

A. No, sir.

X-Q. 19. Did you ever buy a package of these Beech-Nut cigarettes?

A. No, sir.

X-Q. 20. Will you examine the package I show you, in this case as Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes, and tell me what that name is on there?

A. I can't pronounce it. P. Lorillard Company, isn't it?

X-Q. 21. Does that indicate to you the manufacturer of that cigarette, the words "P. Lorillard Co."?

A. It does not say manufactured by them, does it?

X-Q. 22. Would you take it to be that they are the manufacturers?

A. I would know what it was, just what was the name just wrote across the package.

X-Q. 23. See if you can find the name Beech-Nut Packing Company in any place on that package?

A. No, I can't find it now.

X-Q. 24. I hand you a small package of mints. Can you tell me what name that is on there?

A. The Beech-Nut Packing Company.

X-Q. 25. Would you look over that and see if you see any words, "Manufactured by," on that any place?

A. No.

X-Q. 26. Whose goods would you take that to be?

A. By the label I should take it to be the Beech-Nut Packing Company, by the label, just glancing at it.

X-Q. 27. You don't know who manufactured that, do you?

A. No, sir. But I assume, though, it is a product of the Beech-Nut Packing Company, by the label.

X-Q. 28. But you don't know whether they manufacture it or not?

A. No, sir.

Mr. Cavanagh: The small package of Beech-Nut mints is offered for identification as Defendant's Cross-Exhibit No. 6.

X-Q. 29. I understood you to say on your direct examination that you saw an advertisement of Beech-Nut cigarettes. Is that similar to the advertisement that you saw? I call your attention to a page of the Boston Herald of August 18, 1921, marked for identification in this case as Defendant's Cross-Exhibit No. 5.

A. Yes.

X-Q. 30. Do you find the name "P. Lorillard Co." on that package?

A. Yes, on the bottom; yes.

X-Q. 31. Do you find the name, Beech-Nut Packing Company, anywhere on that advertisement?

A. No, sir; I can't see it anywhere.

X-Q. 32. Do you think you could be confused or deceived into buying a packing of Beech-Nut cigarettes for chewing gum?

A. No.

X-Q. 33. You would think a man was crazy to take cigarettes for chewing gum, wouldn't you?

A. Yes.

Mr. Cavanagh: I think that is all.

Mr. Hinton: Deposition closed.

ROBERT JAMES WINTERS.

I, T. Edwin Andrew, a Notary Public within and for the County of Essex, Commonwealth of Massachusetts, acting as special examiner by consent of counsel, do hereby certify that the foregoing depositions of James J. Creevan and Robert James Winters were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me at Lawrence, Massachusetts, on the nineteenth day of August, A. D. 1921; that each of the above named witnesses was

by me duly sworn; that the testimony of said witnesses was taken in shorthand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at Room 303, Bay State Building, Lawrence, Massachusetts, beginning at 4 o'clock p. m. and ending at 5 o'clock p. m., August 19, 1921; that the deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto or interested, directly or indirectly, in the matter in controversy.

(L. S.) T. EDWIN ANDREW,
Notary Public.

My commission expires October 24, 1924.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Depositions taken before Penelope Comberbach, a Notary Public in and for the County of Worcester, State of Massachusetts, acting as Special Commissioner, by consent of counsel, pursuant to notice and agreement of counsel, at 918 Park Building, 507 Main Street Worcester, Massachusetts, on Thursday, August 18, 1921.

Present: Sebastian Hinton Esq., of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

JOSEPH S. AISENBERG, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Joseph S. Aisenberg; thirty-four years; wholesale grocer; 18 Woodford Street, Worcester, Mass.

Q. 2. Does your firm handle tobacco products for its grocery trade?

A. Yes.

Q. 3. What is the name of your firm?

A. United Wholesale Grocery Company.

Q. 4. What is your position with that firm?

A. I am general manager and buyer.

Q. 5. I show you a package of cigarettes which is in

evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before?

A. Yes.

Q. 6. State, if you can remember, about when you first saw these cigarettes.

A. Well, that I don't know.

Q. 7. Well, approximately?

A. I couldn't tell you. I remember seeing the ads in the paper when they first came out. Exactly when I don't remember; I don't know whether it is this year or less than a year ago.

Q. 8. When you first saw these cigarettes, or ads to which you refer, by whom did you think this product was made?

A. Well, my first impression was that they were made by the Beech-Nut Packing Company.

Q. 9. And do you know what led you to that belief?

A. Well, the fact was that the Beech-Nut people, as we always knew them, were in the jams, jellies and meat business, and then they went into the candy business. I thought they just added another line to their products and had gone into the tobacco business.

Q. 10. Can you tell me anything further about the impression you received when you first saw these Beech-Nut cigarettes, with respect to the Beech-Nut people or the rest of their line or anything of that character?

A. Well, knowing the Beech-Nut people as I knew them, and the quality they manufacture, from the line we handle in our own business, I was very much disappointed with the appearance of the package and the price of the cigarettes. I did not think that the quality and the appearance were in line with the general character of the quality of their products.

Q. 11. Do you now believe that these cigarettes were made by the Beech-Nut Packing Company?

A. Well, I did believe that until I found out otherwise upon making inquiry.

Q. 12. And do you remember, Mr. Aisenberg, how long after you first saw the ads or the cigarettes it was that you learnt upon inquiry that these cigarettes were not made by the Beech-Nut Packing Company?

A. Why, I believe it was over a month or so later that I happened to be in one of the tobacco stores and I asked various things, and amongst them I asked whether the Beech-Nut cigarette was being made, or being put out, by the Beech-Nut Packing Company and I was informed to the contrary.

Direct Examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 13. As I understand it, you were in the wholesale grocery business?

A. Yes.

X-Q. 14. You are the general manager and buyer?

A. Yes.

X-Q. 15. Do you buy tobacco products?

A. Why, yes.

X-Q. 16. Do you do the buying?

A. Yes.

X-Q. 17. From what concerns do you buy tobacco products?

A. We buy tobacco largely from H. E. Shaw Company, the Worcester Tobacco Company.

X-Q. 18. A jobber and distributor?

A. Jobber and distributor, as I understand it. It is the direct agent of the American Tobacco Company.

X-Q. 19. You do not buy direct from the American Tobacco Company?

A. No.

X-Q. 20. How many people are employed by your concern?

A. You mean salesmen?

X-Q. 21. Entirely.

A. I believe we employ about thirty.

X-Q. 22. Where is your business located?

A. 133-135 Grafton Street.

X-Q. 23. You employ about thirty people all told?

A. Yes.

X-Q. 24. In what region do you sell your products?

A. We ship as far as Maine; we ship New Hampshire, Rhode Island, Connecticut—of course, Massachusetts; we also make some shipments into New York State, and, occasionally, into Pennsylvania.

X-Q. 25. Do you do a general grocery business?

A. Yes.

X-Q. 26. Just name some of the brands of tobacco products your concern handles.

A. Why, we handle "Union"—in cigarettes, you mean?

X-Q. 27. Cigarettes and tobacco.

A. Camel, Helmar—the various brands we get orders for, we stock up as we get the orders.

X-Q. 28. Do you handle the Mogul?

A. We handle a small amount, not very many, unless we get a special order, a specially large order.

X-Q. 29. Do you handle Climax Plug?

A. No.

X-Q. 30. Do you handle any Beech-Nut tobacco?

A. We have, off and on. We handle the cigarette.

X-Q. 31. You do handle Beech-Nut cigarettes?

A. Occasionally we have had orders, and filled our orders.

X-Q. 32. Do you recall when you got your first order?

A. I can't tell.

X-Q. 33. Approximately.

A. I really couldn't tell. We have through a week about a thousand orders. I couldn't recall any particular order.

X-Q. 34. Was it about the time the cigarette first came along?

A. Some time after I first saw the ads in the paper.

X-Q. 35. When did you first see a package of Beech-Nut cigarettes?

A. Well, some time after I saw the ad. I have always been interested in advertising. I saw them, I believe, in a tobacco store—whether it was a month or a week later after I saw the ad I don't recall at this time.

X-Q. 36. When you first saw that package of cigarettes, did you examine them?

A. No, only on the face of it.

X-Q. 37. Are you familiar with the names of large tobacco concerns, manufacturing concerns?

A. Why, with some of them, yes.

X-Q. 38. Which ones do you know?

A. American Tobacco Company, Lorillard—those are the only two I recall.

X-Q. 39. You know A. J. Reynolds and Liggett & Myers?

A. Yes.

X-Q. 40. I show you a package of Beech-Nut cigarettes (similar to Beech-Nut Exhibit 1). Is that package the Beech-Nut cigarettes to which you refer as having thought they were put out by the Beech-Nut Packing Company?

A. Yes.

X-Q. 41. Whose name appears on that?

A. Now, as I recall, on the ads as they appeared

originally, I don't believe there was any name. On the ads I didn't see a name, or didn't notice a name.

X-Q. 42. I call your attention to an advertisement of Beech-Nut cigarettes appearing in the "Boston Herald" of today, August 18th, 1921. Is that similar to the advertisement you saw?

A. I don't recall.

(Page 1, Boston Herald, referred to marked for identification, Defendant's Cross Exhibit No. 5.

X-Q. 43. Was it like that advertisement?

A. I think it was a much larger ad I saw at the time.

X-Q. 44. Did it show the picture of the Beech-Nut cigarettes?

A. That I don't recall.

X-Q. 45. You don't know whether it had P. Lorillard's name on it?

A. I don't recall.

X-Q. 46. You find P. Lorillard's name on it now?

A. Yes.

X-Q. 47. You can't say that that advertisement you saw didn't have Lorillard's name on it?

A. Not at this time.

X-Q. 48. When did you first examine a package of those Beech-Nut cigarettes?

A. At the time I made the inquiry regarding the maker of the cigarettes or the manufacturer.

X-Q. 49. Then you examined them?

A. Then I looked at them, yes.

X-Q. 50. Whose name did you see?

A. I saw the name that appears on there. P. Lorillard.

X-Q. 51. You knew it was not the Beech-Nut Packing Company's cigarette?

A. Yes.

X-Q. 52. Up to that time you had not examined the package?

A. Up to that time I had not taken the trouble to, no.

X-Q. 53. Do you smoke cigarettes?

A. Why, I do smoke, but not what you call a very heavy smoker of cigarettes.

X-Q. 54. Have you smoked Beech-Nut cigarettes?

A. No, I haven't.

X-Q. 55. Well, then, you don't know anything about the quality of the Beech-Nut cigarette from personal experience?

A. No, not from personal experience.

X-Q. 56. You don't know anything about the tobacco or its blend?

A. No, nothing at all.

X-Q. 57. You are not really in a position to pass on its merits?

A. No, not on the merits, but my impression was conveyed by the general appearance of the package.

X-Q. 58. What do you mean by that?

A. Well, as I stated, previously always having the Beech-Nut concern in our mind, we handled their line in everything they put out, I felt the cigarette would be a much better one in appearance and perhaps a higher-priced cigarette than what it is.

X-Q. 59. You mean the appearance of the package?

A. Yes.

X-Q. 60. You mean it offended your artistic sense?

A. No, it isn't in line with the appearance of the Beech-Nut products.

X-Q. 61. Did you ever sell cigarettes?

A. I have been selling them right along.

X-Q. 62. Do you sell Beech-Nut products?

A. The full line, yes.

X-Q. 63. What does that line consist of?

A. Why, their line consists of jellies, jams, gum, glass—well, bacon glassed, dried beef and other odds and ends.

X-Q. 64. Food products?

A. Food products in general.

X-Q. 65. You never knew the Beech-Nut people to put out tobacco products?

A. I never have until I happened to see the ad.

X-Q. 66. That was the first time you thought they might have put them out?

A. That was my impression.

X-Q. 66*a*. But you didn't know?

A. I didn't know, no.

X-Q. 67. You never had anyone come into your place and ask you for a package of cigarettes made by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 68. And if a person did ask you that question, if cigarettes were made by the Beech-Nut Packing Company, you would not sell them that package of cigarettes?

A. I would tell them it was not put up by the Beech-Nut people, after I got that information.

X-Q. 69. You would tell them it was P. Lorillard's cigarette?

A. If they asked me the question in the way you just put it.

X-Q. 70. If they asked you for cigarettes made by the Beech-Nut Packing Company you would not sell them that package?

A. No.

X-Q. 71. Because that name on there would indicate it as Lorillard's product?

A. Absolutely.

X-Q. 72. If a person came into your place of business and asked you for one of the many food products made by the Beech-Nut Packing Company, any one of them, you would not sell that person a package of these Lorillard "Beech-Nut" cigarettes?

A. No—as a food product?

X-Q. 73. As a food product.

A. No.

X-Q. 74. Suppose a man asked you for Beech-Nut gum, you would not sell him a package of Beech-Nut cigarettes?

A. Well, I would mention we had Beech-Nut cigarettes in stock, but not put up by the Beech-Nut Packing Company.

X-Q. 75. But suppose a man came into your place of business and said, I want a package of Beech-Nut chewing gum, you would think he was crazy if he took a package of Beech-Nut cigarettes in place of chewing gum?

A. In place of chewing gum?

X-Q. 75*a*. Yes.

A. Yes.

X-Q. 76. Are you a member of this firm you stated?

A. Yes, sir.

X-Q. 77. General manager?

A. And buyer.

Cross-Examination closed.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 78. Mr. Aisenberg, in your direct examination you testified about Beech-Nut Exhibit 1, package of Beech-Nut cigarettes. In cross-examination you were shown and testified about another package of Beech-Nut cigarettes. What is the difference between these two packages?

A. Why, in the first place, one has tissue over it and in the second place I don't believe the blend of red on the one to your left is the same as the one to your right.

R-D. Q. 79. That is, as far as you can tell through the tissue paper?

A. Yes.

R-D. Q. 80. The one you were testifying about on direct examination is one with tissue paper on it?

A. Yes.

R-D. Q. 80*a*. And the one you were testifying about on cross-examination is the one without the tissue paper—is that correct?

A. Yes.

R-D. Q. 81. Mr. Aisenberg, if anybody came into your store and asked you for any single Beech-Nut package, such, for instance, as bacon, or jelly, some particular kind of glassed product or chewing gum, would you try to sell him or substitute on him any other Beech-Nut product than the one he asked for?

A. No. I don't believe I would. I don't believe if I tried, I could.

Re-Cross-Examination by Mr. Cavanagh.

R-X. Q. 82. As one that is familiar with tobacco and especially cigarettes as put on the market, is it customary, it is, isn't, Mr. Aisenberg, to place a tissue or glacé paper wrapper around the cigarettes to keep the air out?

A. Yes.

R-X. Q. 83. You have often seen it?

A. Many times.

R-X. Q. 84. If you wanted to purchase a package of Lorillard's cigarettes, you could read P. Lorillard's name on it?

A. I guess I could, if I was interested to find it.

R-X Q. 85. That is, if you wanted that brand?

A. Yes, if I bought a 7-20-4 I would see his name on it.

R-X Q. 86. You know it is customary to put that wrapper on the cigarettes?

A. Yes, but I believe I appreciate, and you do, that it is hard to find the name through tissue paper.

R-X Q. 87. And the same way with an Arrow Collar —you would see this name on it?

A. Yes. I just want to say this word for a matter of explanation. I don't consider myself an expert as a tobacco buyer because tobacco is one of our side lines. Our large and chief line is food products, groceries, and we handle tobacco because all grocers handle it and we like to give our grocers a complete line. I don't want to appear in the light of being an expert or big tobacco man. I am not. I want to say we buy from Worcester Tobacco Company, but also Henry Freeman in town; in case one is short, we naturally go to the other. We buy from both of these men and our profit on our merchandise is always as large as if we bought direct.

Re-Re-Direct Examination by Mr. Hinton.

R-D. Q. 88. Mr. Aisenberg, whom do you sell tobacco products to when you sell them?

A. Mostly grocery stores.

Re-Re-Cross-Examination by Mr. Cavanagh.

R-X Q. 89. Do you sell to tobacco stores, too?

A. Why, our percentage of sales to tobacco stores is very, very small.

R-X Q. 90. But you do sell to them?

A. Yes, we do, but we have about two thousand ac-

counts on our books and I don't believe a hundred of them would be and have been of the tobacco stores on our books, but they buy very little tobacco unless they should happen to run short on their regular jobber.

JOSEPH S. AISENBERG.

RALPH H. HORNE, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Ralph H. Horne; 31; 11 Marsh Avenue, Worcester, Massachusetts; salesman for Beech-Nut Packing Company.

Q. 2. How long have you been working for the Beech-Nut Packing Company?

A. Three years and a half.

Q. 3. And what territories have you covered?

A. Eastern Massachusetts.

Q. 4. I show you a package of cigarettes which is in evidence in this case as "Beech-Nut Exhibit 1," these being "Beech-Nut" cigarettes. Have you ever seen this product before? If so, when and where did you first see it?

A. I saw them first in Worcester about the first of March, this year.

Q. 5. When these cigarettes first came out, state if you remember whether in the course of your work for Beech-Nut Packing Company you heard comments, remarks, inquiries, or the like, about the cigarettes?

A. Why, people have asked me if—how long we had been putting out cigarettes. Others have come up to my car—people that I knew—and asked for cigarettes.

Q. 6. How many times has that kind of thing happened?

A. Oh, I should say hundreds of times.

Q. 7. Can you tell me the names of any people who have made this kind of inquiry from you or made that kind of remark?

A. H. J. Kearns, Dr. F. C. Hayes, F. E. Lekberg, A. H. Powers, David Harrington, Francis M. Farrell, Warner Bottomly.

Q. 8. Have there been others besides these particular instances?

A. Why, yes, a number of others.

Q. 9. When was the last time that you heard this kind of a remark and what was the remark you heard?

A. This morning, I would say about ten o'clock. This Francis M. Farrell made the remark—I was talking about Beech-Nut cigarettes, and he stepped up and asked me this question, "Ain't you putting out the Beech-Nut cigarettes?"

Q. 10. Well, now, take, for instance—did you mention a man named Bottomly or something like that?

A. Yes, Warner Bottomly.

Q. 11. See if you can remember what he said.

A. He says, "I have been saving a package of Beech-Nut cigarettes. You expect us to smoke them," and, he says, "You can smoke them yourself."

Q. 12. How long ago was this?

Mr. Cavanagh: What was his answer?

A. He says, "I have been saving a package of Beech-Nut cigarettes—what there is left." He says, "You expect us to smoke them. You can smoke the rest of them yourself."

Q. 13. Can you recite any further instances of this character or any further remarks made to you about

Beech-Nut cigarettes? Be careful to state exactly what was said and nothing more.

A. This Kearns, H. J. Kearns, stepped up to me one day and says, "Give me a package of cigarettes." Dr. Hayes says, "How are the cigarettes going?" A. H. Powers says, "I see you are putting out cigarettes now." David Harrington, "How long have you been making cigarettes?" I told you about Farrell, didn't I?

Q. 14. Yes. And these instances you have referred to, have they been confined to Worcester or have they happened in other territory you have covered?

A. They have happened in all my territory.

Q. 15. Can you state an instance in some other town, for illustration?

A. Why, there is one in Fall River, Walker's Market, New Boston Road. I went into this store and saw his cigarettes and he asked me, "How Beech-Nut cigarettes were going?" I asked him that, and he said, "Not very good." He says, "I put them in knowing your other products were good."

Q. 16. When was this Fall River episode?

A. Last Tuesday, which would be August 16th.

(Direct examination closed.)

Cross-Examination by Mr. Cavanagh.

X-Q. 17. What did you say your connection with the Beech-Nut Packing Company is?

A. Salesman.

X-Q. 18. Mr. Horne, you have been assisting Mr. Hinton in collecting witnesses and evidence in this case, haven't you?

A. Yes.

X-Q. 19. You have been going around interviewing witnesses about this, and talking to them?

A. I haven't been talking. I?

X-Q. 20. Haven't you seen witnesses——?

A. Mr. Hinton did the talking.

X-Q. 21. You never went to see a witness by yourself?

A. Not any of the witnesses we had.

X-Q. 22. Did you see any probable witness by yourself?

A. What do you mean by a witness?

X-Q. 23. I mean this, by a "witness": As I understood, you have been assisting Mr. Hinton in collecting evidence?

A. Yes, sir.

X-Q. 24. That is being taken during this time?

A. Yes.

X-Q. 25. And by "this time," I mean the past few days or for the past few weeks. Your territory is here in Worcester?

A. Yes.

X-Q. 26. And you have been collecting witnesses?

A. Yes.

X-Q. 27. When did you first see Mr. Hinton about this matter?

A. Last Saturday.

X-Q. 28. After you saw Mr. Hinton, did you see any witness in connection with this matter or ask anybody to testify?

A. Of course I have talked with several. I haven't asked any of them to testify.

X-Q. 29. Have you gone around and talked to them?

A. Why, I have talked; I have talked to hundreds, not anything to do with witnesses.

X-Q. 30. That is what you have been doing during the last few days?

A. No, sir.

X-Q. 31. You haven't done any of that work since last Saturday?

A. Not to have any official witness at all.

X-Q. 32. What have you done in this connection?

A. Why, well, I guess I have talked with people and if they had anything to say I tried to remember it and jotted it down for my own convenience.

X-Q. 33. So you didn't talk to them about this case?

A. No, sir.

X-Q. 34. Well, didn't you go out of here this morning to try to get a witness?

A. To try to get a witness?

X-Q. 35. Yes.

A. Sure.

X-Q. 36. A witness that didn't appear on time, or something of that sort?

A. Well, I went out to get a man for Mr. Hinton.

X-Q. 37. You gave Mr. Hinton that man's name, didn't you?

A. You mean like this man that has come up here?

X-Q. 38. Yes. You told Mr. Hinton that man's name?

A. Yes.

X-Q. 39. You got that witness for Mr. Hinton?

A. Yes.

X-Q. 40. Do you sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 41. Do you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 42. Do you know if they handle, or make, or sell tobacco products?

A. Not to my knowledge.

X-Q. 43. You say you talked to hundreds of people that have said they were under the impression that this Beech-Nut cigarette was put out by the Beech-Nut Packing Company?

A. Yes.

X-Q. 44. You haven't named hundreds of people here, have you?

A. No.

X-Q. 45. Do you recall who those hundreds of people were?

A. No, I can't. I can't give the definite number of people either.

X-Q. 46. Did you see any of these persons that you have named, such as Kearns and others, examine or handle a package of cigarettes like that which is here as "Beech-Nut Exhibit 1"?

A. Did I see them handle it, do you say?

X-Q. 47. Yes, and examine it.

A. No.

X-Q. 48. So you don't know whether they ever examined that package or not, do you?

A. Well, they would all—some of them had smoked it.

X-Q. 49. But you couldn't say they ever examined that package and read the matter on it?

A. No, I couldn't.

X-Q. 50. Do you use tobacco yourself?

A. Yes.

X-Q. 51. And you know, as far as the various brands go, that each man may have his own favorite brand and blend?

A. Yes.

X-Q. 52. Some men might prefer Camel or Fatimas?

A. Yes.

X-Q. 53. It is the same way with cigarettes?

A. Yes.

X-Q. 54. When the Beech-Nut Packing Company puts a new article of merchandise on the market, do you get notice of it?

A. Yes.

X-Q. 55. Just before it goes on the market—what is the procedure?

A. Why, we hear of it sometimes two or three months before it goes on.

X-Q. 56. Through the usual form, circular letters or instructions, or something of that sort?

A. Yes.

X-Q. 57. You never had any such instructions regarding any tobacco product from Beech-Nut Packing Company?

A. No.

X-Q. 58. Will you tell me whose name appears on this tobacco package?

A. P. Lorillard & Company.

X-Q. 59. The name of the Beech-Nut Packing Company does not appear on that package, does it?

A. No, sir.

X-Q. 60. And it is the practice for the Beech-Nut Packing Company to put its name on its packages of products, isn't it?

A. Why, naturally, the same as any other concern.

X-Q. 61. So that you know that isn't any product of the Beech-Nut Packing Company, don't you?

A. I know now.

X-Q. 62. With that name, "P. Lorillard Company," that indicates it is Lorillard's, to you?

A. It would, if I looked it over.

X-Q. 63. The minute you examine it you would know that?

A. If I looked for it.

X-Q. 64. Did you ever know of any person to go into a store and ask to purchase a package of Beech-Nut cigarettes made and put out by the Beech-Nut Packing Company, and to be handed or palmed a package of P. Lorillard cigarettes?

A. No.

X-Q. 65. Well, if you went into a store yourself and asked for a package of Beech-Nut chewing gum of the Beech-Nut Packing Company, could you be deceived or confused into accepting a package of Beech-Nut cigarettes for chewing gum?

A. No.

X-Q. 66. And you don't know of any person who was so deceived, do you?

A. No.

X-Q. 67. You never sold tobacco yourself?

A. No.

Redirect Examination by Mr. Hinton.

R-D. Q. 68. Mr. Horne, you have been asked by Mr. Cavanagh about going for Mr. Aisenberg immediately before you testified. Do you know what happened in connection with Mr. Aisenberg, and why you had to go for him?

A. It was because I knew him; so I could get him up here quicker, to save time, as I thought he was going to Boston on the 2 o'clock train.

Mr. Hinton: That is all.

No recross-examination.

RALPH H. HORNE.

DORACE L. BOTTOMLY, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Dorace L. Bottomly; 6 Fridel street, Worcester; grocery clerk.

Q. 2. In the grocery store in which you work, have you handled any of the products of the Beech-Nut Packing Company?

A. Yes.

Q. 3. And how long, as far as you know, have you handled those products?

A. Why, off and on for a number of years, quite a number of years.

Q. 4. I show you a package of cigarettes which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before?

A. I have.

Q. 5. If so, when and where did you first see them?

A. Well, my brother bought a package, the first time I saw them; I saw them possibly before that on the cigar stands.

Q. 6. About when was this?

A. Why, this spring; this last spring.

Q. 7. You have said that your brother bought a package of these cigarettes. Did you smoke any of those cigarettes?

A. I did.

Q. 8. Did you take them out of the package your brother had?

A. Yes, I did.

Q. 9. At that time, by whom did you believe this product was made?

A. Why, I thought it was the Beech-Nut Packing Company.

Q. 10. Do you know why you believed that?

A. Why, I thought I recognized the label on there.

Q. 11. How long did you continue to believe that these cigarettes were made by the Beech-Nut Packing Company?

A. Until I met Mr. Horne, the agent, one night.

Q. 12. Who is Mr. Horne?

A. The representative or agent, salesman, for Beech-Nut Packing Company.

Q. 13. Yes, and then what happened?

A. I asked him if he ever tried one of the cigarettes—something like that. He laughed. And finally it come about I asked him if he made these cigarettes. He replied, No, his firm didn't make them.

Q. 14. Have you a brother?

A. Yes.

Q. 15. What is his name?

A. Warner; J. Warner.

Q. 16. J. Warner Bottomly?

A. J. Warner Bottomly.

Q. 17. Is he acquainted with Mr. Horne, do you know?

A. Yes, he is.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 18. Mr. Bottomly, what concern are you employed by?

A. Maywood Market.

X-Q. 19. What is their line of business?

A. Grocery and meats.

X-Q. 20. Wholesale or retail?

A. Retail.

X-Q. 21. Do they sell tobacco products?

A. No.

X-Q. 22. So you do not sell tobacco products?

A. Never sold them.

X-Q. 23. Did you purchase any of these Beech-Nut cigarettes yourself?

A. No, I didn't.

X-Q. 24. You have never gone into a store and asked for Beech-Nut cigarettes?

A. I never have.

X-Q. 25. Did you handle the package your brother had?

A. I did.

X-Q. 26. Did you take the trouble to examine it?

A. Not closely, no.

X-Q. 27. Didn't read anything on it at all, did you?

A. No, I didn't. I saw there was the Beech-Nut label on there.

X-Q. 28. You mean, you saw they were Beech-Nut cigarettes?

A. Yes, I saw they were "Beech-Nut" cigarettes.

X-Q. 29. Is that what you mean by the Beech-Nut label?

A. Yes.

X-Q. 30. Just that name "Beech-Nut"?

A. "Beech-Nut."

X-Q. 31. Will you look at that package now, and tell me whose name is on it?

A. Why, Beech-Nut.

X-Q. 32. I call your attention to Plaintiff's Exhibit 1.

A. "Beech-Nut."

X-Q. 33. What wording on that package would you take to indicate the party making or putting out that cigarette?

A. "Beech-Nut."

X-Q. 34. What does this mean (indicating)? Can you read?

A. I can read it, yes.

X-Q. 35. Read it, then.

A. Lorillard Company.

X-Q. 36. Did you ever hear of the Lorillard Company?

A. I never did.

X-Q. 37. You don't chew tobacco?

A. No.

X-Q. 38. Smoke cigarettes?

A. No.

X-Q. 39. Did you ever smoke Moguls?

A. No.

X-Q. 40. Or Egyptian Deities?

A. No.

X-Q. 41. Murad?

A. No.

X-Q. 42. Helmar?

A. I believe I have.

X-Q. 43. You are really not familiar with the makes of cigarettes?

A. I have an idea of who they are made by.

X-Q. 44. Do you know Beech-Nut Packing Company's name appears on its goods?

A. I believe it does.

X-Q. 45. But you don't know, do you? Do you know if Beech-Nut Packing Company puts out any other brands of goods other than under the name "Beech-Nut"?

A. I don't know.

X-Q. 46. You never heard of "Mohawk" brand?

A. No.

X-Q. 47. Or "Erie" brand?

A. No.

X-Q. 48. If you went into a store and wanted to buy some Beech-Nut chewing gum—by that I mean the products of the Beech-Nut Packing Company—could you be confused or deceived into taking a package of these Lorillard "Beech-Nut" cigarettes in place of the article you wanted?

A. Not if I asked for Beech-Nut cigarettes.

(Question read.)

A. Well, as I take it, Beech-Nut don't make cigarettes. How could I be confused on Beech-Nut cigarettes?

X-Q. 49. Well, I will put the question this way specifically, so you will understand me. If you went into a store, and we will say, for example, a retail store, and asked for a package of Beech-Nut chewing gum made by Beech-Nut Packing Company, could the clerk fool you or deceive you into taking a package of these cigarettes in place of the *gum?*

A. No, not if I wanted gum. I would know what it was.

X-Q. 50. That is it. So you would never mix cigarettes with gum?

A. No.

DORACE L. BOTTOMLY.

JOHN H. LANG, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. John H. Lang; 41; 44 William street, Worcester; wholesale grocer.

Q. 2. With what firm are you connected?

A. C. A. King Company.

Q. 3. Do they do business in the wholesale grocery line in Worcester?

A. Yes.

Q. 4. Does your firm handle tobacco products for the grocery trade?

A. Yes, sir.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen cigarettes like these before; if so, when, if you can remember, did you first see them?

A. That brand?

Q. 6. Yes.

A. Well, I first saw it in a newspaper advertisement.

Q. 7. Did you subsequently see the cigarettes themselves?

A. Yes, sir.

Q. 8. When you first saw the advertisement to which you have referred, by whom did you think this product "Beech-Nut" was made?

A. Well, I read it at home, and I said to Mrs. Lang, "What in the dickens do the Beech-Nut people want to come out with a cigarette for?"

Q. 9. What made you think this product was the product of the Beech-Nut Packing Company?

A. Why, naturally, being a wholesale grocer, we think of the brand "Beech-Nut" as applied to the meat people, and my thought was "what do the meat people want to get into the cigarette game for?"

Q. 10. Will you state how long you continued to believe the Beech-Nut cigarettes were product of the Beech-Nut Packing Company?

A. Oh, it probably run along—why it must have run along for a month or six weeks.

Q. 11. And then did you find out the Beech-Nut Packing Company had nothing to do with these cigarettes?

A. One day at the office, when the specialty man was there, the subject came up and I guess I asked him the question: "What the Beech-Nut people wanted to go into this game for?" and he said, "That isn't a Beech-Nut product at all, that it was being made by a tobacco house." Then I remember of saying, "How the dickens —I might have made it a stronger term than that—can a tobacco house get away with it?"—that was my first thought, how can a tobacco house get away with it, how can they get away with a Beech-Nut brand of cigarettes? I was quite surprised, as I say, because my thought was I realized that when the Beech-Nut Packing people was

putting out a cigarette I thought immediately, it is pulling down the high prestige they have had as a meat house; my thought was, it wasn't a good thing.

Q. 12. I would like to have your whole thought, if you have something further to say.

A. My thought was, they have built a high prestige in the meat line of packing, and if they had got to resort to a cigarette it seemed to me it was pulling down that prestige they had been working on for years. That was why I was surprised the Beech-Nut people had come out with a cigarette.

Q. 13. Did you ever hear of a Beech-Nut chewing tobacco or scrap tobacco?

A. No.

Q. 14. It is not sold in this territory?

A. No, sir.

Q. 15. Will you tell me, if you know, whether scrap chewing tobacco sells through this territory?

A. I never heard the term "scrap tobacco."

Q. 16. Do I understand you have sold tobacco products through your house to your grocery trade?

A. Yes.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Mr. Lang, do you personally sell tobacco?

A. The C. A. King Company, and our salesmen, and I being one of the salesmen, we sell tobacco.

X-Q. 18. Have you personally sold tobacco?

A. Yes.

X-Q. 19. What brands?

A. Why, all the local, popular brands of tobacco and cigarettes.

X-Q. 20. What are those?

A. "Just Suits," Mayo's, that is—(I have a whole

page of them in the cost book)—all the popular cut plugs, Prince Albert—I don't use tobacco myself; there is a new one that has come out in a cigarette, 1-11, Meccas, Helmars, Perfections, Eglantin, Planet, and, oh, probably half a dozen different cigars. We buy quite a little direct and quite a lot through Shaw. The tobacco account has been one that we handle more for accommodation to our outlying customers than because there is any real benefit to King & Company. In other words, the profit isn't enough to make us interested in it particularly, although we sell thousands of dollars worth through the year.

X-Q. 21. Do you consider it a different line from the grocery business—from food products?

A. No, sir; we would like, and would welcome, a big tobacco business if we could see that it was helping us financially. We talked with a wholesaler in this state some time ago, knowing that he had developed a million-dollar business a year, and we found he was doing it on so close a margin experts had told him who had made a study of profits in the wholesale grocery line, that he was losing money, even though he was doing a million-dollar-a-year business, and apparently was not increasing his overhead by so selling that line.

X-Q. 22. You mean that the tobacco business has gained, in itself?

A. I mean that we cannot see where there is a profit large enough to interest us in it particularly.

X-Q. 23. Yes. Outside of the question of profit, you would never mix food products with tobacco; you would not sell one for the other, would you?

A. I don't just get you.

X-Q. 24. I mean this: If a person came into your store, for example, and wanted to buy, say, 1000 Beech-Nut hams and 1000 jars of preserves, or a thousand packages of Beech-Nut chewing gum, all being the product of

the Beech-Nut Packing Company, you would not fill that person's order by sending him a carton of Beech-Nut cigarettes like this; would you substitute the cigarettes for the food product?

A. Why, that would be what we call a shipping error, to send something different than what he ordered.

X-Q. 25. You would not do it?

A. No, sir.

X-Q. 26. Do you know the names of any prominent tobacco manufacturers?

A. No, I don't.

X-Q. 27. You have never paid enough attention to tobacco for this purpose?

A. No, I haven't. It has often come up in the office that we could buy these many different things that we sell in the tobacco line, we could buy them as cheaply of Shaw as we could direct of the tobacco people, and I only think of the tobacco people as some organization, some big trust or a combination of trusts that control that whole sweep of the tobacco industry, and so we trade more locally, with Shaw, and buy very little direct.

X-Q. 28. You don't enter the tobacco field at all?

A. No, sir. There is a man that comes in who deals in some of the plugs, and I suppose he represents a big tobacco concern, but if I was to give my stenographer an order for some tobacco direct, I wouldn't know where to mail the order. I haven't taken any interest in it.

X-Q. 29. You have never examined carefully tobacco packages, have you?

A. Only as I would glance at them as one would get the first impression.

X-Q. 30. As I understand it, you never carefully examined that package?

A. Only as I saw it advertised in the paper.

X-Q. 31. I call your attention to an advertisement ap-

pearing on page one of the Boston Herald of August 18th, 1921, today, and which page has been marked for identification as Defendant's Cross-Exhibit No. 5, and direct your particular attention to an advertisement of Beech-Nut cigarettes. Could you tell me what name is shown on that *fac-simile* of the package?

A. It is P. Lorillard Company.

X-Q. 32. You do not find the words "Beech-Nut Packing Company" anywheres on that advertisement?

A. No, sir.

X-Q. 33. Is that the same, or similar to the advertisement you saw in the paper?

A. I should say it was identical.

X-Q. 34. So you did not read the advertisement very carefully, to see if the Beech-Nut name was on it, or Lorillard's name?

A. The thing that impressed me the first time I saw it was the name "Beech-Nut," and what seemed to clinch my thought it must be a Beech-Nut product was the similarity in the trade-mark below "Beech-Nut." I always think of the Beech-Nut products as having a picture of the two half or two whole beech-nuts present; that, having the same, I had no thought that it could be other than the Beech-Nut product. I didn't go below the trade-mark. I didn't go below this circle here.

X-Q. 35. So you didn't examine it carefully at all?

A. I remember at the time this traveling man told me it wasn't a Beech-Nut product. I says, "For Heaven's sake," I says, "they have got the Beech-Nut picture, the same as Beech-Nut has for theirs."

X-Q. 36. What do you mean by the picture?

A. This, here (indicating)—these two—I don't know whether that is two halves of a beech-nut or whether it represents two beech-nuts together. I always think of the Beech-Nut trade-mark as having the beech-nut pictured under their Beech-Nut brand.

X-Q. 37. You say that label is identical with the Beech-Nut label?

A. I say that was my thought when I first saw it.

X-Q. 38. I show you a representation of the Beech-Nut Packing Company label, which is in this case, which has been marked for identification in this case as Defendant's Cross-Exhibit No. 3. Is that Beech-Nut picture (indicating) like that one in the advertisement?

A. No.

X-Q. 39. Why isn't it like it to you?

A. It is not just like it.

X-Q. 40. Well, it isn't like it, is it?

By Mr. Hinton: The witness has answered the question.

A. Well, it isn't like it, no.

X-Q. 41. I presume you have handled a great many varieties of package goods, such as food products and the like, haven't you?

A. Yes, sir.

X-Q. 42. And of course you have observed a great many instances where these various food products have as a part of their label an oval, haven't you?

A. Yes.

X-Q. 43. That is quite common?

A. Yes, sir.

X-Q. 44. Isn't it?

A. Yes, sir.

X-Q. 45. As I understand it, you never purchased a package of Beech-Nut cigarettes at all?

A. No, sir.

X-Q. 46. And you never examined them until today, did you?

A. Well, I haven't today, only as you have shown me the package of them.

X-Q. 47. I mean, this is the first time you saw a package of Beech-Nut cigarettes?

A. Yes.

X-Q. 48. So you never really made an examination, to decide whether it was a Beech-Nut Packing Company cigarette or P. Lorillard's cigarettes?

A. No, sir.

X-Q. 49. So, as far as you know, no person has ever come into your place of business, or any other place of business, and asked for Beech-Nut Packing Company cigarettes?

A. No, sir, not into our place; we don't sell Beech-Nut cigarettes.

X-Q. 50. Now, I understand you do not handle the Beech-Nut cigarette at all?

A. Not to my knowledge, unless it might be on some special order that might have come in and our head office man may have called up Shaw for a carton; there are a great many times through the month that from our outlying customers through the country districts we get certain things in the tobacco line for, as an accommodation. There are a number of brands that I go through and that I check from day to day that I am not even familiar with the prices of.

X-Q. 51. Well, personally you have never sold a package of Beech-Nut cigarettes?

A. Personally I don't remember of Beech-Nut cigarettes going through our house.

X-Q. 52. And personally you have never sold a package, have you?

A. No.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 53. You testified on cross-examination about a certain comparison between the beech-nut on the Beech-Nut cigarette package and the beech-nut on the Beech-Nut Packing Company label. State whether or not when you were being asked about those two beech-nuts you had them both before you side by side, and were comparing the two. Do you understand the question?

A. I don't think I get you.

R-D. Q. 54. All I want to get at is this: Were you comparing the two that way (lying side by side), or comparing the appearance of the two, one with the other, or testifying from recollection, or both of them? If you don't understand the question, let me make it plain to you before you answer it.

A. I can tell you my impression when I first saw the ad in the paper, and I can now give you my impression as I compared them side by side, if that is what you want.

R-D. Q. 55. On direct examination you gave us your impression as you saw the ad in the paper. On cross-examination you were shown this Beech-Nut Packing Company label and the "Beech-Nut" label on the cigarettes and asked whether the two pictures of the beech-nuts were the same. When you answered those questions were you comparing these two pictures with each other, or were you testifying from recollection?

A. Well, I was testifying, comparing the two; comparing the two. My recollection as I saw it in the paper was they were much more similar than they appear to be now side by side under direct examination.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 56. They look different to you when you compare them now, don't they?

A. They look different to me, surely.

JOHN H. LANG.

ALVAH L. CONANT, a witness produced in behalf of the plaintiff, first being duly sworn, notice of production of the said witness being waived, in answer to interrogatories propounded by *Mr. Hinton,* deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Alvah L. Conant, 30 Hartshorn Avenue, Worcester; thirty-seven; salesman.

Q. 2. Mr. Conant, have you used Beech-Nut Packing Company products in your home? If so, how long have you used them, do you remember?

A. Oh, five years, roughly, jellies.

Q. 3. And nothing else other than Beech-Nut jellies?

A. We used the full line.

Q. 4. Prior to the early Spring of this year, tell me what you thought of Beech-Nut Packing Company and their products?

A. I looked upon them as one of the representative houses in the States, thoroughly reliable, and was proud to be a consumer of theirs, a family consumer.

Q. 5. I show you a package of cigarettes, which is in evidence in this case as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before, or an advertisement of these cigarettes? If so, tell us, please, when you first saw this?

A. I was first attracted to the fact they might be making a cigarette when my boy called my attention to

an unusual billboard on the road while I was touring with my family.

Q. 6. When was this, do you remember?

A. It was the first thirty days of their campaign.

Q. 7. Was this in 1921, should you say?

A. Well, it was if it wasn't the last part of 1920. I cannot tell you that right offhand, sir.

Q. 8. When you first saw that large billboard ad, by whom did you believe those cigarettes were made?

A. Beech-Nut Products Company, sir, decidedly.

Q. 9. Will you state, Mr. Conant, why if you know when you saw that advertisement you believed this was the product of Beech-Nut Packing Company?

A. Well, because I have a great respect for the trade name "Beech-Nut," and my two kiddies being consumers of the product, I was forcibly impressed and instantly impressed with the fact that it seemed to be unusual to blend purity with impurity, if you know what I mean—(you will have to accept me as I am). I thought that with the line they were producing, that with a thorough corps of salesmen, they would have all they could do to produce what could be consumed without having an intelligent corps of salesmen explain why there had to be a side line or blending of anything that was forcibly contrasted to me as those two products to manufacture.

Q. 10. Can you state what the effect was on you, on your personal attitude to the Beech-Nut Packing Company, when, as you have stated, you saw these cigarettes or an advertisement thereof and believed they were made by the Beech-Nut Packing Company?

A. My estimation of them as manufacturers was decidedly altered.

Q. 11. What if any decision did you make about the purchase of their products?

A. Why, I immediately made the decision to learn of a manufacturer of pure food products solely, to see that my friends and myself purchased our requirements from them, and I told all my friends and my folks they ought not to purchase from a firm that was becoming what it was evident to me the Beech-Nut Products Company were becoming.

Q. 12. Did you confine this opinion and change of good will about the Beech-Nut Packing Company to yourself, or did you mention the matter to others?

Mr. Cavanagh: The question is objected to. There has been no testimony given to indicate any change of good will; the questions calls for a conclusion of the witness.

Mr. Hinton: What the witness has said certainly does indicate a change of good will.

(Question read.)

A. I did decidedly mention it to my business friends and social friends.

Q. 13. And what did you tell your business friends, do you remember?

A. Why, being a one-line man myself, I decided any product that came into my home must be one-line products, and that I felt, as I said before, that we should stand by a manufacturer who was consistent with his declarations and advertisements as to purity and that sort of thing—perhaps you won't understand my wording in there—and that just as soon as I found a house I could sincerely recommend I would advise them of it. And this I did, too.

Q. 14. Will you state again, so that I may clearly understand you, what recommendation if any you made to your friends about this proposition?

A. Yes, I recommended the "Burlington Jelly House."

Q. 15. Now, you mean instead of Beech-Nut Packing Company?

A. Yes. Yes, I did. A Mrs. Jenkins, a concern known as Mrs. Jenkins' Jellies.

Q. 16. How long did you continue to tell your friends, advise your friends, to buy the products of another house than the Beech-Nut Packing Company?

A. Oh, I would say—as I told you this morning, there was about three or four or five weeks, say a month, offhand.

Q. 17. Did you subsequently stop telling your friends or recommending to your friends to buy other products in place of the Beech-Nut products?

A. Well, decidedly; but it is a question as to how far I might have gone where I could correct a wrongful opinion, that is, not a wrongful opinion—it is a question of how far I might have gone to where it was impossible to correct a natural decision—I had a thought. I don't know whether I have put it on paper. I know what I mean.

Q. 18. Mr. Conant, what was it which caused you to stop recommending other products in place of the Beech-Nut products and again recommend Beech-Nut products?

A. A clear explanation on the part of the Beech-Nut Products Company's representative, Mr. Ralph Horne, led me to believe I would be decidedly loyal to Beech-Nut.

Q. 19. What did he tell you?

A. There wasn't any connection between the cigarette manufacturers and the manufacturers of his products, of his company.

Q. 20. You have testified that when you first saw the sign, you believed the cigarettes were made by the Beech-Nut Packing Company; that you thereafter

not only yourself decided not to purchase further Beech-Nut Packing Company products, but so recommended to your friends; that subsequently you were advised by the Beech-Nut man here that the Beech-Nut Packing Company did not make the cigarettes and again became loyal to the Beech-Nut Packing Company. I would like to have you tell me in a little more detail, if you can remember, just what you said to your friends and business acquaintances during the time you were recommending people to buy other products rather than Beech-Nut Packing Company products.

A. Well, I imagine the three of you gentlemen are cigarette users here. I am very antagonistic to cigarettes, you know. I decide very quickly, and I just decided there wasn't anything coming into my home for the kiddies in the way of a mixed line of manufacturer's products. That was all. I decide things quickly, and that was decided inside of thirty seconds. I wouldn't any more think of mixing high-grade jellies and cigarettes than I would of race horses and fast launches. I don't think there should be any connection and was very much astonished to have this billboard proclaiming to me the Beech-Nut Packing Company, I believed, in marketing their stock and my being personally solicited, that they should want additional funds to venture into any such, to my mind, unwise step.

Q. 21. Can you remember what it was that you said to your friends about this business at the time you were recommending people against buying Beech-Nut prod ucts—what argument did you give them?

A. It would be quite difficult to go over my quickly concocted selling explanation, either whether I was receiving remuneration for it or whether I was recommending courteously or hammering discourteously a line I wanted my business friends and social friends

to be aware of, or to be aware of from a point of letting them alone. It would require so much energy, and not being willing to expend the energy, I don't see how I could tell you except with each individual being reviewed, really. I emphasized the fact that it was unwise for a house of that sort that I thought Beech-Nut products was, to be making a tobacco product and that I was disappointed and that I thought any high-grade manufacturers of jellies, who was having their profit solely from that source, should benefit by what little business we had to give them.

(Direct examination closed.)

Cross-Examination by Mr. Cavanagh.

X-Q. 22. Mr. Conant, what line of goods do you sell? You say you are a salesman?

A. Cleaning products; chemicals and cleaning products.

X-Q. 23. You don't sell any grocery lines?

A. No, I don't.

X-Q. 24. Did you ever sell any food products?

A. No, sir, not for a remuneration to myself.

X-Q. 25. I mean, in your business?

A. Not as having held a position; no, sir.

X-Q. 26. You were speaking a while ago of certain billboard that you saw. Where was this billboard?

A. I would say between here and Fitchburg.

X-Q. 27. Fitchburg, Massachusetts?

A. Yes.

X-Q. 28. Were you riding past the billboard in a car?

A. Yes, I was.

X-Q. 29. You didn't stop and go up and examine that billboard?

A. I slowed down to be courteous to my boy's ob-

servation in this particular matter. I pulled my throttle right down.

X-Q. 30. Will you please describe that advertisement to me in detail, what it showed?

A. Oh, in pulling down from thirty-five or forty to twenty-five or thirty, I remember seeing the word "Beech-Nut" and that was sufficient for me to see, as descriptive of that product.

X-Q. 31. How did you know it related to tobacco?

A. I know it said "Cigarettes" on the billboard.

X-Q. 32. Did it have a package of cigarettes on it?

A. That I don't recall. I recall the "Beech-Nut" and the "Cigarettes."

X-Q. 33. Did it have the name of Beech-Nut Packing Company on it?

A. That I don't recall. I would say from what I know now that it did not.

X-Q. 34. It did have the name P. Lorillard Company on it?

A. That I don't know, sir. I repeat, it seemed to be for me sufficient to see the words "Beech-Nut" and "Cigarettes" on it.

X-Q. 35. You just glanced at it and then went by, as you rode along in your car?

A. And emphatically formed my conclusions. I did not glance at it and then drop the topic, because I was forcibly impressed, personally.

X-Q. 36. But you did not stop your car and examine it?

A. You would not be supposed to do that in connection with billboard advertising.

X-Q. 37. How long have you known this Mr. Horne?

A. Five years, I would say.

X-Q. 38. How long have you known Mr. Horne to represent the Beech-Nut Packing Company?

A. You are testing me forcibly now, but just give me a second—three years, sir, roughly.

X-Q. 39. Did you ever buy any Beech-Nut products from Mr. Horne?

A. Quantities of them, yes, sir.

X-Q. 40. How long a period of time?

A. On and off, for three years, sir.

X-Q. 41. At how frequent intervals?

A. Sixty to ninety days, through those years.

X-Q. 42. And Mr. Horne lives in town, doesn't he?

A. Yes, he does.

X-Q. 43. Do you know where the Beech-Nut Packing Company is located?

A. Yes, I remember of Mr. Horne telling me he went to a conference there, that was the only way I knew that. It is an Indian name.

X-Q. 44. Canajoharie, New York?

A. Yes, that is it.

X-Q. 45. You knew they were up there?

A. Yes.

X-Q. 46. And you have been buying goods from Mr. Horne for three years?

A. Yes.

X-Q. 47. And you rode by a sign in Fitchburg, without stopping to look at it, and you came to the conclusion that the Beech-Nut Packing Company was putting out cigarettes—is that right?

A. Decidedly, yes.

X-Q. 48. Are you antagonistic to tobacco? You are, aren't you?

A. Yes, I am.

X-Q. 49. You don't use cigarettes, do you?

A. No.

X-Q. 50. Or chew tobacco?

A. No.

X-Q. 51. Or smoke?

A. I don't smoke at all.

X-Q. 52. And, being antagonistic to tobacco and all its works, as I understand it, you rode by a sign along side the road and you just gave a glance at it——?

A. No.

X-Q. 53. ——or looked at it?

A. No; I read it sufficiently to know the words "Beech-Nut" and the word "Cigarettes" were on there.

X-Q. 54. I want to get this clear. Whether you read it sufficiently to know whether Beech-Nut Packing Company's name was on it or not, or whether P. Lorillard's name was on it or not, as you have testified that on the strength of that fleeting impression, do you mean to tell me you came back to this town and not only ceased your trading with a reputable concern like Beech-Nut Packing Company, but that you deliberately went around and spread the report amongst other people, that these people were engaged in selling cigarettes?

A. Not on that conclusion alone.

X-Q. 55. You did that?

A. Pardon me, not on that conclusion alone.

X-Q. 56. But you spread the report amongst these people, your friends, that these people were selling cigarettes and you recommended another house to them?

A. I would decidedly do that, with a firm that was manufacturing cigarettes in a case like this.

X-Q. 57. You have stated you did recommend them to other houses to deal with?

A. Decidedly.

X-Q. 58. And Mr. Horne was representing Beech-Nut Packing Company?

A. Yes.

X-Q. 59. And knew where the Beech-Nut Packing Company was located?

A. Yes.

X-Q. 60. And, instead of calling up Mr. Horne and asking him if they were putting out cigarettes, or instead of using a two-cent stamp and writing to the Beech-Nut Packing Company, you turned around and without any definite evidence as to whether or not they were putting out cigarettes, you went around individually and caused a loss of trade amongst the customers of a reputable concern?

A. I had those reasons for my concluding it was a Beech-Nut product.

X-Q. 61. If you had written to Canajoharie when you got home from the automobile trip, you would have found out, wouldn't you?

A. As a consumer of theirs, I am not obliged to.

X-Q. 62. But, not knowing whether they were putting out cigarettes or not, you convicted them of putting out that cigarette?

A. I convicted them, because unfortunately, being a representative myself, I would say that led the general public to conclude that was the fact, sir.

X-Q. 63. But you didn't ask Mr. Horne was it a fact?

A. Yes, I did.

X-Q. 64. Immediately?

A. As soon as I saw him.

X-Q. 65. Immediately?

A. No, I don't think so.

X-Q. 66. You knew where Mr. Horne was?

A. Yes.

X-Q. 67. And you knew where the Beech-Nut Packing Company was?

A. Yes.

X-Q. 68. If you thought a man was doing a wrong

A. I had no reason to believe they were doing other than what appeared on that billboard, sir.

X-Q. 69. You did not know it was the Beech-Nut Packing Company?

A. I concluded it was. It wasn't put there for me to take the trouble to stop and look. I simply saw "Beech-Nut Cigarettes," and concluded, as did my eight-year-old boy, that it was a Beech-Nut product——

X-Q. 70. So, on the opinion of an eight-year-old boy you convicted the Beech-Nut Packing Company was putting out this cigarette, did you?

Mr. Hinton: He has testified that other people had spoken about it.

Mr. Cavanagh: Let him finish.

Mr. Hinton: He was not taking a mere word of an eight-year-old boy.

Mr. Cavanagh: Mr. Hinton is not asked to testify in this case. Mr. Cavanagh is cross-examining the witness and will continue it. If Mr. Hinton has any legal objection, he should state it.

X-Q. 71. Let us go back. You didn't write to the Beech-Nut Packing Company at Canajoharie and ask them if they were putting out cigarettes?

A. I don't know as I was obliged to—I think I should have to object to the way you put that, but but being a consumer of theirs I don't know of any reason why I should write.

X-Q. 72. You did not write to them and ask if they were putting out the Beech-Nut cigarettes?

A. Not being a consumer of cigarettes there would be no reason why I should do that. I was using their jellies, etc.

X-Q. 73. You immediately, after seeing that sign, went around amongst your acquaintances and friends and told them they should not buy the Beech-Nut products but recommended others, and because you happended to be antagonistic to tobacco——

A. Not necessarily that, but because of the disappointment of having that impression made on me. Impressions come to me quickly.

X-Q. 74. Don't you think it would be fair to have found out whether or not the Beech-Nut Packing Company was putting out Beech-Nut cigarettes before you went to such extremes as to go around amongst your friends, neighbors and acquaintances and ask them to stop buying Beech-Nut Packing Company's goods and recommend to them a competitor's goods?

A. Not in connection with the weighty matter this has turned out to be. I find in my connection with it that others were so impressed.

X-Q. 75. So you believe in convicting them of putting out the Beech-Nut cigarettes before you knew anything about it?

A. Through no fault of their own, decidedly yes.

X-Q. 76. That is all on that point. You say you never bought a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 77. Will you tell what name is on this package of Beech-Nut cigarettes which I show you?

A. Lorillard's.

X-Q. 78. Read the name, please.

A. P. Lorillard & Co. I have sold thousands of dollars of their goods.

X-Q. 79. You have sold thousands of dollars' worth of their goods?

A. Yes.

X-Q. 80. It is a reputable house in its line, isn't it?

A. Now that I know them, as I have—right now is the first time I knew Lorillard was putting out the Beech-Nut cigarettes, and they have lowered their standing very, very decidedly, sir, with me.

X-Q. 81. What line of business is P. Lorillard & Co. in?

A. High-grade tobacconists.

X-Q. 82. You have sold their goods?

A. Yes.

X-Q. 83. And you didn't take the trouble, before you spread the report that the Beech-Nut Packing Company was putting out a cigarette, you didn't even take the trouble to buy a package and look and see whose name is on it and write to the Lorillard Company to find out?

A. I ask you why I should buy a package of cigarettes?

X-Q. 84. If you thought so much of the Beech-Nut products, like you have led me to believe, and before you would go around and damage a reputation, I should think you might have paid fifteen cents to find out what it would be and look at the package—wouldn't you do that?

A. Not being a buyer in other lines, I would not take the trouble to look at the house putting it out.

X-Q. 85. Couldn't you go to a cigar store and look at a package?

A. No. It would be sufficient for me to have them put out by the Beech-Nut people, to put "Beech-Nut" on their product.

X-Q. 86. Do you realize that it is dangerous business to go about and damage a firm's reputation on so slight evidence as that?

A. I decidedly contradict that, when I say in being a consistent user of the Beech-Nut products, and seeing that sign, I could form my own conclusions as to their making a cigarette, and speak of it as tactfully as I could.

X-Q. 87. Don't you think it would lead to a suit for slander, libel on the case?

A. No, sir. No.

X-Q. 88. Do you find the name Beech-Nut Packing Company on that package any place? Examine it.

A. It is sufficient to me, I tell you again, to see the word "Beech-Nut" on it.

X-Q. 89. I ask you, do you find the name Beech-Nut Packing Company on that package any place? Examine it, please.

A. No, sir. I answer, no, sir.

X-Q. 90. So that you now know that the package of the P. Lorillard Tobacco Company?

A. Why, I don't know that it is.

X-Q. 91. Would the name on there lead you to believe that?

A. Oh, from what I know now I wouldn't question that. But I know this—and I want to say what I think—I think the Beech-Nut Company has a very high-grade clientele in the States and I think any product that used Beech-Nut in connection with selling of a product would be the result of a direct thought-out campaign, sir.

X-Q. 92. That is only your personal opinion, and that is objected to as voluntary. Did you ever hear of "Beech-Nut" whiskey?

A. No, sir.

X-Q. 93. You never heard of that being trade-marked?

A. No, sir.

X-Q. 94. Do you know how long P. Lorillard has been putting out Beech-Nut tobacco products?

A. Oh, as Beech-Nut products?

X-Q. 95. As tobacco products going under that trade name?

A. Hasn't it been about a year? It seems to me I recall something about it.

X-Q. 96. That is all you know about it?

A. That is all I know about it. I was called in here in twenty minutes.

X-Q. 97. Did you ever see a package similar to that tobacco (indicating)? Scrap tobacco?

A. No.

X-Q. 98. Whose name is on there?

A. Lorillard's.

X-Q. 99. Do you know how long Lorillard Company has been putting out that?

A. No, I don't.

X-Q. 100. If you went into a store and wanted to buy a package of Beech-Nut chewing gum, the product of the Beech-Nut Packing Company, could you be confused or deceived into accepting and purchasing a package of this P. Lorillard "Beech-Nut Cigarettes" in the place of that chewing gum? Would you take that for chewing gum?

A. Why, decidedly not, no sir.

X-Q. 101. I show you a copy of the first page of the Boston Herald of today, August 18, 1921, which has been marked in this case for identification as Defendant's Cross-Exhibit No. 5. Is that like the billboard advertisement you saw?

A. I don't recall, sir, really. I don't recall. I repeat to you I simply saw "Beech-Nut Cigarettes."

X-Q. 102. As you rode by?

A. As I rode by, yes.

Cross-examination closed.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 103. Mr. Conant, did I understand you to say on your cross-examination you had sold tobacco products of P. Lorillard & Company?

A. Yes, sir.

R-D. Q. 104. Mr. Conant, was there any doubt in your

mind—I am simply asking for the fact—any doubt in your mind that the Beech-Nut Packing Company was putting out these cigarettes?

A. There never was for a second, no, sir.

R-D. Q. 105. Mr. Cavanagh has shown you a package of scrap tobacco and called your attention to the name "Lorillard" on it. Had you ever seen that package *before today*?

A. No; I hadn't ever seen that package before today, in all my tobacco selling.

Redirect examination closed. No recross-examination.

ALVAH L. CONANT.

HORACE R. PEARSONS, a witness produced in behalf of the plaintiff, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Horace R. Pearsons; thirty-eight years; wholesale grocer; 41 Clifton Street, Worcester.

Q. 2. Are you with the Daniels-Cornell Company?

A. Yes.

Q. 3. Wholesale grocer?

A. Yes.

Q. 4. What is your position with the company?

A. Treasurer and manager.

Q. 5. Do the Daniels-Cornell Company carry tobacco?

A. Yes.

Q. 6. How long have they carried tobacco products?

A. Always.

Q. 6*a*. To whom do they sell those tobacco products?

A. Retail stores.

Q. 7. Is that grocery stores?

A. Yes. No tobacco stores, just grocery stores.

Q. 8. I show you a package of Beech-Nut cigarettes, which is in evidence as "Beech-Nut Exhibit 1." Have you ever seen these cigarettes before? If so, about when did you first see them?

A. Well, I will tell you; I first saw them, when I saw the ads; must be six months ago; but the first time I ever really paid attention to them was about a couple of months ago.

Q. 9. When you first saw them about a couple of months ago, by whom did you think they were made?

A. I thought they were made by the Beech-Nut people.

Q. 10. How long did you continue to believe they were made by the Beech-Nut people?

A. Up within a couple of months ago. I examined a package in a window on Front Street and then found out it said "P. Lorillard Co." on the bottom.

Q. 11. Is there much scrap tobacco sold through this territory?

A. I don't know, I am sure; we never handle it. I never heard of it. You mean scraps of any kind?

Q. 12. Any scrap tobacco?

A. No, we have not had scrap tobacco.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 13. Do you sell tobacco yourself personally?

A. No, not personally.

X-Q. 14. Do you know of P. Lorillard Company? You do, don't you?

A. Yes.

X-Q. 15. So when you examined that package for the first time, you saw P. Lorillard's name on it, did you?

A. Yes.

X-Q. 16. If a customer came into your store, or if a party ordered from you Beech-Nut cigarettes made by the Beech-Nut Packing Company, would you hand them Beech-Nut cigarettes made by P. Lorillard Company?

A. No; I probably would not if they asked for them; I know they didn't make them.

X-Q. 17. You never heard of the Beech-Nut Packing Company making tobacco products such as cigarettes?

A. No.

X-Q. 18. What line have they been in?

A. Fruits, jams, bacon, beef, etc.

X-Q. 19. Food products?

A. Yes.

X-Q. 20. But if you went into a store and wanted to buy a package of Beech-Nut chewing gum made by Beech-Nut Packing Company, could you be confused or deceived by the salesman into accepting a package those Lorillard Beech-Nut cigarettes, in place of the chewing gum?

A. What is that you say?

X-Q. 21. If you went into a store and wanted to buy a package of Beech-Nut chewing gum made by the Beech-Nut Packing Company, could you be confused or deceived by the salesman into accepting a package of those Lorillard Beech-Nut Cigarettes, in place of the chewing gum?

A. No, I don't think so.

X-Q. 22. You think a person would be weak-witted that would, wouldn't you?

A. Yes.

X-Q. 23. I understand you never sold any scrap tobacco in your line of business?

A. No.

X-Q. 24. You are the sales manager for your concern?

A. Yes.

X-Q. 25. Where is that store located?

A. 78 Mulberry Street.

X-Q. 26. How many people do you employ in the whole department?

A. Thirty or forty offhand.

X-Q. 27. About how many salesmen?

A. Five salesmen.

X-Q. 28. I understand you handle tobaccos as a side line to groceries?

A. Grocery stores, yes.

X-Q. 29. But the main business is wholesale grocery?

A. That is our main business, yes, sir.

Cross-examination closed.

HORACE R. PEARSONS.

IN THE DISTRICT COURT OF THE UNITED STATES, IN AND FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Commonwealth of Massachusetts,
County of Worcester,
District of Massachusetts, ss.

I hereby certify that on the 18th day of August, 1921, before me, Penelope Comberbach, a notary public in and for the County of Worcester, Commonwealth of Massachusetts, acting as Special Commissioner, by consent and agreement of counsel, at my office No. 918 Park Bulding, in the City of Worcester, County of Worcester, Commonwealth of Massachusetts, personally appeared,

pursuant to notice, between the hours of nine o'clock A. M. and six o'clock P. M., the following witnesses, Joseph S. Aisenberg, Ralph H. Horne, Dorace L. Bottomly, John H. Lang, Alvah L. Conant and Horace R. Pearsons, and also Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, appearing for Plaintiff, and Richard B. Cavanagh, Esq., of Meyers, Cavanagh Whitehead & Hyde, appearing for Defendant; and each and all of the said witnesses, Aisenberg, Horne Bottomly, Lang, Conant and Pearsons, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed depositions of each of them, set out.

I further certify that all of said depositions were begun and completed on the 18th day of August, 1921.

I further certify that the several exhibits attached to said depositions were offered in evidence and marked for identification as is set out in said depositions.

I further certify that each of said depositions was then and there reduced to typewriting under my personal supervision, and that each of said depositions, after it had been reduced to typewriting, was read over and subscribed by the witness making same, and that each and all of said depositions have been retained by me for the purpose of sealing up and directing the same to the Clerk of Court as required by law.

I further certify that the reason why these depositions were taken was that the respective witnesses making same all reside at Worcester, County of Worcester, Commonwealth of Massachusetts, more than one hundred miles from Trenton, New Jersey, the place where this cause is to be tried.

I further certify that I am not the counsel or attorney for either of the parties, or related by blood or marriage to either of the parties, nor am I interested in the event of the cause.

I further certify that the fees for taking said depositions, $3.00, have been paid to me by the plaintiff and that the same are just and reasonable.

Witness my hand and official seal at Worcester, Massachusetts, this eighteenth day of August, 1921.

PENELOPE COMBERBACH,
[SEAL.] Notary Public.
(Acting by consent of counsel as Special Commissioner.)

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } In Equity No. 3056.

I hereby certify that in the certificate by me attached to depositions in the above entitled case recently forwarded to the Clerk of the Court, the amount paid me for depositions was stated as $3.00. This amount, however, was erroneous and referred merely to an amount paid for administering oaths. The total for taking the depositions including the reporting, etc., was $80.50.

PENELOPE COMBERBACH,
[SEAL.] Notary Public, Massachusetts.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken on behalf of plaintiff, pursuant to notice and by agreement of counsel, before Walter C. Ross, a Notary Public in and for the State of Massachusetts, County of Hampden, acting as Special Examiner by consent of counsel, at 387 Main street, Springfield, Mass., beginning on Tuesday, August 23rd, 1921, at 12 noon.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, counsel for defendant.

FRANKLIN G. NEAL, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your full name, age, residence, and occupation?

A. Franklin G. Neal; 36 years old; 23 Washington road, Springfield, Mass.; lawyer.

Q. 2. Do you smoke?

A. Yes.

Q. 3. Do you ever buy cigarettes?

A. Very seldom.

Q. 4. Have you recently bought any cigarettes?

A. Yes.

Q. 5. What kind did you buy?

A. Beech-Nut cigarettes.

Q. 6. When was this, and where was it, do you remember?

A. It was within two or three weeks, at one of the cigar stands in Springfield.

Q. 7. Would you be able to identify the cigarettes that you bought if you were shown a package of them?

A. Yes.

Q. 8. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Were these the Beech-Nut cigarettes that you bought?

A. Yes.

Q. 9. You have stated that you seldom buy cigarettes, but that you did buy a package of these Beech-Nut cigarettes. Why did you buy these cigarettes?

A. I expected to get a remarkable smoke.

Q. 10. What led you to that expectation?

A. Because I thought the cigarettes were made by the Beech-Nut Packing Company, and I am acquainted with their products.

Q. 11. Do you know what made you think that these cigarettes were made by the Beech-Nut Packing Company?

A. Because the label appeared to me to be the Beech-Nut label.

Q. 12. You have referred to the "Beech-Nut label." Can you explain what you mean by that expression?

A. The words "Beech-Nut," associated with a large oval and a general color scheme.

Q. 13. Have you seen that label previously on other products?

A. I have, many times. On chewing gum, candies and food products.

Q. 14. Have you purchased those products bearing that label?

A. Yes.

Q. 15. And what has been your experience with those products?

A. I have always found them to be of the very highest quality—exceptional in every respect.

Q. 16. After you had bought this package of Beech-Nut cigarettes, what did you do?

A. I smoked one of them.

Q. 17. Was your expectation that you would find these cigarettes remarkable fulfilled?

A. No.

Q. 18. What did you then do?

A. I looked the package over and found the name P. Lorillard on it.

Q. 19. What did you then conclude, Mr. Neal?

A. That there was some connection between the Beech-Nut Company and Peter Lorillard; or, I mean to say, there was probably some connection between the two, since the label was the same on the Beech-Nut products and on these cigarettes.

Q. 20. Do you now believe that there is some connection between the Beech-Nut people and the Lorillard Company?

A. No. You told me within a day or two that there was not.

Q. 21. Mr. Neal, you have testified that when you bought these cigarettes you expected that you would get a smoke which was remarkable and that expectation was not realized. Could you mention some well-known brand or brands of cigarettes which would correspond more or less to the kind of cigarettes that you expected to get when you saw the Beech-Nut label on cigarettes?

A. Well, I expected to get a cigarette unlike others I had known. But in a general way, I expected a quality at least comparable to such a cigarette as the Phillip Morris, or the Pall Mall.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 22. Mr. Neal, I understood you to say that you were a lawyer?

A. Yes.

X-Q. 23. What branch of law do you practice?

A. I specialize in patent and trade-mark law, but I also do a general office business.

X-Q. 24. Have you always practiced here in Springfield?

A. Yes.

X-Q. 25. Since you started to practice patent and trade-mark law, I mean?

A. Yes.

X-Q. 26. This testimony is being taken under notice in your office, is it not?

A. Yes.

X-Q. 27. And you have consulted with Mr. Hinton and have given him permission to take the testimony of other witnesses in this office; in other words, use your office, have you not?

A. Yes, I have.

X-Q. 28. How long have you practiced trade-mark law?

A. Since 1911.

X-Q, 29. Did you ever hear of the Beech-Nut Packing Company making any tobacco products of any sort whatsoever?

A. No.

X-Q. 30. You have heard of the P. Lorillard Company, haven't you?

A. I have.

X-Q. 31. What kind of business do you know them to be in?

A. Tobacco business.

X-Q. 32. When you purchased that package of Lor-

illard Beech-Nut cigarettes, you didn't examine it to see the name of the manufacturer or the producer thereon, did you?

A. No.

X-Q. 33. You have stated substantially that the cigarette did not meet your expectations. What do you smoke, mainly, cigars?

A. Yes, cigars and a pipe.

X-Q. 34. You have smoked cigarettes from time to time, haven't you?

A. I have.

X-Q. 35. Then, as a person who smokes, you know that different people have a preference for different brands?

A. I do.

X-Q. 36. And that what one man might consider to be a good brand might be distasteful, or appear to be a poor brand to another man?

A. Certainly.

X-Q. 37. You have stated that when you purchased that package of Beech-Nut cigarettes you expected to get a cigarette of the same class as the Pall Mall or the Phillip Morris. What does the Pall Mall cigarette sell for?

A. I have not the price of different brands of cigarettes in mind, but it is about 25 cents.

X-Q. 38. What does the Phillip Morris sell for?

A. About 25 cents.

X-Q. 39. And what did you pay for that package of Beech-Nut cigarettes?

A. I forget what I did pay for those cigarettes, but in the discussion with Mr. Hinton I was told that they sold for 15 cents. I realized at the time I bought them that they were not what I would consider the higher-priced cigarettes.

X-Q. 40. So that you could not expect to get for 15 cents the higher grade cigarettes that you would pay a quarter for, could you—10 cents difference to the pack?

A. I didn't ask the price of the cigarettes before taking a package, nor did I consider the price. In fact, I forgot the price. I bought the cigarettes solely upon the label.

X-Q. 41. Did you tell the clerk or the storekeeper that you wanted a cigarette that was the same class as the Pall Mall or the Phillip Morris?

A. No, I had no conversation with the clerk.

X-Q. 42. So, in the ordinary course of things you could not expect to get the same grade of cigarette for 15 cents that you could expect to get for a quarter, could you?

A. I did expect to, with the Beech-Nut label on the package.

X-Q. 43. And do you know anything about the tobacco industry—how the goods are blended, how the tobaccos are selected, where the tobacco in the Pall Mall or the Phillip Morris comes from, and other matters of that sort in connection with the manufacture of tobacco products like cigarettes?

A. I don't know, except in the most general way that these things are attended to.

X-Q. 44. You say that you have used or purchased Beech-Nut food products and chewing gum, and products of that sort?

A. Yes, I have.

X-Q. 45. And you are familiar with the label?

A. Yes.

X-Q. 46. Will you describe that label to me?

A. The label is not in my mind in any detail, but I will try to describe it generally as an oval label, with the long axis horizontal, the words Beech-Nut above the label (that is, along the upper line of the oval), and usually the name of the product somewhere on the label, and a general color of red and white. Also the representation of one of the beech-nuts, or more than one, I don't carry the exact detail in my mind.

X-Q. 47. And that oval that you speak of is in the nature of a wide red band, more than a line, is it not?

A. Well, the red band may be there, and I believe it is, for I have looked at the labels in the last day or two.

X-Q. 48. And that red band has printing on it? It is wide enough to carry plain printing, is it not?

A. I don't know whether it has printing on it or not.

X-Q. 49. And the beech-nut you refer to is a single cluster in the center of green leaves, is it not?

A. I don't know whether there are one or two beech-nuts. I have seen the labels with both since I have looked at these cigarette labels and the Beech-Nut labels, and they appear on the cigarettes and on the chewing gum, for example, and I have seen one or two nuts represented.

X-Q. 50. One or two nuts represented on what?

A. One nut on one label and two nuts on another label.

X-Q. 51. Can you produce specimens of those labels to which you have referred?

A. I have the package of cigarettes which I bought, and referred to in my answers, here with me. It is the only label I can produce, unless you or Mr. Hinton hand them to me.

Witness produces package.

X-Q. 52. I am afraid we are getting confused. I am not asking you about the label on the Lorillard cigarettes. I am asking you about the Beech-Nut labels on the Beech-Nut chewing gum and other products of the Beech-Nut Packing Company. I am asking you to describe that label for me, and in order to assist you I call your attention to a Beech-Nut label, which is marked in this case as Defendant's Cross Exhibit No. 3. Does that represent the Beech-Nut label?

A. It looks like that Beech-Nut label. I think it does represent the general impression which the Beech-Nut label has given to me.

X-Q. 53. So that is a single beech-nut superimposed on green leaves appearing in the center of the label, is it not?

A. Yes.

X-Q. 54. And it has two similar but smaller beech-nuts represented at the end of the oval, at the ends of the long axis of the oval, has it?

A. Yes.

X-Q. 55. And it has a wide red band, with the words "Beech-Nut Mints" on it in this particular case?

A. Yes.

X-Q. 56. If you went to a store and asked for Beech-Nut chewing gum of the Beech-Nut Packing Company, would you be deceived into taking a package of these Lorillard cigarettes in the place of or instead of the gum?

A. No.

X-Q. 57. And you never heard of any person being so confused or deceived, did you?

A. No.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 58. Do you know how many cigarettes are in a package of Pall Mall or Phillip Morris cigarettes?

A. My memory is that there are ten.

R-D. Q. 59. You have produced on cross-examination the identical package of Beech-Nut cigarettes which you purchased. Will you give me that package?

Witness hands package to Mr. Hinton.

STIPULATION.

It is stipulated by and between the parties through their respective counsel that the package of cigarettes which is produced by the witness was, prior to being opened, identical with Beech-Nut Exhibit No. 1.

R-D. Q. 60. In opening this package of Beech-Nut cigarettes which you have produced, how much, if any, of the waxed paper covering the package was removed?

A. The top only, that is, the part of the waxed paper which covers the opening to the package.

R-D. Q. 61. Have you carried these cigarettes about in your pocket?

A. No.

R-D. Q. 62. Where did you just get them when you handed them to me?

A. I took them out of one of my desks before testifying.

Redirect examination closed.

Recross Examination by Mr. Cavanagh.

R-X Q. 63. Do you remember where you bought these cigarettes?

A. No, it was at one of the cigar stands at Springfield, but I do not remember which one.

R-X Q. 64. You just went in and asked for a package of Beech-Nut cigarettes.

A. No. I went in to buy some cigars and I saw the Beech-nut label on the package of cigarettes and that is the only reason I bought cigarettes.

R-X Q. 65. What did you say when you asked for the cigarettes?

A. I didn't say anything. The cigarettes were displayed on the top of the counter. I took a package and paid for it with my cigars.

R-X Q. 66. So you didn't ask for either cigarettes of the Beech-Nut Packing Company or cigarettes of the P. Lorillard Company, but you just took the package and paid for them.

A. That is all. I had no conversation with the clerk.

Signature waived.

Deposition closed.

SPRINGFIELD, MASS., 1:40 P. M.

CLEMENT W. KIRKPATRICK, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Clement W. Kirkpatrick; 35 years old; Chicopee Falls, Mass.; assistant to the general manager of the Fisk Rubber Company.

Q. 2. I show you a package of cigarettes, which is offered in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before?

A. I have.

Q. 3. When and where did you first see these Beech-Nut cigarettes?

A. March of this year in New York City.

Q. 4. Will you state the circumstances of your first seeing these Beech-Nut cigarettes?

A. I was down there visiting and during the course of a conversation I ran out of cigarettes and a friend of mine by the name of Mrs. Burrill told me I ought to smoke Beech-Nut cigarettes.

Q. 5. And what did you do?

A. Being out, I went down to a store and bought some.

Q. 6. When you saw and purchased these Beech-Nut cigarettes, by whom did you think they were put out?

A. By the Beech-Nut people, the same people that make the gum and candy products and things of that kind.

Q. 7. Subsequently to this incident of March, 1921, have you purchased other packages of these Beech-Nut cigarettes?

A. I have.

Q. 8. About how many have you purchased?

A. About a dozen.

Q. 9. Have you carried these cigarettes about with you and smoked them?

A. I have.

Q. 10. Do you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No.

Q. 11. When and how were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company?

A. Mr. Frank Neal advised me this morning.

Q. 12. Have you ever had these cigarettes brought to you by somebody else?

A. I have.

Q. 13. What happened then?

A. I was out of cigarettes and my wife was going to the post office—this was last Saturday morning—and I asked her to get me some and didn't specify the brand and she brought these back with the remark that these ought to be good, because they were Beech-Nut, which stood for quality.

Q. 14. What brand of cigarettes was it that she brought you?

A. Beech-Nut.

Q. 15. Were those cigarettes that she brought you the same as this Exhibit No. 1 that I have shown you?

A. Yes, as far as I know.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. Mr. Kirkpatrick, I understand you are connected with the Fisk Rubber Company?

A. I am.

X-Q. 17. So that you have had considerable experience in manufacturing lines, particularly the rubber industries?

A. Yes.

X-Q. 18. How many years have you been in the rubber industry?

A. Thirteen years.

X-Q. 19. I understand that you bought your first package of Beech-Nut cigarettes like this Plaintiff's Exhibit No. 1 in New York City?

A. Yes, sir.

X-Q. 20. And when was that?

A. In March of this year.

X-Q. 21. Whose name appears on that package?

(Witness examines package, Exhibit No. 1.)

A. P. Lorillard Co.

X-Q. 22. Did you ever hear of the P. Lorillard Company?

A. I have heard of it.

X-Q. 23. What line of business were they in?

A. I assume that they are in the tobacco business.

X-Q. 24. They are large tobacco manufacturers?

A. Yes.

X-Q. 25. Do you find the name "Beech-Nut Packing Company" any place on that package?

(Witness examines package.)

A. No, unless it is in here (witness points to inside of package).

X-Q. 26. Do any of your goods of the Fisk Rubber Company bear the name "Fisk Rubber Company" on them?

A. No.

X-Q. 27. Any of the packages containing the goods?

A. No.

X-Q. 28. Any of the cartons?

A. No. The name "The Fisk Rubber Company."

X-Q. 29. Oh! Then my previous questions, to which you answered "No," were so answered because I omitted the word "The," but the packages or cartons, then, do bear the name of your concern?

A. Yes, sir.

X-Q. 30. And what does that indicate to the public?

A. That it is the product of The Fisk Rubber Company.

X-Q. 31. And judging from that, would you not take the name P. Lorillard Company on that package of cigarettes to indicate that it is the product of the P. Lorillard Company, tobacco manufacturers?

A. I would.

X-Q. 32. When you first purchased a package of the Lorillard Beech-Nut cigarettes like that Exhibit No. 1, did you look to see whose name was on it?

A. I didn't.

X-Q. 33. Then you didn't examine the package in particular, did you?

A. No.

X-Q. 34. I understand that you smoke cigarettes, do you not?

A. I do.

X-Q. 35. And you bought the Beech-Nut cigarettes several times since you purchased the first package?

A. I have.

X-Q. 36. Now, Mr. Kirkpatrick, basing your answer to this question of mine on your experience in the rubber industry, if you were going to purchase a rubber tire, say, or a rubber pair of shoes, would you purchase the goods of a concern that had been for years in the rubber industry or from a clothing house, say, that had just gone into the rubber business?

A. I would buy it from a concern that had been in business for years.

X-Q. 37. That had made a specialty of that business?

A. Yes, sir.

X-Q. 38. At your home do you use any products of the Beech-Nut Packing Company?

A. We do.

X-Q. 39. What are those products?

A. They are bacon and gum, those are the only ones I can think of just now.

X-Q. 40. Well, if you went into a store and wanted some Beech-Nut bacon or Beech-Nut chewing gum, could you be confused or deceived into taking a package of those Beech-Nut cigarettes in the place and stead of the bacon or gum?

A. I do not think so.

X-Q. 41. In other words, you would not take cigarettes when you wanted gum or bacon?

A. No, sir.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 42. Do you smoke Camel cigarettes?

A. I do.

R-D. Q. 43. To what extent have you smoked Camel cigarettes?

A. Ordinarily, to about the same extent that I have others.

R-D. Q. 44. Do you smoke cigarettes all the time?

A. I do.

R-D. Q. 45. Have you smoked Lucky Strike cigarettes?

A. I have.

R-D. Q. 46. And how much have you smoked them?

A. I have smoked them about an equal proportion with the other brands.

R-D. Q. 47. How about Chesterfield cigarettes?

A. The same applies there.

R-D. Q. 48. And Fatimas?

A. The same.

R-D. Q. 49. What is written on the front of the package of Camel cigarettes underneath the picture of the Camel?

A. I do not know.

R-D. Q. 50. What is printed on the Lucky Strike cigarettes underneath the red panel, with the name "Lucky Strike" on it?

A. I do not know.

R-D. Q. 51. What is printed on the front of the Fatima cigarette package, underneath the name "Fatima" and the picture of a girl?

A. I do not know.

R-D. Q. 52. What is printed on the front of a Chesterfield package of cigarettes underneath the name "Chesterfield"?

A. I do not know.

Redirect Examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 53. Do you know what is printed on the Beech-Nut label for ham?

A. I do not.

R-X Q. 54. And likewise for chewing gum?

A. I do not know.

R-X Q. 55. Now, if you went into a store and you wanted, say, an Arrow shirt or an Arrow collar, of the Cluett-Peabody Company, and you wanted nothing but Cluett & Peabody goods, you would look and see if the Cluett & Peabody name was on it, wouldn't you?

A. I certainly would.

Signature waived.

Deposition closed.

MARTIN T. HUGGARD, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Martin T. Huggard; 55 Dresden Street, Springfield.

Q. 2. And your occupation?

A. Clerk.

Q. 3. In what kind of a store?

A. Meat and groceries.

Q. 4. Mr. Huggard, have you ever seen the so-called Beech-Nut cigarettes as advertised in the Springfield newspapers?

A. Yes, sir.

Q. 5. Would you recognize the advertisement that you saw if I were to show you a copy of it?

A. Yes, sir.

Q. 6. I show you a copy of the Boston Herald of August 18, 1921, marked for identification as Defendant's Cross Exhibit 5, and direct your attention to an advertisement of Beech-Nut cigarettes in that paper. Is this the advertisement that you saw?

A. It was like that. It was smaller. It was in the Daily News with small advertising.

Q. 7. When did you first see this advertisement?

A. Well, I can't tell just when. It was some time in April, along the latter part of April, 1921.

Q. 8. How frequently did you see that advertisement?

A. I saw it every day for quite a while.

Q. 9. When you saw that advertisement, as you have testified, every day for quite a while, by whom did

you believe that those cigarettes were being put out?

A. I thought by the Beech-Nut people.

Q. 10. What other products do those Beech-Nut people make, do you know?

A. Why, they have jams, beans, chewing gum, mints. Why, a whole lot of stuff.

Q. 11. Do you now believe that these cigarettes were put out by the Beech-Nut people?

A. I know that they are not.

Q. 12. How and when were you first advised that those cigarettes were not put out by the Beech-Nut people?

A. By Mr. Hover, the salesman.

Q. 13. Who is he employed by?

A. The Beech-Nut people.

Q. 14. And did he advise you about this?

A. Yes, he did.

Q. 15. And when was this?

A. Well, this was along—well, I should say the first of May some time, as near as I can recollect.

Q. 16. Was this after you had seen those advertisements that you refer to?

A. Yes, because I asked him how they were going, see?

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Mr. Huggard, do you sell tobacco?

A. No, we do not sell tobacco.

X-Q. 18. You do not sell tobacco in your store?

A. No.

X-Q. 19. Do you smoke?

A. Yes, sure.

X-Q. 20. What do you smoke?

A. Cigarettes.

X-Q. 21. Did you ever buy the Beech-Nut cigarettes?

A. I never have. I never smoke them.

X-Q. 22. Did you ever examine a package of the Beech-Nut cigarettes?

A. I have never seen one. Only that one he (indicating Mr. Hinton) showed me.

X-Q. 23. When did Mr. Hinton show you that package of cigarettes?

A. Last Saturday morning.

X-Q. 24. Whose name appears on that package?

Witness examines package.

A. P. Lorillard Company.

X-Q. 25. Did you ever know of the Beech-Nut Packing Company putting out any tobacco products?

A. I never knew that they did. No, sir.

X-Q. 26. But you know that Lorillard puts out tobacco?

A. Yes, sir.

X-Q. 27. Mr. Hinton has called your attention to an advertisement in this Boston Herald of August 18, 1921, with reference to the Beech-Nut cigarette. Doesn't the name P. Lorillard Company appear there?

Witness examines paper.

A. Yes, it does.

X-Q. 28. So that you didn't examine the advertisement very carefully?

A. No, I didn't. I simply saw the package of cigarettes and "Beech-Nut" and as I supposed the Beech-Nut trademark.

X-Q. 29. So you just glanced at it carelessly and didn't examine it particularly at all?

A. Yes.

X-Q. 30. You can tell whether that wording on this advertisement is the same as in the advertisement you saw, is it?

A. No, I can't. I can't tell you.

X-Q. 31. If you went into a store and wanted to purchase a package of Beech-Nut chewing gum, or any of the other Beech-Nut Packing Company products you have mentioned, could you be confused or deceived into taking a package of cigarettes in place of those products?

A. If I went in to buy chewing gum?

X-Q. 32. Yes, and the man handed a package of those Lorillard cigarettes in the place of the gum or other Beech-Nut Packing Company products mentioned, would you take the cigarettes in place of gum?

A. Why, no, naturally not if I didn't ask for cigarettes. Not if I asked for gum and he gave me cigarettes.

X-Q. 33. You would be crazy, wouldn't you?

A. Yes.

Recross-examination closed.

Signature waived.

Deposition closed.

LOUIS ISENBERG, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Louis Isenberg; 48, will be 49; 46 Warriner Avenue, Springfield, Mass.; manager of the Springfield, Public Market.

Q. 2. How many people are employed in the Springfield Public Market?

A. Why, somewheres around one hundred and twenty-five.

Q. 3. Have you ever seen in the Springfield papers the so-called Beech-Nut cigarettes?

A. I have seen it advertised.

Q. 4. Would you recognize one of those advertisements if I were to show you one?

A. I think so.

Q. 5. I show you an advertisement in the Boston Herald of August 18, 1921, marked for identification in this case as Defendant's Cross-Exhibit No. 5. Is that the advertisement that you have previously seen?

A. Somewhat similar.

Q. 6. When you saw that advertisement, by whom did you think that those cigarettes were being put out?

A. By the Beech-Nut Packing Company.

Q. 7. Do you now believe that those cigarettes were put out by the Beech-Nut products people?

A. No.

Q. 8. When and how were you first advised that they were not?

A. Yesterday, August 22nd, you told me.

Q. 9. Did you ever hear any remark made about these Beech-Nut cigarettes?

A. Yes, sir.

Q. 10. How did that come about?

A. Some gentleman friend of mine called at the house one evening and he was smoking cigarettes and my wife passed the remark. She says, "I see the Beech-Nut people are putting out a cigarette."

Q. 11. And when was this?

A. Only a week ago, a little over a week ago.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Mr. Isenberg, do you sell tobacco products and cigarettes?

A. We sell only edibles—food products.

X-Q. 13. Do you sell any food products of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 14. What do you sell?

A. Well, practically their full line. Jellies, jams, preserves, gum and we got some marshmallows, bacon and dried beef, pork and beans, catsup, chili sauce, macaroni, spaghetti, also cereal coffee. I guess that is pretty much all they make. Also drinks—ginger ale, sarsaparilla and birch beer.

X-Q. 14*a*. Have you ever heard of the Beech-Nut Packing Company putting out any tobacco products?

A. I was under the impression when I seen that advertisement that they put out cigarettes.

X-Q. 15. I am not asking now for your impression or what you thought, but did you ever know them to put out any tobacco products?

A. Not to my knowledge.

X-Q. 16. When you saw this advertisement did you see the name P. Lorillard Company?

A. No, I didn't look close enough. I just seen Beech-Nut on that and thought it was one of their products. I was not interested in the tobacco end of it.

X-Q. 17. Well, the name P. Lorillard Company is on that advertisement, isn't it?

Witness examines advertisement.

A. Yes, I see it now.

X-Q. 18. Did you ever buy any Beech-Nut cigarettes of the P. Lorillard Company?

A. No, I do not smoke cigarettes.

X-Q. 19. So you just never buy cigarettes?

A. No.

X-Q. 20. If you went into a store and wanted to buy

some Beech-Nut bacon or Beech-Nut gum or any of the other products which you have mentioned as being put out by the Beech-Nut Packing Company, could you be confused or deceived into taking a package of these Beech-Nut cigarettes?

A. I positively would—that is, if I bought cigarettes I would take it for Beech-Nut product.

X-Q. 21. So you would go into a store and ask the man for a package of Beech-Nut gum and if he handed you a package of Beech-Nut cigarettes you would take them?

A. I would not take it for cigarettes.

X-Q. 22. But you told me you would.

A. I would if I asked for cigarettes and they said they had Beech-Nut cigarettes. I would take it for a Beech-Nut product.

X-Q. 22*a*. I didn't ask you that. I asked you if you would take gum for cigarettes.

A. No, why should I take gum for cigarettes?

X-Q. 23. Didn't you say awhile ago that you had never heard of the Beech-Nut people putting out tobacco products like cigarettes?

A. Yes, I didn't know they put out any tobacco products.

X-Q. 24. And the name P. Lorillard Company is on this package, Exhibit No. 1, is it not?

Witness examines package.

A. Yes.

X-Q. 25. And it is on the advertisement, isn't it?

Witness examines paper.

A. From what I see, it is.

X-Q. 26. And you do not find the name of the Beech-Nut Packing Company on that package, do you?

A. No, sir.

X-Q. 27. The Beech-Nut products which you sell have the name "Beech-Nut Packing Company" on them?

A. They all have the name on them. This label is similar to the Beech-Nut label.

X-Q. 28. You say that is the same label?

A. Very similar.

X-Q. 29. Will you describe the Beech-Nut label to me that they use on Beech-Nut products?

A. Well, it is an oval label with a red border around it. I think you have one there. (Witness points to label in Mr. Cavanagh's hand.)

X-Q. 30. I show you a label which is marked in this case as Defendant's Cross Exhibit 3. Is that the Beech-Nut label to which you refer?

A. Yes.

X-Q. 31. Will you look at this Exhibit No. 1? Do you find any wide red oval band with printing on it?

Witness examines exhibit.

A. No, not on this package of cigarettes.

X-Q. 32. I notice on the Beech-Nut Packing Company label a single beech-Nut overlying three green leaves; do you find that on this?

A. No, sir.

X-Q. 33. And I notice two single beech-nuts at opposite sides of the central beech-nuts—these two beech-nuts being single nuts mounted on green leaves. Do you find that there?

A. No, not there.

Signature waived.

Deposition closed.

ADELARD J. LANDRY, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Adelard J. Landry; 27; 83 College Street, Springfield; clerk—meat cutter.

Q. 2. I show you a package of Beech-Nut cigarettes in evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen cigarettes like these displayed for sale in Springfield stores?

Witness examines Exhibit No. 1.

A. Yes, sir.

Q. 3. And how long have you seen these cigarettes?

A. Well, I should say along four or five months.

Q. 4. When you first saw these cigarettes, by whom did you believe that they were made?

A. By the Beech-Nut Packing Company.

Q. 5. And how long did you continue to believe that?

A. Why, I believed it until the salesman insisted that they did not make them. I should say about six weeks ago or two months.

Q. 6. And what was this salesman's name?

A. The salesman for the Beech-Nut people—Mr. Hover.

Q. 7. I call your attention to the brand on these cigarettes. Have you ever seen that brand on other products?

A. Yes, sir.

Q. 8. Can you tell some of the other products on which you have seen this brand?

A. Why, on all the jams and Beech-Nut gum. I

could name a half a dozen if I could think of them. All the Beech-Nut house packing products. On all of them.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 9. Where are you employed?

A. At 1083 State Street.

X-Q. 10. What line of business is that?

A. Meat and groceries.

X-Q. 11. Do you sell tobacco products?

A. No, sir.

X-Q. 12. You don't handle them at all?

A. No, sir.

X-Q. 13. Do you smoke yourself?

A. Cigars and tobacco.

X-Q. 14. Do you ever smoke cigarettes?

A. Not for the last six or seven years.

X-Q. 15. Did you ever buy a package of these Beech-Nut cigarettes like Exhibit No. 1?

A. No, sir.

X-Q. 16. You notice the name P. Lorillard Company on that?

A. Yes, I notice it. I'd never notice it unless you pick it up and glance it over very thoroughly.

X-Q. 17. Did you ever have a package of these Beech-Nut cigarettes in your possession before today?

A. No.

X-Q. 18. So, when I handed you these cigarettes it was the first time you ever handled this package?

A. Yes, sir.

X-Q. 19. It was the first time you ever closely examined this package?

A. Yes, sir.

X-Q. 20. Are you familiar with the label of the

Beech-Nut Packing Company that it uses upon its gum and various food products?

A. Yes, sir.

X-Q. 21. I show you a label which is in this case as Defendant's Cross-Exhibit 3, is that the Beech-Nut Packing Company label?

A. Yes, sir.

X-Q. 22. That label has a wide red oval band, has it not?

A. Yes, sir.

X-Q. 23. And that band has the words "Beech-Nut Mints" on it?

A. Yes, sir.

X-Q. 24. This package of cigarettes has no such oval band, has it?

A. No, it has not.

X-Q. 25. And this label has in the center a single beech-nut imprinted upon three green leaves, has it not?

A. Yes, sir.

X-Q. 26. You do not find any such beech-nut on this package, do you?

A. No, sir.

X-Q. 27. And this label has the words "Beech-Nut Packing Company" on it, has it not?

A. Yes, sir.

X-Q. 28. And you do not find any words "Beech-Nut Packing Company" on that package, do you? Will you examine it?

Witness examines package.

A. No, there is not, sir.

X-Q. 29. Did you ever hear of the P. Lorillard Company?

A. Yes, sir.

X-Q. 30. They are large tobacco manufacturers, are they not?

A. Yes, sir.

X-Q. 31. Well known tobacco manufacturers?

A. Yes, sir.

X-Q. 32. If you saw a package of tobacco products, such as these cigarettes, with that name on it, you would naturally presume that that was a product of the P. Lorillard Company, the tobacco manufacturers, would you not?

A. Yes, sir.

X-Q. 33. Now, Mr. Landry, if you went into a store and you wanted to buy a package of Beech-Nut chewing gum, or some Beech-Nut bacon, say, could you be fooled or confused or deceived into taking a package of these Lorillard Beech-Nut cigarettes in the place of your gum or bacon?

A. Why, I do not quite understand you, sir. I wouldn't be fooled. I can't get you clear. I would not buy bacon for cigarettes.

X-Q. 33*a*. That is what I mean, you would not be fooled into buying cigarettes for chewing gum when you asked for gum?

A. Why, certainly not.

X-Q. 34. And likewise, if you asked for a pound of Beech-Nut bacon, you would not be fooled into buying Beech-Nut cigarettes, would you?

A. No, sir.

Signature waived.

Deposition closed.

ROBERT N. BROUGHTON, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Robert N. Broughton; 34; 151 Sherman Street, Springfield, Mass.; druggist, pharmacist.

Q. 2. Do you sell tobacco products in this store?

A. Yes.

Q. 3. I show you a package of Beech-Nut cigarettes in evidence in this case as Beech-Nut Exhibit No. 1, have you sold these cigarettes in this store?

A. Yes.

Q. 4. How long?

A. Since they were on the market, since they started around leaving the packages in the store. Since they have been on the market, I presume.

Q. 5. Was that in the Spring of this year?

A. Yes, March or April.

Q. 6. When you first saw and sold these cigarettes over the counter, by whom did you think they were put out?

A. By the Beech-Nut Packing Company.

Q. 7. Do you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

A. No, I do not.

Q. 8. How were you first advised that these cigarettes were not a product of the Beech-Nut Packing Company?

A. By your representative who came around here first. He called my attention to it.

Q. 9. And what company did he represent?

A. The Beech-Nut Packing Company.

Q. 10. And how long ago was this?

A. It seems a month ago.

Q. 11. And in this period from March or April, 1921, until about a month ago did you personally sell these cigarettes over the counter?

A. Yes, I did.

Q. 12. Did you hand the cigarettes to the customers?

A. Yes.

Q. 13. I call your attention to the brand on this package of cigarettes. Have you ever seen that brand on other products?

A. Yes. I have seen them on Beech-Nut gum and on Beech-Nut peanut butter.

Q. 14. And any other products, you think?

A. Beech-Nut bacon, Beech-Nut mints.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. Are you still buying these Beech-Nut cigarettes?

A. I have not bought any in a week's time.

X-Q. 16. Who do you buy them from?

A. Whitcomb.

X-Q. 17. Who is Whitcomb; what kind of business?

A. Wholesale cigar jobbers.

X-Q. 18. You did not buy from the manufacturer direct?

A. No. The first carton I bought I bought direct from their salesman, the P. Lorillard Company salesman. I paid him cash right on the spot.

X-Q. 19. He didn't tell you that those cigarettes were made by the Beech-Nut Packing Company?

A. He didn't say anything. He simply said they were Beech-Nut cigarettes.

X-Q. 20. You notice the name "P. Lorillard Company" on this package, do you not?

A. I do now.

X-Q. 21. Did you ever look at this package to decide whether the goods were those of the P. Lorillard Company or the Beech-Nut Packing Company?

A. I never did.

X-Q. 22. Just handed the cigarettes out?

A. Yes. If they called for Beech-Nut I handed them out.

X-Q. 23. That name, P. Lorillard Company, on this package of cigarettes, Plaintiff's Exhibit No. 1, indicates to you that it is the product of the P. Lorillard Company, does it not?

A. Yes, it does.

X-Q. 24. You never heard of the Beech-Nut Packing Company putting out any tobacco products whatsoever?

A. I never did, no.

X-Q. 25. You never had a man come into this store and say "I want a package of Beech-Nut cigarettes made by the Beech-Nut Packing Company," and then you handed him a package of P. Lorillard Company's cigarettes, did you?

A. No, I never heard him say that.

X-Q. 26. And you never sold him Lorillard's cigarettes when he asked you for Beech-Nut Packing Company cigarettes, did you?

A. No.

X-Q. 27. As I understand it, you sold Beech-Nut chewing gum of the Beech-Nut Packing Company, didn't you?

A. Yes.

X-Q. 28. You never sold anybody Lorillard's cigarettes when they wanted and asked you for Beech-Nut chewing gum or any of the other Beech-Nut Packing Company products which you have?

A. No.

X-Q. 29. If you yourself went into a store and asked for Beech-Nut chewing gum you could not be fooled into taking a package of the Lorillard Beech-Nut cigarettes for chewing gum, could you?

A. Not for chewing gum.

X-Q. 30. It would be absurd, would it not?

A. Yes.

X-Q. 31. I show you a label which is in this case as Defendant's Cross-Exhibit 3. Does that represent the Beech-Nut label of the Beech-Nut Packing Company?

A. Well, I never particularly noticed. It looks very much like it.

X-Q. 32. Whose name appears on it?

A. Beech-Nut Packing Company. Besides without you looked at it you would think it was. Beech-Nut is Beech-Nut with us in the store. We don't pay attention to who it is made by. We just know them by what they ask for.

X-Q. 33. If he says "Beech-Nut" what do you hand him?

A. If he asks for Beech-Nut gum at the candy counter we hand him Beech-Nut gum. If he asks for cigarettes at the cigarette counter, we hand him cigarettes.

X-Q. 34. The two counters are separate. One at one side of the store and the other at the other?

A. Yes.

X-Q. 35. By the two counters I mean the candy counter is one place where you keep the gum and the tobacco counter is at the other side where you keep the tobacco and where you keep these Beech-Nut cigarettes?

A. Yes.

Signature waived.

Deposition closed.

GEORGE L. CARLTON, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. George L. Carlton, grocer, 929 Dwight Street, Holyoke, Mass., 47 years of age.

Q. 2. Do you sell tobacco products in your grocery store?

A. Yes.

Q. 3. I show you a package of cigarettes, which is in this case, as Exhibit No. 1. (Mr. Hinton displays to Mr. Carlton a package of cigarettes.) Have you ever sold these cigarettes in your store?

A. Yes.

Q. 4. How long have you sold them?

A. Since the early spring of 1921.

Q. 5. When you bought these cigarettes which other product did you have for sale?

A. Beech-Nut. The same people that put up the canned goods and the gum.

Q. 6. Why did you put Beech-Nut cigarettes in? Do you remember?

A. Well, Beech-Nut product is a good seller. Then I thought they would sell good, the same as the gum and the same as the canned goods.

Q. 7. How long did you continue to think that these cigarettes were a Beech-Nut product?

A. Until Mr. Hover, drummer, who sells Beech-Nut products, told me the Beech-Nut Packing Company had nothing to do with it.

Q. 8. Who is Mr. Hover?

A. Beech-Nut drummer, fellow who sells the goods.

Q. 9. How long after you had put in these cigarettes did Mr. Hover tell you that the Beech-Nut Packing Company had nothing to do with them?

A. Why, a month, I guess, after I had the cigarettes in.

Q. 10. Did you yourself sell these cigarettes over the counter during that month?

A. Yes.

Q. 11. Did you hand packages of the cigarettes to your customers?

A. Yes.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Mr. Carlton, you state that you bought these Beech-Nut cigarettes about last spring?

A. Yes.

X-Q. 13. From whom did you first buy them?

A. Well, the drummer's name I do not know. There were two of them together. I did not ask him his name. He says we have new packages of cigarettes, Beech-Nut brand. He said there are twenty cigarettes in a package for fifteen cents and ought to be a good seller. The Beech-Nut brand is a good brand and it ought to sell. I will take some of them.

X-Q. 14. Did you ask him if those cigarettes were made by the Beech-Nut Packing Company?

A. Well, now, I do not remember whether I did or not.

X-Q. 15. Have you bought any of those cigarettes since?

A. Yes, I have, right along.

X-Q. 16. Are you still buying cigarettes like these? (Mr. Cavanagh here exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Carlton.)

A. Yes.

X-Q. 17. So after the Beech-Nut Packing Company's agent told you they were not made by the Beech-Nut Packing Company you still continued to buy them? And have you a good sale for them?

A. Well, pretty fair.

X-Q. 18. Do you notice the name "P. Lorillard Company" on this package of cigarettes? (Mr. Cavanagh exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Carlton.)

A. Yes.

X-Q. 19. You know they are not a product of the Beech-Nut Packing Company?

A. Yes.

X-Q. 20. The Lorillard Company is a large and well known tobacco concern, is it not?

A. Yes.

X-Q. 21. If you had taken the trouble to look at that package when you first bought those cigarettes you would have known that it was P. Lorillard Company's product, would you not?

A. Yes.

X-Q. 22. You did not find on that package the name of the Beech-Nut Packing Company, did you?

A. Only that Beech-Nut brand.

X-Q. 23. You mean that name Beech-Nut?

A. Yes.

X-Q. 24. Do you sell Beech-Nut chewing gum?

A. Yes.

X-Q. 25. And Beech-Nut bacon?

A. Yes.

X-Q. 26. If a customer came into your store and asked you for a package of Beech-Nut chewing gum, or asked you for a pound of Beech-Nut bacon, you would not hand him this package of Beech-Nut cigarettes in the place of the gum or bacon, would you?

A. Of course not.

X-Q. 27. You would think or say you were crazy for taking these cigarettes for Beech-Nut chewing gum?

A. Yes.

X-Q. 28. You know that these cigarettes are the cigarettes of the P. Lorillard Company?

A. Yes. I never examined the package. Never noticed the name on the package.

X-Q. 29. You have lots of food products that you do not notice?

A. Yes. The name of the party that is making them I do not know. The brand is all there is. We go by the brand.

X-Q. 30. From whom do you buy your Beech-Nut cigarettes?

A. Kaffir Cigar Company. Sometimes from H. G. Sears.

X-Q. 31. And these people are tobacco jobbers and not manufacturers and wholesalers?

A. Yes.

X-Q. 32. And do you buy direct from P. Lorillard Company?

A. No.

X-Q. 33. You never buy direct from P. Lorillard Company?

A. Not unless those two fellows were from there. That I do not know.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 34. Do you know whether H. G. Sears sells other things than tobacco products?

A. Yes.

R-D. Q. 35. What do they sell besides tobacco products?

A. Confectionery, fruits, groceries, etc.

R-D. Q. 36. Does the Kaffir Cigar Company run a wholesale grocery business?

A. Wholesale and retail.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 37. How many people do you employ in your store?

A. Three or four.

R-X Q. 38. You do retail grocery business?

A. Yes.

R-X Q. 39. Your store is in a residential neighborhood?

A. Yes.

R-X Q. 40. That's all Mr. Carlton. Thank you.

Recross-examination closed.

Signature waived.

Deposition closed.

MICHAEL O'CONNOR, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and your occupation.

A. Michael O'Connor; age, 32; residence, 801 Canal street, Holyoke, Mass.

Q. 2. Your occupation, Mr. O'Connor?

A. Clerk.

Q. 3. In what kind of a store?

A. General store, public market.

Q. 4. Mr. O'Connor, I show you a package, which is in

this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes, and if so, when did you first see them?

A. Six months ago.

Q. 5. Did you ever buy any of these cigarettes (Mr. Hinton here exhibiting a package of Beech-Nut cigarettes to Mr. O'Connor)?

A. Once.

Q. 6. Why did you buy these cigarettes, do you remember?

A. Because they were new on the market and I tried them, seeing the Beech-Nut label, and thought I would take a shot at it.

Q. 7. When you saw and bought these cigarettes, by whom did you think they were made?

A. By the Beech-Nut people. They put out chewing gum, peppermint candies, and I thought that they had gone into the tobacco business.

Q. 8. Do you now believe that the Beech-Nut people put out these cigarettes?

A. No. I do not.

Q. 9. When were you first advised that the Beech-Nut people did not put out these cigarettes, and by whom?

A. By one of your salesmen, Mr. Hover.

Q. 10. What company does Mr. Hover represent?

A. The Beech-Nut Company.

Q. 11. How long after you had bought and smoked these Beech-Nut cigarettes was it that Mr. Hover told you?

A. About two weeks. Near there anyway. Two weeks anyway.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Mr. O'Connor, when was it you said that you bought a package of Beech-Nut cigarettes?

A. The first package I bought of them was maybe two months ago.

X-Q. 13. Around about June, 1921?

A. Possibly, yes.

X-Q. 14. Have you bought any of these cigarettes since?

A. No.

X-Q. 15. Do you sell tobacco in the store where you work?

A. No.

X-Q. 16. Did you ever buy tobacco from tobacco manufacturers in your line of business; that is, to sell in your store?

A. I do not handle tobacco of any description.

X-Q. 17. You notice the name of P. Lorillard Company? (Mr. Cavanagh here exhibits a package of Beech-Nut cigarettes of the P. Lorillard Company to Mr. O'Connor.)

A. Now I do, yes.

X-Q. 18. When you first purchased a package of these cigarettes, about two months ago, you did not notice the name on it, did you?

A. No, I did not.

X-Q. 19. You did not ask the dealer who they were made by, did you?

A. No, I did not.

X-Q. 20. You just went in and bought cigarettes and told him just what you wanted?

A. I just went in and said, "Give me a package of Beech-Nut cigarettes."

X-Q. 21. That was the only thing you asked him?

A. Yes.

X-Q. 22. Then you did not notice the package in particular when you bought the cigarettes?

A. I did not notice it, only the label and the beech-nuts. The label was similar to the other ones and the regular beech-nuts, that is why I took them.

X-Q. 23. Are you familiar with the regular Beech-Nut label?

A. Yes. Well, to a certain extent I am.

X-Q. 24. I show you a label, which is in this case as the Defendant's Cross-Exhibit No. 3; is that the regular Beech-Nut label?

A. No, it is not.

X-Q. 25. This label which I have shown you has a wide red label, has it not?

A. It has.

X-Q. 26. And it has the words "Beech-Nut Mints" on it, and it has a single beech-nut in the center on green leaves, has it not?

A. It has.

X-Q. 27. It is not like them? (Mr. Cavanagh displays the label on the cigarette package put out by the P. Lorillard Company to Mr. O'Connor.)

A. No, it is not.

X-Q. 28. On this defendant's label you find the words, "Beech-Nut Packing Company, Canajoharie, New York," do you not? (Mr. Cavanagh displays label to Mr. O'Connor.)

A. Yes.

X-Q. 29. Mr. O'Connor, if you went into a store and you wanted to buy some Beech-Nut chewing gum or some Beech-Nut bacon, would you be confused or be deceived into permitting the dealer to sell you a package of Beech-Nut cigarettes in the place of the gum or the bacon you asked for?

A. Why, that would be out of the question.

X-Q. 30. In other words, they are different things and you wouldn't be fooled, would you?

A. Of course not.

X-Q. 31. You would not take bacon for cigarettes?

A. No, of course not.

X-Q. 32. You would not take chewing gum for cigarettes?

A. No, of course not.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 33. Do you recognize this label that I now show you?

(Mr. Hinton displays to Mr. O'Connor the Beech-Nut Packing Company's label.)

A. Beech-Nut brand.

R-D. Q. 34. Is that a Beech-Nut label?

A. That nut in the center does not look familiar to me.

R-D. Q. 35. Can you describe the nut in the center of the regular Beech-Nut label; what does it look like?

A. Well, if I am right, I always figure there are two nuts there.

R-D. Q. 36. That is on the regular Beech-Nut Packing Company's label?

A. Yes.

NOTE.—The label which has been shown to the witness is marked for identification "Plaintiff's Exhibit," and is a Beech-Nut strawberry jam label.

Redirect examination closed.

Signature waived.

Deposition closed.

HENRY LE CLAIR, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. Henry Le Clair; 289 Walnut street, Holyoke, Mass.; age, 28.

Q. 2. What is your occupation?

A. Grocer.

Q. 3. Do you smoke, Mr. Le Clair?

A. Yes.

Q. 4. I show you a package of cigarettes, which is in this case as Beech-Nut Exhibit No. 1. (Mr. Hinton displays package of Beech-Nut cigarettes to Mr. Le Clair.) Have you ever seen these cigarettes before?

A. I have.

Q. 5. Have you bought and smoked these cigarettes?

A. I have.

Q. 6. When you saw, bought and smoked these cigarettes, by whom did you think they were put out?

A. Well, by the Beech-Nut people, of course. I did not notice and did not care who they were put out by.

Q. 7. How long did you continue to think that these cigarettes were put out by the Beech-Nut people?

A. A couple of weeks, I suppose. As soon as the salesman came around.

Q. 8. What salesman was this, do you remember?

A. Your Holyoke salesman of the Beech-Nut Company.

Q. 9. Do you remember what you said to this salesman when he came around?

A. The only thing I told him was "what are they going to put out next?"

Q. 10. Did he tell you that these cigarettes were not a product of the Beech-Nut Company?

A. He did.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 11. Are you the proprietor of this store, Mr. Le Clair?

A. Yes.

X-Q. 12. Where did you buy these cigarettes?

A. At George Carlton's store across the street. I sent a boy after them.

X-Q. 13. You do not sell tobacco products in your store, do you?

A. No.

X-Q. 14. And you never buy any tobacco products to sell from your store, do you?

A. No.

X-Q. 15. You notice P. Lorillard Company on this package of cigarettes, don't you? (Mr. Cavanagh displays a package of P. Lorillard Company's cigarettes to Mr. Le Clair.)

A. I notice it after I have been shown. I never cared to look at it. I gave them away. I could not smoke them.

X-Q. 16. You did not pay any attention to the package at all?

A. No.

X-Q. 17. How many times have you bought these Beech-Nut cigarettes?

A. Once.

X-Q. 18. You did not like the cigarettes, did you?

A. No.

X-Q. 19. As a smoker you know that different people have different tastes for tobacco; and you know that what one man might like another might dislike?

A. Certainly.

X-Q. 20. Do you sell Beech-Nut Packing Company's products?

A. Yes.

X-Q. 21. Do you sell chewing gum?

A. Yes.

X-Q. 22. Do you sell jam and bacon?

A. Yes.

X-Q. 23. Do you sell peanut butter and ginger ale?

A. Yes.

X-Q. 24. If you went into a store and wanted to purchase Beech-Nut chewing gum or ginger ale, would you be fooled by the salesman into taking a package of these cigarettes? (Mr. Cavanagh exhibits a package of P. Lorillard Company's cigarettes.)

A. I notice the package by looking at it, and after I have once seen the package I could tell it.

X-Q. 25. If you wanted a package of Beech-Nut chewing gum, would you take a package of cigarettes in the place of the gum?

A. No, of course not.

X-Q. 26. They are different things, are they not?

A. Yes.

Cross-examination closed.

Signature waived.

Deposition closed.

HENRY BUTCHER, a witness produced pursuant to notice and by agreement of counsel, first being duly sworn, deposes and says as follows, in answer to interrogatories propounded by Mr. Hinton:

Q. 1. Please state your name, age, place of residence and occupation.

A. Henry Butcher; 476 South street, Holyoke, Mass.; age, 52.

Q. 2. Give me your occupation.

A. Grocer and merchant.

Q. 3. Is your grocery store in the business part of Holyoke, Mass.?

A. I would say that it is in the center of things.

Q. 4. How many clerks do you employ in your store?

A. Seven.

Q. 5. Did you see the advertising of Beech-Nut cigarettes displayed in this territory, and if so, when did you first see it?

A. Along in the springtime, about April.

Q. 6. When you saw the advertising of the cigarettes, by whom did you believe these cigarettes were made?

A. By the Beech-Nut Packing Company.

Q. 7. Why did you think they were made by the Beech-Nut Packing Company?

A. Because I know of no other company by that name.

Q. 8. I call your attention to the brand on the cigarettes, Beech-Nut Exhibit No. 1. What company does that brand suggest to you?

A. It suggests to me the Beech-Nut Packing Company, Canajoharie, New York.

Q. 9. Do you now believe that these cigarettes are made by the Beech-Nut Packing Company?

A. No, I do not believe it now because I know different.

Q. 10. When did you first find out that they were not made by them?

A. I took it up with your salesman and expressed my sentiments in regard to the Beech-Nut Packing Company doing anything of that sort. That is how I received my information. I got it from the salesman.

Q. 11. What were your sentiments about that, Mr. Butcher?

A. My sentiments were that the Beech-Nut Packing

Company's standard was lowered by the fact that they were putting out cigarettes under their own label. I was very much surprised to think that they would do a thing of that sort. It seemed to me that the output of cigarettes and foods were decidedly at variance. One was beneficial and the other was not.

Q. 12. For how long a time did you believe that these cigarettes were put out by the Beech-Nut Packing Company after you first saw the advertising?

A. I could not say definitely as to that.

Q. 13. Would it be more or less than one month?

A. Well, I could not say. It might have been a month, and it might have been longer.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 14. Do you sell tobacco products and groceries in your store?

A. No.

X-Q. 15. Do you use cigarettes?

A. No.

X-Q. 16. You don't believe in people using tobacco?

A. I am always opposed to it.

X-Q. 17. You have never, of course, bought a package of Beech-Nut cigarettes?

A. No.

X-Q. 18. Did you ever closely examine a package of them?

A. No.

X-Q. 19. You did not notice the name P. Lorillard Company on the package?

A. I could not say that they were Lorillard Company's. I did not examine the package anyway. I did not know that the name Lorillard Company was on there until after Mr. Hover had informed me that the Beech-

Nut Packing Company did not make the cigarettes. I never examined the package.

X-Q. 20. You see the name P. Lorillard Company on that package? (Mr. Cavanagh exhibits a package of P. Lorillard Company's Beech-Nut cigarettes to Mr. Butcher.)

A. Yes, I see it now.

X-Q. 21. Do you know that they are large tobacco merchants?

A. Yes.

X-Q. 22. That name on the package would indicate it was one of their packages?

A. Certainly if I saw it, but I did not see it.

X-Q. 23. And you did not see it because you never examined the package?

A. No, I never examined the package.

X-Q. 24. Mr. Butcher, if a man came into your store and wanted a package of Beech-Nut cigarettes, would you sell him Beech-Nut chewing gum or Beech-Nut ham for cigarettes?

A. That looks to me like a foolish question. What do you take me for, a fool?

X-Q. 25. In other words, as you said before, you consider them widely different classes of goods?

A. I consider them diametrically opposed. One product is to eat and the other is for pleasure. I do not consider that smoking lets every man live. I do not consider it necessary to smoke in order to live. They get along without it in the Springfield jail, and they get along without it in the hospitals, but they cannot get along very well without their baked beans.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 26. Mr. Butcher, how do you regard the Beech-Nut products?

A. A No. 1. Highest thing possible to make. I haven't anything better in my store than the Beech-Nut Packing Company's goods, and don't see how they can make them any better.

Redirect examination closed.

Signature waived.

Deposition closed.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff,*
vs.
P. Lorillard Company, *Defendant.*
} In Equity No. 3056.

CERTIFICATE.

Commonwealth of Massachusetts, County of Hampden, ss.

I, Walter C. Ross, a Notary Public within and for the Commonwealth of Massachusetts, County of Hampden, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Franklin G. Neal, Clement W. Kirkpatrick, Martin T. Huggard, Louis Isenberg, Adelard J. Landry, Robert N. Broughton, George L. Carlton, Michael O'Connor, Henry LeClair and Henry Butcher were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Springfield, Massachusetts, beginning August 23, 1921; that each of the foregoing witnesses was by me duly sworn; that the tes-

timony of said witnesses was taken down in short-hand, under my supervision, by Minnie A. Hunter and W. F. O'Connor, stenographers well known to me, and thereafter reduced to typewriting; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at the offices of Chapin & Neal, 387 Main street, Springfield, Mass., beginning at 12 o'clock noon, August 23, 1921, and ending August 24th, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also further certify that I have been paid my fees as Special Examiner and for copies taken, in accordance with the attached bill, amounting to $76.20.

In witness whereof, I have hereunto set my hand and official seal, this 25th day of August, 1921.

WALTER C. ROSS,
Notary Public.

[SEAL.]

My commission expires April 16, 1922.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Depositions taken on behalf of plaintiff at New Haven, West Haven, Milford and Hartford, Connecticut, before Herbert J. Krause, a notary public and Court Reporter, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, beginning August 29, 1921.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for defendant.

JOHN A. PETERS (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John A. Peters; you are 52 years of age; your residence is 132 Thompson street, New Haven, Conn., and you are a salesman; is that correct?

A. Yes.

Q. 2. By whom are you employed, Mr. Peters; how long have you been employed by this concern, and in what capacity?

A. By the Beech-Nut Packing Co. since 1905, as a missionary and salesman, for about four years and three months, and as division manager in Connecticut since January 1st, a year ago, eleven years. I have been with them eleven years last January, last January, that's it.

Q. 3. In the course of your work for the Beech-Nut Packing Co., has that company, from time to time, come out with new products?

A. It has.

Q. 4. And have these products been always similar to previous products made by the Beech-Nut Packing Company?

A. No they weren't sometimes.

Q. 5. Can you give me an instance of what you mean by a product that is different from previous products?

A. Ginger ale and Beech-Nut gum are different than the products that we have previously put out like beef and peanut butter.

Q. 6. Do you remember when Beech-Nut chewing gum came out?

A. I think about ten years ago, I think it was.

Q. 7. And what was your experience with Beech-Nut chewing gum with respect to its sales?

A. Went off from the very start, the Beech-Nut name started it going, people tried it because it was Beech-Nut. I had no trouble selling it; in fact, we have been oversold on this product ever since nearly all the time.

Q. 8. What is the present situation with respect to Beech-Nut gum?

A. I am not supposed to accept or solicit orders for Beech-Nut gum.

Q. 9. When a man does order Beech-Nut gum and sends you the order, what do you do with it?

A. Forward it to the house.

Q. 10. And how much of his order does he get?

A. Well, we fill, I believe, about one-third of what he previously has been getting; we have been short ever since 1914, I believe; we got short and have been short ever since. He gets about one-third of what has previously been shipped.

Q. 11. How long ago did Beech-Nut ginger ale come out?

A. Why, I think between two and three years, nearly three years, I believe it is; I haven't the exact date.

Q. 12. And what was your experience in selling Beech-Nut ginger ale from the standpoint of its sales?

A. I had no trouble in selling it; everybody wanted to try it, because it was a Beech-Nut product.

Q. 13. Previous to coming out with Beech-Nut chewing gum, had the Beech-Nut Packing Company, to your knowledge, ever made a similar product?

A. Not that I know of.

Q. 14. Previous to coming out with Beech-Nut ginger ale, had the Beech-Nut Packing Company, to your knowledge, ever made a similar product?

A. No.

Q. 15. What has been your experience generally with respect to the selling of the various new Beech-Nut products which, from time to time, have come out?

A. It has been no trouble to put them down the first time, because everybody knew a Beech-Nut product; even a new man would go out and sell Beech-Nut goods; green men we call them.

Q. 16. And how are all these products marked?

A. With an oval label and Beech-Nut name at the top.

Q. 17. Mr. Peters, in your selling experience, what is the greatest sales instrumentality which you have encountered?

A. The Beech-Nut label.

Q. 18. When the Beech-Nut chewing gum was offered on the market, did you hear any comments, remarks or inquiries about it; if so, to what extent, and what was the nature of the remarks?

A. A great many people asked me how long we had been putting out chewing gum, how it was going, and if it was as good as the other products.

Q. 19. And did you hear that kind of remark frequently, or only a few times, or what?

A. Oh, plenty of times.

Q. 20. When Beech-Nut ginger ale was offered on the market, did you hear any comments, remarks or inquiries as you went about in your territory, about this product?

A. Why, the same inquiries that we had about the gum and other products—how long we had been putting it out, how it was selling, how the Beech-Nut Products would certainly make a good one. I sold a great many customers twenty-five case lots that I would probably not have sold more than one on account of its being a Beech-Nut product.

Q. 21. Were these twenty-five case lots the first sales?

A. The first sales, yes; I can give you several instances in this town where I sold twenty-five cases the first time.

Q. 22. When did the Beech-Nut cigarettes, similar to the package I now show you (Mr. Hinton showing witness a package of Beech-Nut cigarettes), which is in evidence in this case as Plaintiff's Exhibit No. 1, come on the market in this territory?

A. Why, I think I saw them this year first about either April or May; I think I saw them in Hartford first, although I am not sure.

Q. 23. Did you ever hear any comments, remarks or inquiries about these Beech-Nut cigarettes when they came on the market?

A. People asked me how long we were making cigarettes, how they were selling, and if they were as good as the other products.

Q. 24. I wish you would give me an estimate conservatively as to the number of times you have heard inquiries, comments or remarks of that kind and character since these cigarettes were first offered.

A. I should say five or six hundred times; in covering the whole State of Connecticut you hear a good many remarks.

Q. 25. Would you say that was a conservative estimate?

A. I should say it was.

Q. 26. Can you give me any special or particular instances of comments, remarks or inquiries of the character you have just mentioned? I want you to confine your answers to cases where you can state definitely where the remark was made, who made it, and just exactly what was said.

A. Well, about two weeks ago I was at S. D. Tendlers, wholesale candy people on George street, New Haven, and gave them all a stick of gum around. One of the men I gave it to said, "I don't want any gum, give me a Beech-Nut cigarette." I said, "Why do you ask me for a Beech-Nut cigarette?" He said, "Why, the Beech-Nut Packing Company make cigarettes, don't they, the same as the other goods?" I told him, "No," and he wanted to know how it was that they used our name.

Q. 27. Can you give any further instances?

A. Last Wednesday, when I was down in Milford, in front of Gardner's store, with Mr. Hinton, when I stopped the car and got out of the car, a man who was standing waiting for the trolley said, "Why don't you put out a near beer? The Beech-Nut Packing Company make nearly everything else and near-beer sure would sell." Mr. Hinton said to him, "What was the last product the Beech-Nut Packing Company put out?" He said a cigarette. This man's name is Harrison, and he has a clothing store in Milford; and another instance which happened about three weeks ago, but I don't know the man's name, happened in Waterbury. I was driving from Bank street into Center street when a man who stood on the curb looked at the name and then motioned me to stop, ran out on the street and came to the side of the car and asked me who to see

in regard to getting advertising for Beech-Nut cigarettes. He said he was a newspaper man. I said Beech-Nut cigarettes were not our product——

Q. 28. Just a minute, I don't want what you said particularly.

Mr. Cavanagh: Let him go on.

Q. 29. Well, go ahead.

A. He said he was a newspaper man and wanted the advertising. He didn't give me his name, and I didn't ask him.

Q. 30. You stated that you and I got out of a car in Milford, and also that a man called to you while you were driving your car in the instance you have just related. Is there any sign on that car?

A. There is a Beech-Nut sign on the door.

Q. 31. What do you mean by a Beech-Nut sign?

A. A copy of the trade-mark, containing the Beech-Nut label.

Q. 32. Do you know whether Beech-Nut scrap tobacco sells largely in this territory or not?

A. There is some of it sold here, not largely I should say.

Q. 33. Did you ever hear any comments, remarks or inquiries about Beech-Nut scrap tobacco?

A. A few times, when it first came out, they asked me about the making of Beech-Nut scrap tobacco, but not lately.

Q. 34. How does the Beech-Nut scrap tobacco sell in comparison, for instance, with chewing gum and other products of that character through this territory, do you know?

Mr. Cavanagh: That question is objected to as calling for an opinion on the part of the witness, who has not been shown in any manner qualified to answer.

Mr. Hinton: Question withdrawn.

Q. 35. To what extent have you seen Beech-Nut scrap tobacco displayed through this territory in comparison, for instance, with Beech-Nut cigarettes?

A. Well, in certain sections I have seen quite a little of it; in other sections I have seen hardly any of it.

Q. 36. Speaking generally, has the Beech-Nut scrap tobacco been displayed as much as the cigarettes?

A. Oh, no, not near.

Q. 37. I show you a photograph which I now mark for identification in this case as "Plaintiff's Exhibit No. 2, West Haven Drug Store Window Display," and ask you if you recognize the display shown in this photograph?

A. Yes, I saw that display myself.

Q. 38. Did you directly or indirectly have anything to do with putting that display of "Beech-Nut" gum boxes into that window?

A. No, I did not have anything to do with it. My first knowledge of it was when I saw it.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 39. As I understand it, you are division salesman for the Beech-Nut Packing Company?

A. In Connecticut, yes.

X-Q. 40. And how many years have you occupied that position?

A. Eleven years last January.

X-Q. 41. You say you have a Beech-Nut sign on your car?

A. Yes.

X-Q. 42. Will you just tell me the wording that appears on that sign; describe the sign in detail.

A. It says "Beech-Nut Packing Company" on it.

X-Q. 43. What sign is that?

A. On the car.

X-Q. 44. How long have you had that car?

A. Since—I have had the car since October, 1919, but I haven't had the sign on it all that time.

X-Q. 45. How long have you had the sign on it?

A. The sign was put on, well, about a year ago, I think.

X-Q. 46. Is that the car in which you drove Mr. Hinton from the Garde Hotel this morning?

A. The same one, yes.

X-Q. 47. That car has got a sign on it reading "Food Products," hasn't it?

A. I think it has, I didn't think of it before.

X-Q. 48. Never even took the trouble to notice it?

A. I didn't notice about the food products; it is an absolute fact, I didn't think of the food products when I spoke.

X-Q. 49. But you hadn't noticed it, had you?

A. I noticed the Beech-Nut Packing Company had it on there.

X-Q. 50. But you didn't notice the "Food Products" and have been driving the car for a year?

A. I didn't think of it.

X-Q. 51. When did you first notice these Beech-Nut cigarettes?

A. I think April or May.

X-Q. 52. 1920 or 1921?

A. 1921, yes, in the spring some time.

X-Q. 53. Do you smoke cigarettes?

A. No, very, very seldom.

X-Q. 54. Did you ever buy any of these Beech-Nut cigarettes?

A. I never bought any, I never smoked one.

X-Q. 55. But you never took a package in your hand, you never took the trouble to examine it, did you?

A. No, I don't think I have ever had a Beech-Nut package in my hand as far as I remember.

X-Q. 56. So it didn't occur to you, when you first saw this package, to examine it and see if it was made by the Beech-Nut Packing Company?

A. No, it didn't occur to me to examine it to see if it was made by the Beech-Nut Packing Company.

X-Q. 57. Just what is the procedure that is followed in informing you when the company brings out new products?

A. They usually notify me when they bring them out and send me a sample of the product. I usually get the new products before any of the other men.

X-Q. 58. Do they usually write you a notice?

A. They send me a letter.

X-Q. 59. So you didn't get any notice of the Beech-Nut cigarette from the Beech-Nut Packing Company?

A. I surely did not.

X-Q. 60. Do you know if the Beech-Nut Packing Company ever manufactured or marketed a tobacco product?

A. No.

X-Q. 61. Never heard of them putting out cigarettes?

A. No.

X-Q. 62. Or scrap tobacco?

A. No.

X-Q. 63. Whose name is on that package? (Mr. Cavanagh indicating Plaintiff's Exhibit No. 1.)

A. P. Lorillard & Co.

X-Q. 64. You don't find the Beech-Nut Packing Company's name anywhere on it, do you?

A. No, I do not.

X-Q. 65. If you went into a store and wanted to

purchase a package of Beech-Nut chewing gum or a bottle of Beech-Nut ginger ale, would you be confused or deceived into taking a package of Beech-Nut cigarettes in place of the gum or ginger ale?

A. If I asked for chewing gum would I take cigarettes?

X-Q. 66. Yes.

A. No, if I asked for gum I wouldn't take cigarettes.

X-Q. 67. Do you think a man who asked for gum would take cigarettes?

A. Why, a man who asked for cigarettes wouldn't take gum, no.

X-Q. 68. Or if he had asked for a jar of peanut butter he wouldn't take a jar of bacon?

A. Not unless he is a fool.

X-Q. 69. You spoke of the amount of scrap tobacco displayed in this territory, Lorillard scrap tobacco and Lorillard cigarettes. As a matter of fact, you don't know anything about the Lorillard business; what they do in Beech-Nut scrap tobacco or Beech-Nut cigarettes, do you?

A. I see the cigarettes in nearly all the stores that I go into where they have candy and tobacco. Now and then I see some scrap tobacco.

X-Q. 70. You don't know how much scrap tobacco Lorillard sells?

A. Absolutely nothing, I don't know anything about the Lorillard business whatever.

X-Q. 71. You say that during the course of conversation you had with some party, he asked you for a Beech-Nut cigarette when you offered him gum?

A. He did.

X-Q. 72. He said substantially, "I don't want the gum, but you can give me Beech-Nut cigarettes"?

A. He said, "I don't want the gum, give me a Beech-Nut cigarette."

X-Q. 73. What did you say?

A. Why do you ask me for Beech-Nut cigarettes?

X-Q. 74. What did he say?

A. The Beech-Nut Company put out Beech-Nut cigarettes.

X-Q. 75. What did you say?

A. I said, "You think so?" He said, "Sure." I said, "They do not," and then he wanted to know what right they had to use our label.

X-Q. 76. Then you informed him that the Beech-Nut Packing Company did not put out cigarettes?

A. Yes.

X-Q. 77. As far as you know, the Beech-Nut people had never put out a cigarette?

A. As far as I know.

X-Q. 78. That Beech-Nut label I asked you about; that is the one with the wide red band?

A. The Beech-Nut is an oval label and has Beech-Nut on it.

X-Q. 79. What else?

A. Well, it has a beech-nut with leaves, I think, below the name.

X-Q. 80. And it has a wide red band, has it not?

A. I think it has a red band.

X-Q. 81. And it has got printing on that red band?

A. I don't know if it has printing on a red band or a white band, I couldn't tell you.

X-Q. 82. The Beech-Nut Packing Company also sells other goods—other food products—but not under the Beech-Nut label to which you have just referred, does it not?

A. What do you mean?

X-Q. 83. I mean they have other brands of goods, food products, which the Beech-Nut Packing Company sells and upon which they do not use the Beech-Nut label which you have described generally?

A. They don't use Beech-Nut on the oval. They don't have it on the oval.

X-Q. 84. No, they don't have the oval with the word "Beech-Nut"?

A. I don't know, I can't think of any that don't have the oval labels that I have ever seen. There is some beef.

X-Q. 85. You mean Erie beef?

A. Erie Beef and Holly Beef.

X-Q. 86. They have a Mohawk brand, have they not?

A. They haven't got that in this part of the country, they have that in other territories. I don't think they have the name on it although they may, I couldn't say.

X-Q. 87. But they have the Erie brand and the Holly brand?

A. Yes, they have the Erie brand and the Holly brand.

X-Q. 88. And those are not sold under the Beech-Nut label?

A. No.

X-Q. 89. Beech-Nut is put on the better brand of goods?

A. Yes.

X-Q. 90. But does the words "Beech-Nut Packing Company" appear on those brands?

A. I think so.

Mr. Cavanagh: I think that is all.

Signature of witness waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if JEROME F. CARNEY was called, he would testify as follows:

I am of legal age and reside at 289 Dwight Street, New Haven, Connecticut. I am a university student, at present on my vacation. I know the people in a cigar store on Dwight Street, New Haven, Connecticut, and have spent considerable time there recently during my summer vacation. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, displayed in that and other stores. I have seen posters of these Beech-Nut cigarettes and the advertising in the newspapers about these cigarettes. I always believed that these cigarettes were a product of the Beech-Nut Packing Company, the same people who put out the chewing gum, bacon and other products. I was led to this belief by the appearance of the package.

I do not now believe that these cigarettes were made by the Beech-Nut Packing Company because I was told on August 24th, 1921, by Mr. Griffin, the salesman for the Beech-Nut Packing Company, that the Beech-Nut Packing Company had nothing to do with these cigarettes. I had never seen a package of the Beech-Nut scrap chewing tobacco before until I was shown one on August 25th, 1921.

On cross-examination by Mr. Cavanagh it is stipulated that the witness would testify as follows:

I have never purchased a package of Beech-Nut cigarettes or Beech-Nut scrap tobacco. I never examined a package of Beech-Nut cigarettes and therefore did not notice the name "P. Lorillard Co." which appears thereon, as I now see it does, and I have been informed by the Beech-Nut salesman, Mr. Griffin, that the Beech-Nut

Packing Company has nothing to do with the manufacture or marketing of these Lorillard Beech-Nut cigarettes. I would not confuse Beech-Nut chewing gum with Lorillard Beech-Nut cigarettes, nor be deceived into accepting the one product for the other.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if MARY W. GREGORY were called, she would testify as follows:

I am the wife of Mr. Gregory, who keeps a grocery store in Milford, Connecticut, and I work in the store. This store is a general grocery store and handles tobacco products. We do not handle Beech-Nut cigarettes. I have seen the Beech-Nut cigarettes advertised and I have seen them displayed in various windows and I always believed that they were a Beech-Nut Packing Company product, made by the same people who make the chewing gum and other products, until August 25th, 1921, when I was told by Mr. Hinton that these cigarettes were not a Beech-Nut Packing Company product. I have never seen a package of Beech-Nut scrap tobacco until Mr. Hinton showed me one on the date mentioned.

On cross-examination it is stipulated that the witness would testify as follows:

We do not sell Beech-Nut cigarettes in our store, nor do we handle the same. I have never purchased a package of Lorillard Beech-Nut cigarettes, have never made any particular examination thereof and therefore did not note the name P. Lorillard Co. appearing on the package.

I would not confuse chewing gum with Lorillard Beech-Nut cigarettes, nor be deceived into accepting the one product for the other.

JAMES J. CASHMAN, JR. (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is James J. Cashman, Jr., your age is 23, your occupation is a drug clerk and your place of business is 615 Howard Avenue, New Haven, Conn. Is that correct?

A. Yes.

Q. 2. Do you sell tobacco products in this drug store, Mr. Cashman?

A. Yes.

Q. 2*a*. When did you first see Beech-Nut cigarettes, similar to the package I now show you, which is in this case as Plaintiff's Exhibit No. 1? (Mr. Hinton shows witness Plaintiff's Exhibit No. 1.)

A. About April.

Q. 3. Did you put these cigarettes in this store for sale?

A. Yes.

Q. 4. Did you personally sell these cigarettes to customers?

A. Yes.

Q. 5. Did you take them out of the case or off the shelf and hand them to the customers?

A. Yes.

Q. 6. When you first saw these cigarettes, by whom did you think they were made?

A. The Beech-Nut Gum Company.

Q. 7. How long did you continue to believe that these cigarettes were made by the Beech-Nut gum people?

A. About a month or six weeks.

Q. 8. And during this month or six weeks were you selling the cigarettes over the counter?

A. Yes.

Q. 9. When were you first advised that these cigarettes were not made by the Beech-Nut gum people?

A. Why, I asked Mr. Griffin how long since he has been putting out cigarettes and he told me they were not putting out cigarettes. He said they had nothing to do with it.

Q. 10. Who is Mr. Griffin?

A. He is a salesman for the Beech-Nut people.

Q. 11. And what does he sell?

A. Beech-Nut gum and candy.

Q. 12. Have you ever seen a package of Beech-Nut scrap tobacco before I showed you this package the other day? (Mr. Hinton showed the witness a package of Beech-Nut chewing tobacco.)

A. No.

Q. 13. I call your attention to an oval brand on this package, which is marked in this case Defendant's Cross-Exhibit No. 1. Do you recognize that brand; if so, will you state what it is?

A. The same label as on Beech-Nut gum, on the gum.

Q. 14. That's all.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. I notice you have a candy counter and a cigar counter and they are both separated by the soda counter?

A. Yes.

X-Q. 16. You handle the gum at the candy counter, do you not, and you handle the cigarettes at the cigar counter near the front of the store?

A. Yes.

X-Q. 17. I also note that you have a show window,

which is completely dressed or filled with advertising of tobacco products?

A. Yes.

X-Q. 18. And I notice these products that are advertised in the windows are Beech-Nut cigarettes, Murad cigarettes, Mogul cigarettes and other products. Did you ever hear of the P. Lorillard Co.?

A. Yes, sir.

X-Q. 19. Did you ever buy goods from the P. Lorillard Co.?

A. Not directly, indirectly.

X-Q. 20. But you knew you were buying their goods?

A. Yes, yes.

X-Q. 21. And that window is practically dressed with P. Lorillard Company's goods, is it not?

A. If those cigarettes are made by those people. Those are Anargyros, is it Lorillard?

X-Q. 22. What is that cigarette you named?

A. Murad is made by Anargyros.

X-Q. 23. You don't buy tobacco yourself here, do you?

A. Yes, yes.

X-Q. 24. Did you ever smoke Beech-Nut cigarettes?

A. Yes, I have smoked them the other day for the first time.

X-Q. 25. But that was after you knew they were made by P. Lorillard Co., was it not?

A. He didn't tell me who they were made by, but he gave them to me the other day.

X-Q. 26. Did you ever take the trouble to examine a package of Beech-Nut cigarettes?

A. No, I didn't.

X-Q. 27. Never even glanced at them?

A. No, I didn't.

X-Q. 28. Never took the trouble to examine the package at all?

A. I never took the trouble to look at any of them. On the Murads the name is quite plain. I am quite sure I think S. Anargyros is on there.

X-Q. 29. But if you had noticed that name on there you would have noticed the name P. Lorillard on it, would you not?

A. Yes, I would.

X-Q. 30. And that would indicate that was a package of the P. Lorillard Company's tobacco?

A. Yes.

X-Q. 31. If you took the trouble to examine the package?

A. Yes.

X-Q. 32. I think you testified substantially that the label on the Beech-Nut scrap tobacco was like the label on the chewing gum?

A. As far as I remember.

X-Q. 33. Will you look at those two (Mr. Cavanagh indicating a package of Beech-Nut scrap tobacco and a package of Beech-Nut chewing gum)? Do you see on the Lorillard scrap tobacco package that red band that appears on the Beech-Nut gum package?

A. No.

X-Q. 34. And the red band oval on the Beech-Nut package has printing on it, has it not?

A. Yes.

X-Q. 35. And that is not on the single line oval of the package?

A. No.

X-Q. 36. And the beech-nuts in the center are not the same, are they?

A. No.

X-Q. 37. And you don't know of any gum package or any other Beech-Nut product package that has those red radiating lines like a sunburst, do you?

A. No, I do not.

X-Q. 38. And the name "Lorillard" appears on the Beech-Nut package?

A. Yes.

X-Q. 39. And that would indicate to you that is a product of the tobacco people, the Lorillard people, would it not?

A. Yes.

X-Q. 40. If a customer of yours came into this store and asked for a package of this Beech-Nut chewing gum, would you sell him a package of these Beech-Nut cigarettes in its place?

A. No.

X-Q. 41. And would you yourself, if you wished to purchase a package of Beech-Nut chewing gum, be confused or deceived into accepting a package of these Lorillard Beech-Nut cigarettes or a package of Lorillard Beech-Nut chewing tobacco in the place of chewing gum?

A. Not if I asked for chewing gum, no.

X-Q. 42. You would think a person was crazy that would confuse the two, do you not?

A. Yes, as far as I was concerned.

Signature of witness waived.

Deposition closed.

EDWARD J. GLYNN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Edward J. Glynn, your age 24, you are a clerk by occupation and your residence is 630 Campbell Avenue, West Haven, Connecticut, is that correct?

A. Yes, sir.

Q. 2. Have you ever seen Beech-Nut cigarettes like the package I now show you (Mr. Hinton shows witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1?

A. I have.

Q. 3. When did you first see these cigarettes that you remember?

A. Quite a while ago. A year or so, in the spring—last spring—sometime, I guess it was.

Q. 4. Did you ever buy and smoke any of these cigarettes?

A. I did.

Q. 5. When did you buy this first package of these cigarettes?

A. I don't remember just what store it was.

Q. 6. When?

A. Last spring, I guess.

Q. 7. Have you subsequently bought other packages?

A. Yes.

Q. 8. Why did you buy these cigarettes last spring?

A. Because they were Beech-Nut cigarettes, I thought they were made by this company, the Beech-Nut Company.

Q. 9. Have you purchased other Beech-Nut products?

A. Yes, and sold Beech-Nut products besides.

Q. 10. What has been your experience with the Beech-Nut products which you have bought; have they been satisfactory?

A. Absolutely in every way.

Q. 11. Do you know why you believed that these cigarettes were a Beech-Nut product?

A. Well, they are Beech-Nut brand. I thought they were the Beech-Nut brand, I think it is now, that is, it appears to be to me.

Q. 12. Do you now believe these cigarettes were put out by the Beech-Nut Packing Company?

A. No, I do know now that they are not.

Q. 13. When did you first find out they were not put out by the Beech-Nut Packing Company?

A. Last week when Mr. Green told me.

Q. 14. What did he tell you?

A. He told me they were not made by the Beech-Nut Company. And Friday or Saturday I bought a package to see who they were made by, but I didn't know then, I didn't know they were made by Lorillard, but I do now.

Q. 15. Did you find out when, as you have stated, you bought these cigarettes in the spring of this year in the belief that they were a Beech-Nut product, did you find that they came up to the standard of quality which you expected of a Beech-Nut product?

A. No, I did not.

Q. 16. Do you know the name of some brands of cigarettes which would seem to you to come up to the Beech-Nut standard of quality more than the Beech-Nut cigarettes?

A. Pall Mall, Philip Morris, or any good quality of cigarettes.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Mr. Glynn, when did you buy your first package of Beech-Nut cigarettes about?

A. Well, I couldn't give you any exact date you know.

X-Q. 18. Approximately.

A. Last spring, I guess it was.

X-Q. 19. When did you buy your last package?

A. The last package I bought Saturday, Friday or

Saturday, to find out who they were made by, that's all. I was always under the impression that these cigarettes were made by the Beech-Nut Company.

X-Q. 20. And how frequently, from the time you first bought them and last Saturday did you purchase these cigarettes?

A. I only bought one or two packages.

X-Q. 21. Did you ever hear of P. Lorillard Company?

A. I have.

X-Q. 22. They are a large tobacco concern, are they not?

A. I knew they made Level Head.

X-Q. 23. They are large tobacco manufacturers?

A. I don't know how large they are, I know they made Level Head.

X-Q. 24. Did you ever hear of Climax Plug tobacco, chewing tobacco?

A. I have seen it, yes, in red tin boxes.

X-Q. 25. When you first purchased that package of cigarettes (Mr. Cavanagh showing witness package of Beech-Nut cigarettes), did you look on it to see whose name was on it?

A. I did not.

X-Q. 26. If you had looked at that package you would have seen the Lorillard name on it, wouldn't you?

A. I presume I would if I had looked at the package, but I didn't look at the package, I looked at the Beech-Nut.

X-Q. 27. You didn't take the trouble to examine the package?

A. No, I didn't.

X-Q. 28. Had you looked at it, you would have seen the Lorillard name?

A. Yes, I presume so.

X-Q. 29. Do you know that the P. Lorillard Company have been in the tobacco business for many years?

A. No, not for many years; I knew they made Level Head.

X-Q. 30. How long do you know that they had been in the tobacco business, to your own knowledge?

A. Why, I should say around—well, six years. I worked in a grocery store and I seen the name.

X-Q. 31. You never heard of the Beech-Nut Packing Co. putting out any tobacco products?

A. No.

X-Q. 32. But you know Lorillard did put them out?

A. Yes.

X-Q. 33. But when purchasing tobacco, you prefer to purchase tobacco from a concern in the tobacco business rather than one in the food business?

A. Not absolutely.

X-Q. 34. Wouldn't you think they would know more of the tobacco business?

A. I would presume so.

X-Q. 35. Now, if you went into a store and wanted to purchase some Beech-Nut chewing gum or Beech-Nut bacon, would you be confused into taking a package of these Lorillard cigarettes instead of chewing gum or bacon? If a man tried to palm off on you cigarettes in the place of chewing gum or bacon would you be confused into taking cigarettes for gum or bacon?

A. Absolutely not.

X-Q. 36. You think a man would be crazy to do that?

A. I know if it said cigarettes on it, it wouldn't be bacon.

X-Q. 37. And you think a man who would take cigarettes for bacon would be crazy?

A. Yes, I would.

X-Q. 38. Now, you said a good cigarette was something along the line of Pall Malls or Philip Morris?

A. Yes.

X-Q. 39. Do you know what Pall Malls sell for?

A. Yes.

X-Q. 40. What is the price?

A. I think 25 cents.

X-Q. 41. Are there twenty in a package of Pall Malls?

A. Either ten or twelve.

X-Q. 42. Philip Morris about the same; are they a 25-cent cigarette?

A. Yes.

X-Q. 43. What did you pay for Beech-Nut cigarettes?

A. Fifteen cents.

X-Q. 44. And there are twenty in a package?

A. Yes.

X-Q. 45. Now, you didn't expect to get the same grade of cigarettes at the rate of twenty for fifteen cents as you would when you paid twenty-five cents for ten, would you?

A. Well, I don't know as I would, I wouldn't expect to get the same grade; I would expect to get a good quality if it has got that brand on it.

X-Q. 46. You have heard of the Hanan shoe, haven't you?

A. No, I haven't.

X-Q. 47. What high price shoe have you heard of?

A. High priced shoes?

X-Q. 48. Yes.

A. You mention some of them.

X-Q. 49. French, Shriner and Earner?

A. No.

X-Q. 50. Name a high priced shoe.

A. Well, the Walk-Over, you call that a high priced shoe or good quality shoe.

X-Q. 51. For instance, there is a Hanan shoe that costs twenty dollars. I don't know how high a Walk-Over shoe goes.

A. I see.

X-Q. 52. Well, I will put it like this. You know that manufacturers of high grade goods also have brands they sell of cheaper materials and of an inferior grade?

A. I don't know as to that.

X-Q. 53. You know a manufacturer has high grade goods and also lower grade goods?

A. Yes.

X-Q. 54. Yes. Do you mean to say he would sell the lower grade for the higher price goods?

A. No.

X-Q. 55. You take a Hanan shoe, for example, you can get a pair of Hanan shoes for $20 and you can get a pair of Hanan shoes for $16.

A. I see.

X-Q. 56. You can get a pair of Hanan shoes for $14.

A. Yes.

X-Q. 57. You know that it is customary in the trade for a man to charge different prices for his goods under different brands?

A. Yes.

X-Q. 58. In other words, you wouldn't expect to get a Packard automobile at the same price as a Ford?

A. No.

Mr. Cavanagh: I think that is all.

Cross-examination closed.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 59. Have you ever seen the Beech-Nut brand on any product put out by the Beech-Nut Company that was not a high quality product?

A. No.

Signature of witness waived.

Deposition closed.

ROBERT G. GREENE (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Robert G. Greene, your age is 49, and your occupation is the meat and grocery business at 735 Washington Avenue, West Haven, Connecticut. Is that correct?

A. Yes, sir.

Q. 2. I show you a package of cigarettes, which is in evidence in this case as Plaintiff's Exhibit No. 1. (Mr. Hinton showed witness package of Beech-Nut cigarettes.) Have you ever seen these cigarettes displayed or advertised in this town?

A. I have seen them advertised and displayed by a carton about that long (indicating) in the windows of stores.

Q. 3. When did you first see these cigarettes advertised?

A. About two months ago.

Q. 4. When you first saw these cigarettes advertised, by whom did you think they were made?

A. By the Beech-Nut Company.

Q. 5. Why?

A. The initials were the same, the letters were the same as the Beech-Nut product people, that is what drew my attention to the cigarettes, the letters looked so much like the other.

Q. 6. You refer to this oval device that is on the cigarette?

A. The oval device, yes.

Q. 7. How long did you continue to believe this the product of the Beech-Nut Packing Company?

A. Until I saw Peters about a month ago.

Q. 8. Who is Mr. Peters?

A. Drummer for the Beech-Nut Product Company.

Q. 9. Did he tell you that the Beech-Nut Product Co. did not make these cigarettes?

A. He said they had a suit against them now.

Q. 10. That's all.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 11. Do you sell tobacco, Mr. Greene?

A. No.

X-Q. 12. You do not handle Beech-Nut chewing tobacco?

A. No.

X-Q. 13. Did you ever see a package of it?

A. No.

X-Q. 14. You didn't look to see if the name Lorillard was on it?

A. No, I don't smoke.

X-Q. 15. Didn't you look at the cigarette package or advertising to see if the name Lorillard was on it?

A. No, all I see was Beech-Nut.

X-Q. 16. I show you a package of the Beech-Nut brand of chewing gum (Mr. Cavanagh showed the witness a package of Beech-Nut chewing gum). That has got a red oval on it?

A. Yes.

X-Q. 17. That has got a Beech-Nut leaf in the center?

A. Yes.

X-Q. 18. That has got a double beech-nut?

A. Yes.

X-Q. 19. If you went into a store and wanted to purchase some Beech-Nut chewing gum or Beech-Nut food

product, would you be confused or deceived into accepting a package of cigarettes in place of the gum?

A. I wouldn't, no, because I am experienced in the business myself.

X-Q. 20. You wouldn't confuse chewing gum with tobacco?

A. No.

X-Q. 21. You wouldn't confuse a tobacco product, such as cigarettes, with chewing gum or a food product, would you?

A. What do you mean, I wouldn't confuse chewing gum with cigarettes?

X-Q. 22. You wouldn't accept one for the other?

A. Oh, no, absolutely not.

Witness of signature waived.

Deposition closed.

NATHAN HAMMERMAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is Nathan Hammerman, your age is 29, your occupation is a drug clerk, is that correct?

A. Yes.

Q. 2. Where is your drug store located?

A. 1235 Whitney Avenue.

Q. 3. I show you a package of cigarettes (Mr. Hinton showed witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Have you sold these cigarettes in your store; if so, how long have you sold them?

A. I don't know, about six months, I guess. No, I don't know, about four months they have been out, haven't they?

Q. 4. When you first sold these cigarettes in your store, by whom did you think they were made?

A. The Beech-Nut people.

Q. 5. Can you name any other products made by these Beech-Nut people?

A. Peanut butter, popcorn, gum, that's about all. I know they make a whole line, but don't know all of them.

Q. 6. How long did you continue to believe that these cigarettes were made by the Beech-Nut people?

A. About two months.

Q. 7. Do you now believe they were made by the Beech-Nut people?

A. No.

Q. 8. How did you first find out they were not?

A. Some one come in and told me you people were suing the people who put them out. I don't know his name.

Q. 9. In this period of two months that you believed these cigarettes were made by the Beech-Nut people, did you sell them yourself to customers over the counter?

A. Oh, yes, surely.

Q. 10. Did you take them out of that—those shelves and hand them to the customers? (Mr. Hinton indicated.)

A. Yes.

Q. 11. Have you ever heard customers make remarks about Beech-Nut cigarettes to you over the counter; if so, what kind of remarks did they make, if you remember?

A. Just that they thought—that they wanted to know if the Beech-Nut people were putting out cigarettes, they wanted to know how long since the Beech-Nut people went into the tobacco business. I sell quite a lot of it now. It is the biggest 15 cent seller we got.

Q. 12. What did you tell customers who made remarks of this kind to you?

A. I guessed they were because I didn't know.

Q. 13. Did you ever have customers purchase gum in this store and ask for just Beech-Nut?

A. Yes.

Q. 14. And what did you do then?

A. I don't know, I always asked them whether they wanted the gum or cigarettes.

Q. 15. How often did this happen?

A. Every day now; well, not so much now because people kind of got hip to it, but up to a month ago anyhow.

Q. 16. You mean when you say they got hip to it you mean they have got hip to the fact that there are both cigarettes and gum?

A. Both cigarettes and gum, that is what I mean.

Q. 17. Do you know what caused you to believe that these cigarettes were made by the Beech-Nut people?

A. The name.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 18. From whom do you buy your Beech-Nut cigarettes?

A. All the tobacco jobbers, the New Haven Tobacco Co., Cozzilano down there on College Street. They buy through Anthony Pepe.

X-Q. 19. On this Plaintiff's Exhibit No. 1 (Mr. Cavanagh showed the witness a package of Beech-Nut cigarettes), you notice the name P. Lorillard on it, don't you?

A. I do now that you have called my attention to it.

X-Q. 20. You never did before?

A. I never took the trouble to examine it.

X-Q. 21. I understand you are still buying those Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 22. You have heard of P. Lorillard Co.?

A. Yes, sir.

X-Q. 23. They are a large tobacco concern?

A. Yes.

X-Q. 24. That name would naturally indicate to you that it was their product?

A. Yes, it would, if I had gone to the trouble to look at it I would have known it; otherwise I wouldn't know whether they were putting it out for the Beech-Nut people.

X-Q. 25. But you noticed the Lorillard name on the product?

A. Yes, but I never did before.

X-Q. 26. You don't find any Beech-Nut Packing Company on it, do you?

A. No, but I would have to look at it, to tell the truth.

X-Q. 27. You have purchased lots of other Lorillard products?

A. Oh, yes.

X-Q. 28. And you naturally presumed, being in the tobacco business, that that was a Lorillard brand?

A. No.

X-Q. 29. Not even with the name on it?

A. I do now, I see the name on it.

X-Q. 30. Since you have found out that it was not the Beech-Nut Packing Company's cigarette, you have still been purchasing it, haven't you?

A. Sure.

X-Q. 31. You said it was a good seller?

A. Yes, better, if anything, than it was.

X-Q. 32. You have quite a demand for it?

A. Yes, it is the biggest 15-cent seller we have.

X-Q. 33. You never deliberately had a customer come in and ask you for the Beech-Nut cigarette of the Beech-Nut Packing Company, and you deliberately sold him a Lorillard cigarette of the Beech-Nut brand?

A. No.

X-Q. 34. And you never had a customer come in this store and ask you for Beech-Nut chewing gum, and in place of Beech-Nut gum you have handed him cigarettes?

A. Oh, yes.

X-Q. 35. You have?

A. Oh, yes.

X-Q. 36. You have?

A. He asked for Beech-Nut, and I gave him a pack of Beech-Nut gum, because Beech-Nut gum is a whole lot better known than the cigarette.

X-Q. 37. My question was this: If a customer asked you for Beech-Nut gum you would not palm off a package of cigarettes in place of the gum?

A. Oh, no.

X-Q. 38. You would think the man was crazy to take it?

A. I wouldn't think very much of him, I probably would think I was much more crazy for giving it to him.

X-Q. 39. You yourself wouldn't be confused in buying Beech-Nut cigarettes when you wanted Beech-Nut gum?

A. Oh, no, if I know what they came in for, and know what they was after. Anyway, it is up to you people to take care of your trade-mark, not me.

Signature of witness waived.

Deposition closed.

JAMES J. MARRINAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Q. 1. Your name is James J. Marrinan; your age is 25; your residence is 228 Blatchley avenue, New Haven, Conn., and your occupation is a drug clerk; is that correct?

A. Yes, sir.

Q. 2. What is the name of this drug store in which you are now employed?

A. W. A. Hussion.

Q. 3. How long have you been in the drug business?

A. Nine years.

Q. 4. Have you, in that time, been selling to customers over the counter?

A. Yes, yes.

Q. 5. I show you a package of cigarettes (Mr. Hinton showed witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. When did you first see these cigarettes or see them advertised; do you remember?

A. Early in the spring of this year.

Q. 6. When you first saw these cigarettes and saw them advertised, by whom did you believe they were made?

A. The Beech-Nut people.

Q. 7. Can you name other products made by the Beech-Nut people?

A. Gum, ginger ale, peanut butter and bacon; I see that advertised.

Q. 8. Do you now believe these cigarettes are made by the Beech-Nut people?

A. No, no.

Q. 9. How did you first find out these cigarettes were not made by the Beech-Nut people?

A. I inquired of Mr. Griffin and he told me they were not made by the Beech-Nut people.

Q. 10. Who is Mr. Griffin?

A. Salesman for the Beech-Nut people.

Q. 11. I notice you have in this store a rack or set of shelves for cigarettes, containing cigarettes.

A. Yes.

Q. 12. And a shelf immediately below the rack there, forming part of the same cabinet, and on this shelf immediately adjacent to the cigarettes is the display of ginger ale.

A. That isn't on display; that will be put out of there in five minutes.

Q. 13. It is there now?

A. Yes.

Q. 14. Ginger ale, seeded raisins, Beech-Nut chewing gum, etc.; is that right?

A. Yes, that's right.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. Next to your tobacco rack or shelving this wall forms a continuation of the shelving, and you have on it pharmaceutical preparations and packages like patent medicines?

A. Patent medicines; that is what it is.

X-Q. 16. And your chewing gum is directly under the patent medicine counter?

A. Yes.

X-Q. 17. And it is not your tobacco counter?

A. No.

X-Q. 18. And your cigarette shelves are in line with your cigar counter?

A. Directly in back of it.

X-Q. 19. Directly in back of it; and your pharmaceutical shelves with your chewing gum, is back of your candy counter?

A. Yes, and here are three boxes of gum behind this case here.

X-Q. 20. What gums are these?

A. Apollo, Peppermint and Beeman's. The Peppermint and double mint is in back of it.

X-Q. 21. But the Beech-Nut chewing gum is not in the cigarette case?

A. No.

X-Q. 22. And your pharmaceutical preparations are on this shelf?

A. I call it the ledge.

X-Q. 23. They are on the ledge?

A. Yes, sir.

X-Q. 24. Did you ever hear of P. Lorillard Co.?

A. Yes, sir.

X-Q. 25. They are large tobacco manufacturers, are they not?

A. So I understand.

X-Q. 26. How long have you been buying Beech-Nut cigarettes?

A. I never bought them myself.

X-Q. 27. You never yourself bought a package of Beech-Nut cigarettes?

A. No.

X-Q. 28. How long have you been buying them here in the store, four or five months?

A. I have been out of here, I have been out of here nine months; I came back a month ago.

X-Q. 29. Yes. So they have been buying them since you came back?

A. They were here when I came, so I take it for

granted they were buying them for the last two or three months.

X-Q. 30. Are you buying them yet?

A. Yes, they are still selling them, they are here on the counter.

X-Q. 31. You have sold them over the counter?

A. Yes.

X-Q. 32. The name P. Lorillard Co. would naturally indicate to you a Lorillard product?

A. Yes.

X-Q. 33. You never heard a person come in here and ask for a package of Beech-Nut cigarettes made by Beech-Nut Packing Co., have you?

A. No.

X-Q. 34. If a person came into this store and asked you for a package of chewing gum made by the Beech-Nut Packing Company, that is, the Beech-Nut chewing gum, you wouldn't sell him a package of Beech-Nut cigarettes for a package of chewing gum?

A. In New Haven, no.

X-Q. 35. You would think he was crazy if he took it?

A. Yes, sure.

X-Q. 36. Well, if you went into a store and wanted a package of Beech-Nut cigarettes, you wouldn't be confused or deceived into taking a package of Beech-Nut chewing gum for Beech-Nut cigarettes?

A. No.

X-Q. 37. As I understand it, you never smoked Beech-Nut cigarettes?

A. No.

X-Q. 38. And you didn't examine the package?

A. No, not until the other day.

X-Q. 39. And you saw the name P. Lorillard Co. on it?

A. Yes.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 40. Was this examination made after your attention had been called to it?

A. After my attention had been called to it, yes.

Signature of witness waived.

Depositon closed.

T. J. BRANIGAN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is T. J. Branigan; you are employed in a shoe store at 1022 Chapel street, New Haven, Connecticut; you are 24 years of age, and your residence is 182 Wolcott street, New Haven, Connecticut; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Have you ever seen these cigarettes before on advertisements or posters of them; if so, when did you first see them?

A. It was last spring when they first came out I saw them displayed.

Q. 3. Did you ever buy a package of these cigarettes?

A. Yes, one package.

Q. 4. Why did you buy those cigarettes?

A. I thought they were a Beech-Nut product.

Q. 5. Had you previously bought Beech-Nut products?

A. Yes.

Q. 6. And what had been your experience with Beech-Nut products?

A. Very good.

Q. 7. What Beech-Nut products do you remember having bought prior to having bought the cigarettes?

A. Gum and caramels.

Q. 8. Do you know why you believed these cigarettes were a product of the Beech-Nut people when you bought them?

A. I saw the Beech-Nut name on them.

Q. 9. How long did you continue to believe that these cigarettes were a product of the Beech-Nut people?

A. Until about two weeks ago.

Q. 10. How did you first find out they were not?

A. I met Mr. Griffin one day and he gave me a sample of the gum, and I asked him for a sample of the cigarettes, and he informed me then that they weren't a Beech-Nut product.

Q. 11. Did these Beech-Nut cigarettes that you bought in the belief that they were made by the Beech-Nut people, come up to your expectations as to quality?

A. No, they didn't.

Q. 12. Did you ever buy any more Beech-Nut cigarettes after that first package?

A. No, I didn't.

Q. 13. Mr. Branigan, you have testified that these cigarettes came out in the spring, that you saw them advertised or displayed and that you bought a package of them. Can you give me an idea to what extent you saw the cigarettes advertised and displayed in the store windows between the spring and the time Mr. Griffin told you they were not the product of the Beech-Nut Packing Company?

A. I saw them on billboards and displayed on quite a few store windows, dummy boxes and like all different types of advertising.

Q. 14. Were these dummy boxes similar to these boxes of cigarettes that I have shown you?

A. Why, no, I can't say they were. I don't remember the dummy boxes very well.

Q. 15. What I mean is, were they dummy packages of cigarettes?

A. Yes, about like that.

Q. 16. And did you see posters and the like in the windows?

A. Yes.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Do you smoke cigarettes?

A. A great deal.

X-Q. 18. What brands do you use?

A. Mostly Lucky Strikes.

X-Q. 19. Did you ever smoke any Murads?

A. Yes, quite a lot.

X-Q. 20. Moguls?

A. Moguls, yes.

X-Q. 21. And Egyptian Deities?

A. Yes.

X-Q. 22. Those are all good brands, are they not?

A. Very good.

X-Q. 23. They are made by P. Lorillard Co.?

A. I never looked to see who they were made by.

X-Q. 24. Did you ever hear of P. Lorillard Co.?

A. Yes.

X-Q. 25. They are large manufacturers of tobacco products, are they not?

A. Yes.

X-Q. 26. If I tell you that they make those brands I have mentioned—Murads, Moguls, Egyptian Deities, you know Lorillard makes a good cigarette, don't you?

A. Yes.

X-Q. 27. And you also know, as a smoker, that differ-

ent people have different tastes as to tobacco—cigars and cigarettes?

A. Yes.

X-Q. 28. You know what you might consider to be a high grade brand, another man might consider very poor and inferior, do you not; that is true, isn't it?

A. Yes, sir.

X-Q. 29. So it is a matter of individual taste in cigarettes?

A. Absolutely.

X-Q. 30. Did you notice the name P. Lorillard Co. on this package of Beech-Nut cigarettes (Mr. Cavanagh indicating)?

A. I have noticed it in the past week or so.

X-Q. 31. You never took the trouble to examine that pack of cigarettes to see who did produce it, did you?

A. Never.

X-Q. 32. And when you were looking at all these advertisements and displays you never took the trouble to see whose name was on them?

A. No, I didn't. I just looked at the head line.

X-Q. 33. At the word Beech-Nut?

A. That's all.

X-Q. 34. You didn't pay any attention to the name at all?

A. No.

X-Q. 35. If you wanted a shirt like an Arrow shirt, you would see if Cluett-Peabody's name was on it, would you not?

A. Yes.

X-Q. 36. You have probably had that experience?

A. Yes, that is true.

X-Q. 37. You are in the shoe business?

A. Yes.

X-Q. 38. Have you ever heard of the Hanan shoe—H-a-n-a-n?

A. Yes.

X-Q. 39. You know that the Hanan Shoe Co., for example, like many merchandise concerns, will have a very high grade, expensive shoe, and then they will have shoes of other prices, not of the same superior grade?

A. Yes.

X-Q. 40. And that is so in a great many lines of business?

A. Absolutely.

X-Q. 41. So, for example, you, as a smoker, would not expect in all common sense, to get a package of twenty cigarettes at the price of 15 cents that would equal a pack of, say, Pall Malls, ten in a pack, for 25 cents, would you?

A. You wouldn't expect the same quality.

X-Q. 42. That is what I mean. The Pall Malls you would naturally expect, you would naturally expect the high price cigarette to be superior, as you would in the shoe business?

A. Yes.

X-Q. 43. I understood you to say you had purchased Beech-Nut chewing gum.

A. Chewing gum, yes.

X-Q. 44. Did you ever go into a store and ask the man for a package of Beech-Nut chewing gum and have him pass you out a substitute and you accepted a package of these Lorillard Beech-Nut cigarettes for the chewing gum?

A. No, not when I ask for gum.

X-Q. 45. You would be crazy if you took the cigarettes for the gum?

A. Yes.

X-Q. 46. You think that a man would be crazy or insane that would try to pass off cigarettes for gum, wouldn't you?

A. Yes, sure.

X-Q. 47. You never chew tobacco?

A. No.

X-Q. 48. You never heard of this Lorillard scrap tobacco like the package I show you (Mr. Cavanagh shows witness a package of Beech-Nut chewing tobacco)?

A. Only the same as the package, that is all; I didn't take any notice to see who put it out.

X-Q. 49. You didn't pay any attention to that?

A. No.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

STIPULATION.

It is stipulated between the parties, through their respective counsel, that if J. P. McHUGH were called, he would testify as follows:

I am of legal age, a lumberman by occupation, and my residence is at 12 East 31st street, New York City. I have seen the Beech-Nut cigarettes advertised, have seen them displayed in cigar store windows, and have seen posters of them in cigar store windows and on billboards since the spring of 1921. I believed until today, when I was advised by Mr. Griffin, a representative of the Beech-Nut Packing Company, to the contrary, that these cigarettes were a product of the Beech-Nut Packing Company, the same people who make chewing gum and other products.

On cross-examination the witness would state that he never paid any attention to the advertising and never examined it to see whose name was on it; that if he had examined this package to see whose product it was, and

seen Lorillard's name on it, he would recognize it as a product of the P. Lorillard Co. That he never personally purchased any of these cigarettes, never having had occasion to, and therefore never examined a package carefully. He has never smoked any of these cigarettes.

ADAM SATTIG (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Adam Sattig; you are the proprietor of a grocery store and also sell meat products in Milford, Connecticut. This store employes four people altogether. You are 58 years of age, and your residence is No. 3 Center street, Milford, Connecticut, while your store is located on River street, Milford, Connecticut; is that correct?

A. Yes.

Q. 2. I show you a package of cigarettes (Mr. Hinton showed the witness a package of Beech-Nut cigarettes), which is in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before or advertisements or posters displaying these cigarettes?

A. I did.

Q. 3. When did you first see these cigarettes approximately?

A. I should say that I saw them next door here on the shelf.

Q. 4. This year, was it?

A. Oh, sure, this year, but if in the last month or so I couldn't tell you the exact date, because I go in there every day at least.

Q. 5. Did he have the cigarette boxes on display in the store on the show case?

A. No, on the shelf.

Q. 6. When you first saw these cigarettes, Mr. Sattig, by whom did you believe they were put out?

A. By the Beech-Nut people.

Q. 7. What made you believe that, do you know?

A. Because on account of the name Beech-Nut showed similar to all their packages; the label.

Q. 8. How long did you continue to believe these cigarettes were a product of the Beech-Nut people?

A. Why, I can't tell exactly how long, but quite a while. Mr. Peters called my attention to the name Lorillard and afterwards I spoke to Mr. Peters about handling my starch. I got a Flossy starch, and I told him if they put up cigarettes and advertised them, they have got enough money to put my starch on the market.

Q. 9. Now, Mr. Sattig, you say you told Mr. Peters if they are putting up and advertising cigarettes that they could do it for your starch. What do you mean by "they"?

A. The Beech-Nut people.

Q. 10. You say after your attention had been called to the name Lorillard on these Beech-Nut cigarettes, you said what has just been quoted, to Mr. Peters the next time you saw him?

A. Yes.

Q. 11. Will you tell me just what you thought the situation was, after your attention had been called to the name Lorillard on this package?

A. I thought Lorillard was making and putting them up for the Beech-Nut Company, that is what I thought, because that is what I wanted to do for the starch.

Q. 12. In other words, you wanted Mr. Peters to distribute the starch?

A. Yes, because I didn't have the money to do so myself.

Q. 13. What did Mr. Peters tell you?

A. He told me that the Beech-Nut people had nothing to do with the cigarette. That was the first I was positive they did not. I knew him so long I thought he would know.

Q. 14. I show you a package of scrap tobacco (Mr. Hinton shows the witness a package of Beech-Nut chewing tobacco), which has been marked in this case as Defendant's Cross-Exhibit No. 1. What brand is that on that tobacco?

A. Beech-Nut.

Q. 15. Whose product would you take that to be?

A. Beech-Nut people.

Q. 16. Had you ever seen this tobacco before you were shown this package the other day?

A. No, not that one.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Do you sell Beech-Nut products here?

A. I do.

X-Q. 18. What do you sell?

A. Everything in their line; Beech-Nut catsup you will find up here (indicating), and if you will come up here I will show you. (Witness walked to front of store with Mr. Cavanagh.)

X-Q. 19. Do you sell tobacco products?

A. No, sir.

X-Q. 20. Did you ever sell them?

A. No, sir, that is years ago, but not here in Milford.

X-Q. 21. You never sold Beech-Nut cigarettes?

A. No, sir.

X-Q. 22. Do you smoke?

A. No, sir.

X-Q. 23. So you have never smoked Beech-Nut cigarettes?

A. No, sir.

X-Q. 24. When did you first have a package of Beech-Nut cigarettes in your hand?

A. I never had them in my hand. I looked at them on the shelf in the restaurant, that is the first package that I ever saw.

X-Q. 25. You looked at them at a distance?

A. No, they are right on the counter on the shelf.

X-Q. 26. So you didn't pick up a package and examine them?

A. No, I saw them from a distance.

X-Q. 27. You didn't take the trouble to see whose name was on that package?

A. No.

X-Q. 28. You know that P. Lorillard Company's name is on that package now?

A. Yes, I do now when my attention was called to it.

X-Q. 29. I have purchased from you a small glass of Beech-Nut brand peanut butter. You have also referred to the Beech-Nut scrap tobacco. Whose name appears on the scrap tobacco? (Mr. Cavanagh indicates.)

A. Lorillard, where you have just pointed.

X-Q. 30. So that would indicate to you that it was Lorillard's?

A. No, sir, it would not. It would indicate to me that Lorillard was putting them up for the Beech-Nut people.

X-Q. 31. Do you see their name anywhere on the package?

A. No, sir, Beech-Nut there and Beech-Nut there. (Indicating.)

X-Q. 32. On this small jar of peanut butter which I have purchased from you, you notice the name Beech-Nut Packing Company, do you not?

A. Yes, I see the Beech-Nut name right above there.

X-Q. 33. You see Beech-Nut Packing Company?

A. I do.

X-Q. 34. And the address, Canajoharie, N. Y.?

A. Yes, sir.

X-Q. 35. And on this small package of gum I show you (Mr. Cavanagh shows witness package of Beech-Nut chewing gum), you also see the name Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 36. And Canajoharie, N. Y.?

A. Sure.

X-Q. 37. But do you know of any product of the Beech-Nut Packing Company where their name don't appear on it?

A. That I couldn't say. We don't scrutinize the labels to such an extent, knowing they are Beech-Nut products and put them on our shelves, and sell them, as I sold you this peanut butter.

X-Q. 38. Do you know of any package of this peanut butter that has red radiating lines on it as this package of Beech-Nut scrap tobacco?

A. That I couldn't say, I don't remember any.

X-Q. 39. On this Beech-Nut Packing Company's label they have a wide red band, with the words Beech-Nut Peanut Butter printed on it, do they not?

A. That one, yes.

X-Q. 40. You don't find any red band on that package (Mr. Cavanagh indicating package of Beech-Nut scrap tobacco)?

A. No.

X-Q. 41. And the Beech-Nut label is a nut imposed on three green leaves?

A. That one, yes.

X-Q. 42. You didn't notice any such words on that?

A. No, that one changed my opinion as to the Beech-Nut goods.

X-Q. 43. And on this Lorillard package you find the words "Lorillard" and "Beech-Nut tobacco," do you not?

A. I do.

X-Q. 44. You never heard of the Lorillard Company?

A. Sure.

X-Q. 45. They are large tobacco manufacturers, are they not?

A. I suppose so.

X-Q. 46. You never heard of them in the trade?

A. Sure.

X-Q. 47. If you saw the name Lorillard on there you would know it was their product, wouldn't you? And came from their factory?

A. No, sir, I would not think they were putting it up, but that a large concern was putting it up for other people. I was with Lewis De Groff & Son of New York City and there is their goods and labels and we had this man put up our jellies and the other man put up their goods and from my experience I was satisfied it was a product of the Lorillard Company put up for the Beech-Nut people.

X-Q. 48. Then your theory would be that the Lorillard Company, the tobacco concern, put out a tobacco with their name on it for the Beech-Nut Packing Company and without the name Beech-Nut Packing Company appearing anywhere on that label? Now, as I cannot conceive of that situation, would you kindly get me a can which you have spoken of where any such condition would exist? (Witness got a glass jar.)

X-Q. 49. Now you have handed me a can of sweet corn which I will gladly purchase, and it bears on it the name of Lewis De Groff & Son, wholesale distributors, New York. Now whose goods are these?

A. Mine, I paid for it from Lewis De Groff. You mean who put it up?

X-Q. 50. Yes.

A. Well, you shouldn't ask me that. Who put it up for them I couldn't say but the U. S. Register office will tell you because there is registered the U. S. patent on it.

X-Q. 51. Does the name of the manufacturer or party that put those goods up appear anywhere on that label?

A. No.

X-Q. 52. There is absolutely nothing to indicate where that can came from; the only thing that appears on there is De Groff's name, is it not?

A. De Groff's.

X-Q. 53. Your name doesn't appear on it, does it?

A. Not that I know of, I don't see it there.

X-Q. 54. So that, as far as the public is concerned, looking simply at this label, they wouldn't know the concern that manufactures this; whether it was a high grade corn concern or whether it was from some inferior factory or they wouldn't know it was coming to a first class store like yours or whether it was coming to some store that would sell seconds. All that appears on there is Lewis De Groff & Sons?

A. Yes.

X-Q. 55. So you couldn't tell, as far as that went, where the corn came from?

A. Only that that corn was put up by Lewis De Groff.

X-Q. 56. I am not in any way trying to confuse the situation, Mr. Sattig, I simply want to get a clear explanation. On this package of scrap tobacco we have the name Lorillard, which is, as you know, a tobacco house, and they manufacture tobacco. The Beech-Nut

Packing Company's name does not appear on this so there is nothing to indicate on that package that Lorillard ever put out anything for the Beech-Nut Packing Company. On the contrary, in this case of the can of sweet corn there is nothing to indicate the manufacturer, the same as the Lorillard Co. would be for the tobacco, but there is something to indicate the distributor, Lewis De Groff & Son. Now, my point is that you don't know of any case of this sort where the manufacturer's name would appear on it and not the distributor where it was made for the distributor, do you?

A. No, I couldn't tell you that.

X-Q. 57. That is all on that point.

A. You will agree with me that Lewis De Groff has got the label registered, won't you?

X-Q. 58. I absolutely will not, as a patent lawyer, I will not.

A. (Witness gets a jar of jelly from shelf.) I know the party that puts this up because I have been in that place. I just want to see if they have got it on there.

X-Q. 59. Mr. Sattig, if you went into a store and wanted to purchase some Beech-Nut peanut butter or Beech-Nut jellies or Beech-Nut gum and you asked the clerk for peanut butter or jellies or gum, would you be confused or deceived into taking a package of this Beech-Nut scrap tobacco or Beech-Nut cigarettes for jelly or gum?

A. I don't quite understand that question.

X-Q. 60. I will just explain that. The point is this, that if you went into a store and said to the man, "Give me a package of Beech-Nut jelly" or Beech-Nut gum and that man handed you out a package of Beech-Nut cigarettes, you would not take the package of Beech-Nut cigarettes for the gum or jelly?

A. I would think I had Beech-Nut in my hand if the name Beech-Nut was on there I would be satisfied that the Beech-Nut people were putting it out and would purchase it for that.

X-Q. 61. If you went into a store and wanted a package of Beech-Nut gum and you were handed a package of Beech-Nut cigarettes, would you take the Beech-Nut cigarettes in place of the gum?

A. Certainly not, if I asked for the gum.

X-Q. 62. You would know the difference between the cigarettes and the gum immediately?

A. Certainly.

Cross-examination closed.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 63. On one of the questions of the cross-examination I understood Mr. Cavanagh to say that there was nothing on this package of Beech-Nut scrap tobacco to indicate that the Beech-Nut people put it out. Do you agree with that statement?

A. No, sir, I take it that the Beech-Nut name would be Beech-Nut goods.

Re-Cross-Examination by Mr. Cavanagh.

R-X Q. 64. You mean the word Beech-Nut?

A. The word Beech-Nut on there would satisfy me it was a Beech-Nut product.

R-X Q. 65. But you don't find the name Beech-Nut Packing Co., do you?

A. I didn't scrutinize the label as closely as that. If I went into a store to buy a package of Beech-Nut gum I would not take any cigarettes, but if I bought a package of Beech-Nut tobacco I would think it was their product, and I am still of the opinion that the Lorillard Company are putting out the cigarettes for the Beech-Nut people.

R-X Q. 66. In spite of the fact that you found Lorillard's name on it?

A. Sure, that wouldn't make any difference any more than this starch here if I had it put up under the Beech-Nut name.

R-X Q. 67. So that the public would be led to believe this was a product of the Beech-Nut Packing Company?

A. Not at all, I would say that it was the Beech-Nut people that were putting out my goods.

R-X Q. 68. How long have you known the Lorillard people to put out Beech-Nut tobacco?

A. As I said before, I don't know how long.

R-X Q. 69. Do you know how many years they have been putting it out?

A. No.

R-X Q. 70. Do you know how long Beech-Nut tobacco has been on the market?

A. No, sir, I don't.

R-X Q. 71. Never heard of it before?

A. I have not seen it before.

R-X Q. 72. You would be surprised if you found they had been putting it out for years?

A. No, sir.

Mr. Hinton: I object to this as immaterial and irrelevant.

The Witness: If you don't—— I haven't got time to stand here all day and answer these questions. I have my work to do.

Mr. Cavanagh: Well, if you don't want to answer these questions here, I'll see that you have an opportunity to do so in the United States court.

Mr. Hinton: I would be very glad to have the witness place himself fully at the disposition of the opposing counsel, but this is degenerating into

an argument between the counsel and witness; for instance, on the question of whether the witness knows how long the scrap tobacco has been put out. He has testified that he has never seen it before and that would seem to me to end the proposition.

Mr. Cavanagh: This testimony is being taken in the witness's store. Mr. Cavanagh has endeavored to accommodate Mr. Hinton by coming to examine the witness at the store. As the witness is under cross-examination and as this is a suit pending in the United States District Court for the District of New Jersey, the defendant is entitled to avail himself of his rights under the laws and statutes in such cases made and provided. If Mr. Hinton has any objection to the nature of the questions he shall simply enter his objection on the record and let the court pass on the same.

However, in view of the attitude assumed by the witness, counsel refuses to cross-examine further and the deposition is closed so far as he is concerned. The Beech-Nut peanut butter purchased from the witness is marked for identification as Defendant's Cross-Exhibit No. 7.

The deposition of the witness, so far as his opinion of the Lorillard scrap tobacco and the Beech-Nut cigarette is concerned, is objected to as merely opinion made without any support.

Mr. Hinton: The witness has just expressed a perfect willingness to answer any number of questions. My only point is that I don't think that counsel and the witness should engage in argumentative matter about how long Lorillard has put out the scrap tobacco. The witness is proffered to counsel for further cross-examination if he desires to cross-examine him further and is not in a hos-

tile frame of mind. On the contrary, he is, at the present moment, engaged in an amicable and friendly talk with opposing counsel.

Mr. Cavanagh: Opposing counsel tries to make it a habit of being amicable and friendly with every person in this universe when possible.

Mr. Hinton: So does the witness.

Signature of witness waived.

Deposition closed.

SANFORD HAWKINS (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Sanford Hawkins, your age is 67, you are the proprietor of a grocery and general store at 53 Broad Street, Milford, Connecticut, and your residence is 45 Broad Street, Milford, Connecticut, is that correct?

A. Yes.

Q. 2. Do you handle tobacco products in this store, Mr. Hawkins?

A. I do.

Q. 3. Have you sold Beech-Nut cigarettes, similar to the package I now show you (Mr. Hinton shows witness a package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1, in this store?

A. Yes.

Q. 4. How long have you sold these cigarettes here?

A. Well, I started in last spring, about the spring of 1921.

Q. 5. When you first saw these cigarettes, by whom did you believe they were put out?

A. The Beech-Nut Packing Co.

Q. 6. Do you know what led you to that belief?

A. Well, the name Beech-Nut on the goods. Of course, I hadn't seen the package at that time, but they were a demand for them so we put them in and as I sold them I thought first of course, I thought they were put up by the Beech-Nut Packing Company.

Q. 7. Yes.

A. And afterwards, when I came to open them, I found out they were packed by the Lorillard people.

Q. 8. Where did you get your information that they were packed by the Lorillard people as you opened them?

A. By looking over the package.

Q. 9. You mean the carton in which the cigarettes were packed?

A. Well, I don't recall that, but I know I examined the package and I see there was a similarity of the label that the Beech-Nut Packing Company uses and that led me to believe they were the packers of it, but I soon found out by the name they were packed by other parties.

Q. 10. You have referred to the package—what I want to get at is that the container that holds a number of packages of cigarettes in which the cigarettes come.

A. The small package?

Q. 11. Well, how many individual packages of cigarettes are in that package do you know, about?

A. I think there are ten. I don't recall now whether there was or not. I couldn't say positively but of course when I opened up the package, then I——

Q. 12. Was there a slip in the package?

A. I think there was at that time.

Q. 13. I show you a package of Beech-Nut scrap tobacco (Mr. Hinton shows witness package of Beech-Nut

chewing tobacco), which has been marked for identification in this case as Defendant's Cross-Exhibit No. 1. I call your attention to the brand on it; have you ever seen that brand before?

A. Yes, I have seen the same or one similar to that on the Beech-Nut Packing Company's goods.

Q. 14. Yes. Had you ever seen this package of scrap tobacco before or any like it before I showed you this one?

A. No, that is the first time.

Q. 15. Whose product would you take that to be?

A. From just the appearance of it, the Beech-Nut Packing Company's.

Mr. Hinton: That is all, you may cross-examine.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. Mr. Hawkins, do you buy tobacco products direct from the manufacturer?

A. No.

X-Q. 17. You know of the Lorillard Company, don't you?

A. Yes.

X-Q. 18. It is a large and well known tobacco concern?

A. Yes.

X-Q. 19. And this name, P. Lorillard Co., on that package indicated to you, when you examined it, that it was a Lorillard product?

A. Yes.

X-Q. 20. And the Lorillard name also appears on this package of Beech-Nut scrap tobacco?

A. Yes.

X-Q. 21. That would indicate to you that it was a Lorillard product, would it not?

A. Yes.

X-Q. 22. And on this question of the label, I show you a package or jar of peanut butter, which has got on it the Beech-Nut Packing Company, Canajoharie, N. Y. Do you recognize that to be the label of the Beech-Nut Packing Company?

A. Yes.

X-Q. 23. That contains a wide red label with printing on it, does it not?

A. Yes.

X-Q. 24. There is no such label on Lorillard products, is there?

A. No.

X-Q. 25. You know it is very common in the trade, especially in connection with packaged goods, to use an oval or a circle or the like on the package?

A. Well, it is quite commonly done.

X-Q. 26. That is a practice in the printing of the label?

A. Well, the Armour people, they use an oval label on theirs.

X-Q. 27. And this package here has the words on it, chewing tobacco, has it not?

A. Yes.

X-Q. 28. And you don't find that on any Beech-Nut label you know of?

A. Chewing tobacco?

X-Q. 29. Yes.

A. No, not chewing tobacco.

X-Q. 30. You never heard of the Beech-Nut Packing Co. putting out a tobacco product?

A. I never had up to that time, but of course they were putting out so many other things all the while I wasn't surprised they were getting out the cigarettes and I supposed, until my attention was called to that, they were putting up the cigarettes.

X-Q. 31. But the products you have been handling of theirs have been food products?

A. Yes, food products altogether excepting chewing gum. I don't know if that is classed in among the food.

X-Q. 32. And the various products which you have, except chewing gum, which you don't know how to classify, all these products have been along the food product line, haven't they?

A. Yes, altogether, with the exception of the chewing gum, I guess.

X-Q. 33. Now, Mr. Hawkins, if a man came into your store and asked you for a package of Beech-Nut chewing gum or asked you for a jar of peanut butter, you wouldn't hand him a package of this Lorillard's scrap tobacco or a package of the Lorillard cigarettes for peanut butter, would you?

A. Oh, certainly not.

X-Q. 34. And you yourself wouldn't be deceived if you wanted to purchase the peanut butter or chewing gum, you wouldn't let a man in the store palm off tobacco on you, would you?

A. Well, now, of course after I found out——

X-Q. 35. Answer my question.

A. Well, of course, after I knew these goods were put up by the Lorillard people, of course I knew that that label did not stand for their goods, the Beech-Nut.

X-Q. 36. The Beech-Nut Packing Company?

A. No, no, because they are—well, there was a similarity, of course, in the two—between the regular label that they have and that one, and they was so near alike that it would deceive me at first until I found out who packed the goods, you know.

X-Q. 37. Will you say that, looking at those labels, that that label on the scrap tobacco isn't like that label (Mr. Cavanagh indicating)?

A. It was so near to it it deceived me at first.

X-Q. 38. The name Beech-Nut?

A. The name Beech-Nut, and I wondered how they could use that and everything so closely resembling that without the permission from the Beech-Nut people, but I was afterwards told by parties who said that they knew—who said that they had given the Beech-Nut people a large amount of money for the use of that label.

X-Q. 39. The label on the scrap tobacco is not the same as the label on the peanut butter?

A. Well, of course, when you come to examine it closely there is a similarity, of course, and a little difference.

X-Q. 40. But my original question was back there if you wanted to buy some peanut butter or chewing gum, would you take this scrap tobacco or cigarettes for chewing gum or peanut butter?

A. Oh, no, no.

X-Q. 41. Did you ever see any Beech-Nut product with those red radiating lines or the like on that scrap tobacco package?

A. No, no, I don't recall any.

X-Q. 42. You never saw any Lorillard cigarettes with that wide red band and the printing on it, did you?

A. No, I haven't seen any.

X-Q. 43. And you never saw a Beech-Nut Packing Company product with the two crossed beech-nuts like that, did you; like is on the cigarette package (Mr. Cavanagh indicating)?

A. No, I haven't seen any, but they have something very similar.

X-Q. 44. They have a single beech-nut imposed on three green leaves, haven't they?

A. Well, I never noticed—yes, that is the one (witness indicating).

X-Q. 45. Do you smoke cigarettes yourself?

A. No.

X-Q. 46. So you never bought the Lorillard cigarettes to smoke yourself?

A. No.

X-Q. 47. But you have bought their other products and know them to be good sellers?

A. Yes, we have handled their products almost ever since I been in business.

X-Q. 48. And sell a good line of goods?

A. Yes, always.

X-Q. 49. And since you found out that Lorillard put out those cigarettes you have still stocked them?

A. Yes.

X-Q. 50. And have purchased them from time to time and know they are Lorillard's?

A. Yes.

X-Q. 51. And if a customer came in and asked you for some of them you would be interested enough to tell him, wouldn't you——

A. Yes, I think the general public all know that name ——

(Question continued.) ——that they were Lorillard cigarettes?

A. Yes, as far as that goes.

X-Q. 52. I think that is all.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 53. Have you talked to anybody who came into your store about these Beech-Nut cigarettes?

A. No, I can't say that I have.

R-D. Q. 54. Has anybody who comes into your store and wants to buy these cigarettes, told you he thinks they are made by the Lorillard Company?

A. No, they just simply come in and ask for a package of Beech-Nut cigarettes, and I hand them out.

R-D. Q. 55. And you have not discussed this question of who makes these cigarettes with the people who come into the store?

A. No, I don't recall.

R-D. Q. 56. You don't recall any conversation with anybody about it?

A. Only in regard—I know I had several times reference to—I thought they would have to get a permit from them to use that label. That's all I have recalled speaking about.

R-D. Q. 57. Then your statement that the general public knows about this is just a guess on your part?

A. As far as I know, as far as our customers are concerned. When I say general public, of course, that had not ought to have been so wide, it covers too much.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

ALEXANDER C. GARDNER (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. You are the proprietor of a grocery and confectionery store, which sells tobacco products, in Milford, Connecticut; your age is 37; your residence is 11 Cherry street, and your store is located at 28 Baldwin street, Milford, Connecticut; is that correct?

A. Yes.

Q. 2. How many people do you employ in this store altogether?

A. This one here?

Q. 3. No, both, altogether.

A. Nine.

Q. 4. Do you sell tobacco products in this store?

A. Yes.

Q. 5. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Do you remember when you first stocked these cigarettes in this store?

A. When I did?

Q. 6. Yes.

A. I don't remember exactly.

Q. 7. Do you remember whether it was spring, summer, or fall?

A. Well, let's see; I should say we got those in about the middle of winter, probably a little later.

Q. 8. In the early spring?

A. Yes, in the early spring.

Q. 9. This year?

A. Yes.

Q. 10. When you first saw these cigarettes, by whom did you believe they were made?

A. The Beech-Nut Packing Co.

Q. 11. Why did you believe that?

A. From the label, the Beech-Nut label.

Q. 12. Do you refer to this oval device on the front of the package of cigarettes?

A. Yes.

Q. 13. Do you now believe they are made by the Beech-Nut Packing Company?

A. No.

Q. 14. When did you first find out they were not made by the Beech-Nut Packing Company, do you remember?

A. There was a salesman, who informed me they were not a Beech-Nut product.

Q. 15. Have you ever had any customers make any remarks to you over the counter about these cigarettes; if so, will you state the nature of the remarks?

A. Why, they said if they were as good as the other Beech-Nut products they would be all right.

Q. 16. Can you remember any other remarks that was made over the counter?

A. Well, let's see, my mind is so full of other things—I was just trying to get these orders out.

Q. 17. All right. Never mind that. Have you, since you knew who made these cigarettes, ever told customers they were a product of the Beech-Nut Packing Company?

A. No, but I have had to inform them they were not a product of the Beech-Nut Packing Company.

Q. 18. How often has this happened; I don't mean the exact number, but has it been frequent or not?

A. Quite frequent when they first came out.

Q. 19. Yes. Have you ever seen a package of this scrap tobacco, which is in this case, marked for identification as Defendant's Cross-Exhibit No. 1 (Mr. Hinton shows witness package of Beech-Nut chewing tobacco), before I showed you one the other day?

A. Not until you showed it to me.

Q. 19. I call your attention to the oval panel on the front of this package of scrap tobacco. Have you ever seen that device before?

A. On all Beech-Nut products.

Q. 20. Whose product would you take this to be?

A. Beech-Nut Packing Company from the label.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 21. I understand you first bought the Beech-Nut cigarettes several months ago, did you?

A. Yes.

X-Q. 22. Are you still buying them?

A. Yes.

X-Q. 23. From whom do you buy them?

A. New Haven Tobacco Co.

X-Q. 24. You don't buy from the manufacturer?

A. No.

X-Q. 25. You have bought at least several orders of these cigarettes, I presume, since you first knew they were Lorillard's?

A. Yes, I buy them in one thousand lots.

X-Q. 26. And it is a good seller?

A. Yes.

X-Q. 27. You know of the Lorillard Co.?

A. Yes.

X-Q. 28. You know they are large tobacco manufacturers?

A. Yes.

X-Q. 29. And you have handled their goods of various kinds?

A. Yes.

X-Q. 30. Have they always been very satisfactory?

A. Yes.

X-Q. 31. Lorillard has a good reputation as a tobacco concern?

A. As far as I know; of course I never dealt direct with them, but——

X-Q. 32. You have always handled their goods?

A. Yes.

X-Q. 33. And have handled a lot of their brands?

A. Yes.

X-Q. 34. The name Lorillard always appears on the package, does it not?

A. Yes.

X-Q. 35. And that would indicate it was a Lorillard product?

A. Well, the name is so small at first you wouldn't notice it.

X-Q. 36. But if you took the trouble to examine it, you would notice it, would you not?

A. Yes, I would notice it; of course I can read.

X-Q. 37. You never heard of the Beech-Nut Packing Company putting out a tobacco product, did you?

A. No.

X-Q. 38. You never sold any Beech-Nut Packing Co. tobacco products, did you?

A. No.

X-Q. 39. Do you sell Beech-Nut products?

A. Yes, sir.

X-Q. 40. Of the Beech-Nut Packing Co.?

A. Yes, sir.

X-Q. 41. What do you sell?

A. Jellies, jams, chewing gum, beans, catsup, jelly sauce.

X-Q. 42. That's enough. If a person came into your store and asked you for any of those products of the Beech-Nut Packing Company that you have just named, you wouldn't hand him a package of those Beech-Nut cigarettes in the place of the stuff he asked for, would you?

A. No.

X-Q. 43. And you yourself, if you went into a store and wanted some Beech-Nut chewing gum or asked a man for Beech-Nut jelly, you wouldn't walk out of that store with a package of Beech-Nut cigarettes?

A. Not if I wanted jelly.

X-Q. 44. You wouldn't confuse the two?

A. If a man asked for jelly of any kind, I wouldn't hand him cigarettes of any brand.

X-Q. 45. I show you a can of peanut butter, bearing the Beech-Nut label (Mr. Cavanagh shows witness jar of

peanut butter made by the Beech-Nut Packing Co.), which is in this case, marked for identification Defendant's Cross-Exhibit No. 7. You recognize that label, do you not?

A. Yes.

X-Q. 46. Whose label is that?

A. The Beech-Nut Packing Company's.

X-Q. 47. The name Beech-Nut Packing Company appears on it, doesn't it?

A. Yes.

X-Q. 48. And consists of a wide red band, with printing on it?

A. Yes.

X-Q. 49. With the name?

A. Yes.

X-Q. 50. And has in the center a single beech-nut with leaves superimposed on it?

A. Yes.

X-Q. 51. You don't find on that scrap tobacco a wide red oval band, with a single beech-nut, do you?

A. No.

X-Q. 52. And you know that, from your experience in the grocery and other business, you are in the store business, that lots of products have ovals on the packages and have an oval on which the name appears, do you not?

A. Why, there is some, yes.

X-Q. 53. For instance, Armour's Veribest, and others, have an oval, don't they?

A. Yes.

X-Q. 54. You don't recall any Beech-Nut product having any of those red radiating lines like shown on that package, do you? (Mr. Cavanagh indicating package of Beech-Nut chewing tobacco.)

A. No.

X-Q. 55. That cigarette package hasn't that wide red band, with the name shown on it, has it?

A. No, but I didn't remember the Beech-Nut having a red band until you called my attention to it.

X-Q. 56. You know the oval is very old in the business?

A. Yes, but an oval with a beech-nut is very different from an oval without a beech-nut.

X-Q. 57. But I understood you to say you never knew of the Beech-Nut people to put out any tobacco.

A. No.

X-Q. 58. You have never sold any of their tobacco?

A. No, but they have put out so many new articles lately that it was no surprise to me to see a Beech-Nut cigarette. I classed it as a Beech-Nut product.

X-Q. 59. All the Beech-Nut products you have known have been in the nature of food products, have they not?

A. Yes.

X-Q. 60. Did you ever buy any of this Beech-Nut scrap tobacco yourself?

A. Yes.

X-Q. 61. You don't handle the Beech-Nut scrap chewing tobacco?

A. No.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 62. You say you handle Beech-Nut chewing gum?

A. I do.

R-D. Q. 63. You said that chewing gum is a food product?

A. I don't know that it is exactly a food.

R-D. Q. 64. Where do you keep your chewing gum here?

A. Right on top of the case. You got the Beech-Nut gum out of it.

R-D. Q. 65. Yes. Is that case adjoining——

A. Right next to the cigar case.

Mr. Cavanagh: But you keep the chewing gum on top of your candy case, do you not?

The Witness: Yes.

Mr. Cavanagh: And it is not on top of the cigar case?

The Witness: No.

Mr. Cavanagh: It is more of a confection than it is tobacco?

The Witness: Absolutely.

Redirect Examination continued by Mr. Hinton.

R-D. Q. 66. Did you ever go into a United Cigar store?

A. I have been in them.

R-D. Q. 67. Do you know where they keep the chewing gum in the United Cigar stores?

A. I have seen it right on top of the cigar counter.

R-D. Q. 68. Do you know if that is the universal practice in the United Cigar Stores?

A. I don't know if it is universal.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if C. A. SATTIG were called, he would testify as follows:

My name is C. A. Sattig; I am of legal age; I work in the grocery and meat store of Adam Sattig, who testified in this case, and am his son. I first saw the Beech-Nut cigarettes advertised and on display in the early spring of 1921. I believed that they were a product of the Beech-

Nut Packing Co. I bought a number of packages, I do not know exactly how many, in that belief, and smoked them. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Co. until about three months after I had bought my first package. I was riding in a train and I pulled out a package of Beech-Nut cigarettes to smoke one, and a man in the seat next to me said, "Why do you smoke those Beech-Nut cigarettes?" and I said, "Well, the Beech-Nut people make good stuff," and he said, "Those cigarettes are not made by the Beech-Nut people," and called my attention to the name P. Lorillard Co. on the package.

It is further stipulated that on cross-examination the witness would say, that he made no particular examination of the package and did not notice the name P. Lorillard Co. thereon; that if he had he would have known the cigarette to be a product of that company; if he went into a store to buy chewing gum or any Beech-Nut food product he would not be confused or deceived into accepting a package of the Lorillard Beech-Nut cigarettes in the place of the chewing gum.

NEWTON HARRISON (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Newton Harrison; you are the proprietor of a dry goods store in Milford, Connecticut; your residence is 8 Crown street, Milford, Connecticut, and your store is located at 18-20 Broad street, Milford, Connecticut; you are of legal age; is that correct?

A. Yes.

Q. 2. Mr. Harrison, what else do you do beside being the proprietor of a drygoods store?

A. Editor of the Central Station, a monthly newspaper devoted and representing the interests of the electric light and power plants of the United States.

Q. 3. I show you a package of cigarettes (Mr. Hinton shows *witness a package of Beech Nut cigarettes*), which is in this case, marked as Plaintiff's Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when you first saw them?

A. Sometime in the spring in Mr. A. C. Gardner's store.

Q. 4. Do you remember the month?

A. Yes, April, and I purchased a package.

Q. 5. Why did you buy these cigarettes when you first saw them?

A. Because I saw the character of the name and believed it to be a Beech-Nut product. I thought it was good, and I thought I would try them.

Q. 6. You thought it was good before you bought the cigarettes?

A. I thought it was a Beech-Nut product, I thought the package was a good package, so I tried it, believing it was a Beech-Nut product.

Q. 7. You subsequently bought other packages?

A. Yes, other packages.

Q. 8. When did you first buy these cigarettes; was that in the spring?

A. Sometime in the spring, I presume; I couldn't give you the exact date, but believe it was in Gardner's store, but I have seen them in other places since then, believing it was a Beech-Nut product.

Q. 9. Do you now believe it is a Beech-Nut product?

A. Not since I have heard from your representatives quite recently that the Beech-Nut people have nothing to do with it.

Q. 10. Do you remember seeing myself and another

man get out of an automobile in front of Mr. Gardner's store?

A. Last week?

Q. 11. Last week.

A. Yes, and I said first, "Why don't you bring out a good grade of near beer as long as you have so many other good products. Then you spoke to me and I discovered in a very short time that the Beech-Nut cigarette was not made by you, at which I was very much surprised.

Q. 12. What was on this automobile we got out of?

A. Beech-Nut stamp, the Beech-Nut trade-mark.

Q. 13. And was it that——

A. That was what attracted my attention.

Q. 14. And then you said to me, "Why don't you put out a near beer?"

A. I was thinking of the other companies that had made near beer, and I thought in these prohibition days you might develop a nice branch of your business by use of the Beech-Nut trade-mark.

Q. 15. Do you remember what I asked you exactly?

A. You told me at the time, as nearly as I can recollect, that had I any particular brand in mind. I said, "You recently came out with a Beech-Nut cigarette." I think that was what I said as nearly as I can remember.

Q. 16. Yes, that is my recollection. You have bought Beech-Nut products before, have you?

A. Yes, jellies.

Q. 17. And what has been your experience with them?

A. They were excellent, always excellent, good quality, what we call a good brand. The name Beech-Nut seems to speak well for their ginger ale and jellies and such products as I have bought.

Q. 18. I show you a package of scrap tobacco (Mr. Hinton shows witness package of Beech-Nut chewing to-

bacco), which is in this case as Defendant's Cross-Exhibit No. 1. Have you ever seen that brand or panel on that before; I mean have you ever seen that label before?

A. Yes.

Q. 19. Where have you seen it?

A. I have seen it in Bridgeport in a tobacco store.

Q. 20. Have you ever seen this label on any other product?

A. Why, that particular label—

Q. 21. Or one like it?

A. I have looked at that label and believed it to be a label belonging to the Beech-Nut Company because the name Beech-Nut seems to be comprehensive. I naturally concluded it was a Beech-Nut product, that was my impression of it, also the cigarette.

Direct Examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 22. How often did you purchase these Beech-Nut cigarettes?

A. Well, we will say a half a dozen times. I smoke various brands. I buy Murads, Pall Malls, Chesterfields or Egyptians, and I have been buying Saulsbury's lately. I tried the Beech-Nut. I have had Beech-Nut cigarettes in the house; we gave them to friends and they smoked whatever we had there.

X-Q. 23. Have you ever heard of P. Lorillard Co.?

A. Yes.

X-Q. 24. You know them to be large tobacco manufacturers?

A. Yes.

X-Q. 25. Do you notice the name P. Lorillard Co. now?

A. Yes, I notice it now but would not have otherwise.

X-Q. 26. Do you notice the name Beech-Nut on there?

A. Yes.

X-Q. 27. If you had taken the trouble to notice the name Lorillard—

A. I would have noticed it was not a Beech-Nut product, but the Beech-Nut trade-mark is so conspicuous that I didn't draw any other conclusion but that it was a Beech-Nut product.

X-Q. 28. That is, that word Beech-Nut?

A. That is sufficient.

X-Q. 29. And if you had taken the trouble to examine the package and noted the P. Lorillard Co. on it you would have known it was the tobacco company's product and not the Beech-Nut Company's?

A. Yes, but the Beech-Nut is very conspicuous and the Lorillard very inconspicuous.

X-Q. 30. On this scrap tobacco (Mr. Cavanagh shows witness package of Beech-Nut chewing tobacco), can you find the name Lorillard on that?

A. Yes, if you know where to look for it.

X-Q. 31. You have never seen any Beech-Nut products with any of those red radiating lines on it like that, have you?

A. To my recollection they have a simple oval trade-mark, that is as far as I saw the goods, that is the way I remember their product. It just has a red oval with Beech-Nut in it.

X-Q. 32. Do you know that in trade-marks it is very customary to use an oval on packages?

A. Yes, it seems to be convenient for them.

X-Q. 33. Did you ever hear of the Beech-Nut Packing Company putting out any tobacco product whatsoever?

A. Not since I have been informed, I realized they haven't put out any tobacco products. It was a surprise to me to know it wasn't their product.

X-Q. 34. You never made any particular inquiries to find out whether or not it was their product?

A. I took it as a matter of course that it was their product.

X-Q. 35. Because of the name Beech-Nut?

A. Yes, because of the name Beech-Nut.

X-Q. 36. You don't know how long the Lorillard people have been using that as a trade-mark, do you?

A. No.

X-Q. 37. If you went into a store and wanted a package of Beech-Nut jelly or gum, would you be confused or deceived into accepting a package of Beech-Nut cigarettes in place of the gum or jelly?

A. I don't think so.

X-Q. 38. You would think a man who did was crazy, wouldn't you?

A. Yes.

That's all.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

JOHN F. GRIFFIN (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John F. Griffin; you are 26 years of age; you reside at 518 Orange Street, New Haven, Connecticut and your occupation is salesman; is that correct?

A. Yes.

Q. 2. By whom are you employed, Mr. Griffin, and how long have you been employed by this concern?

A. I am employed by the Beech-Nut Packing Company and have been for two and three-quarter years; two years and eight months.

Q. 3. What territory do you cover?

A. All Connecticut but Fairfield County.

Q. 4. What do you sell?

A. I sell confectionery, chewing gum and beverages.

Q. 5. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in the case as Plaintiff's Exhibit No. 1; do you remember when these cigarettes came out in your territory?

A. March, 1921.

Q. 6. Have these cigarettes appeared in the state generally?

A. Yes.

Q. 7. Have they been displayed in windows of stores and the like?

A. Yes.

Q. 8. Have you seen advertising and posters of these cigarettes?

A. Yes.

Q. 9. Have you, in the course of your traveling about from place to place for the Beech-Nut Packing Company, heard anybody make any comments, remarks or inquiries about these cigarettes?

A. Yes.

Q. 10. Will you state the nature of these comments, inquiries or remarks? What did they say?

A. They asked me how they were going, how they were selling, and they are selling because Beech-Nut products always have been known to be good products and people asked me for samples.

Q. 11. I wish you would give me a strictly conservative estimate as to the number of comments you have

heard; or this kind of remarks made since this spring.

A. About five or six hundred and I am hearing them every day yet.

Q. 12. What is this? (Mr. Hinton shows witness photograph.)

A. That is a photograph of a window display I had taken.

Q. 13. Where was that window display?

A. At the corner of Elm Street and First Avenue, West Haven.

Q. 14. What store?

A. It was in the drug store.

Q. 15. Who was the proprietor?

A. Mr. Coughlan, I don't know his initials.

Q. 16. Was he one of your customers?

A. Yes.

Q. 17. Did you have this photograph taken yourself?

A. I saw the window display and went there and got this Mr. Madden and he took the photograph.

Q. 18. Do you recognize it as the picture of this display?

A. Yes.

Q. 19. Now, Mr. Griffin, did you in any way instigate or cause this display to be made?

A. None whatsoever.

Q. 20. I refer to the display of the Beech-Nut gum in this picture.

A. None whatsoever.

Q. 21. Have you investigated through the company's sources and do you know whether the Beech-Nut Packing Company recently sent the proprietor of this store this display of gum boxes or whether they are old boxes?

A. They are old boxes. We are not sending out gum advertising now on account of the scarcity.

Q. 22. When was this picture taken?
A. The 24th day of August, I think.
Q. 23. Were you present when it was taken?
A. Yes, sir.

Mr. Hinton: The photograph, identified by the witness, is introduced and offered in evidence as Plaintiff's Exhibit No. 2, West Haven Drug Store Display.

Mr. Cavanagh: The exhibit is objected to as immaterial and irrelevant and is not properly proven.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if FRANK MADDEN was called, he would testify as follows:

I am of legal age and reside in New Haven, Connecticut. I am a photographer by trade and am frequently employed by Donnelly's Photo Studio, 1050 Chapel Street, New Haven, Connecticut, to take photographs.

I was employed on August 25th, 1921, to go with Mr. Griffin of the Beech-Nut Packing Company and take a photograph of a display in a drug store on the corner of Elm Street and First Avenue, West Haven, Connecticut. I accordingly took the photograph, developed it, and printed it. The photograph, which is marked in this case as Plaintiff's Exhibit No. 2 (West Haven Drug Store Display Window) is the photograph which I then and there took.

Mr. Cavanagh: Without waiving any objections to the introduction of this photograph as an exhibit, so far as it concerns its immateriality and

irrelevancy, counsel for P. Lorillard Co. proceeded to cross-examine Mr. Griffin as follows:

X-Q. 24. Did you personally instruct the photographer Madden to take this picture?

A. Indirectly I did.

X-Q. 25. Just tell us how it happened.

A. Well, Mr. Hinton and I were coming up from West Haven; we saw the window there and thought we would have it taken, so I got this employee, this Frank Madden, to come with me and photograph this window display.

X-Q. 26. What instructions did you give Madden?

A. To take the photograph of this window and—just to make a photograph of the window. That's about all the instructions I gave him.

X-Q. 27. Did you say anything to the proprietor of the drug store about it?

A. I asked him where he got the display from, as there was hardly anybody displaying Beech-Nut gum because you can't get it under the circumstances and it seems that it was some old advertising he had in his cellar.

X-Q. 28. Will you look at the part of this photograph so far as the section under the window, under Ex-Lax is concerned; is that a true representation, do you know, of the advertisements that appear in that window?

A. Why, yes, it is.

X-Q. 29. You never sold tobacco for the Beech-Nut Packing Company, tobacco products?

A. No.

X-Q. 30. So far as you know, they don't sell tobacco products, do they?

A. No, sir.

X-Q. 31. You never told any persons that these Lor-

illard Beech-Nut cigarettes were a product of the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 32. You didn't keep any particular account of the number of people that asked you if they were as good as the chewing gum and the other remarks you made, did you?

A. Just approximately.

X-Q. 33. I mean, you didn't keep any count of them?

A. No, no.

Mr. Cavanagh: I think that will be all.

Redirect Examination by Mr. Hinton.

R-D. Q. 34. Can you give me any particular instances of people who made these comments and remarks you refer to? Please give me no instances except where you can state definitely who made the remarks and definitely what he said.

A. Mr. Marrinan, the drug clerk, one night in a restaurant, came up to me and asked me how the Beech-Nut cigarettes were going.

R-D. Q. 35. Has Mr. Marrinan testified in this case?

A. Yes, he has.

R-D. Q. 36. All right. Give me another one.

A. Mr. Branigan, a shoe clerk on Chapel Street, New Haven, on giving him a few samples of Beech-Nut gum said, "Let me have a few samples of Beech-Nut cigarettes instead."

R-D. Q. 37. Did he testify in this case?

A. Yes, he did, too.

R-D. Q. 38. Can you give me any more?

A. A fellow named James Cashman. On meeting him one day downtown, he asked me how the cigarettes were moving.

R-D. Q. 39. Did he testify in this case?

A. Yes, he did.

R-D. Q. 40. Can you give me another one?

A. Yes, Robert Greene, who runs a store in West Haven, grocery and meat market, just here the other day I got into conversation with him about Beech-Nut cigarettes and when I informed him we weren't making them he said it was an awful surprise.

R-D. Q. 41. What did he say?

A. He said that—he asked me about the sale of cigarettes. "I hear they go good," and I told him we had nothing to do with the cigarettes absolutely.

R-D. Q. 42. He has testified in this case?

A. Yes.

R-D. Q. 43. Now, about this photograph, I notice that on the right of the photograph, it apparently does not run to the extreme end of the window. Do you know, as a matter of fact, whether that photograph shows the entire display of the window or not?

A. No.

R-D. Q. 44. Is there a wide or narrow window on the right?

A. A narrow window, there is a board coming down right here (witness indicates). See that board there, it shows only about a quarter of the big one. I thought he had the whole picture.

R-D. Q. 45. Did he come close to the edge?

A. Awfully close to the edge.

R-D. Q. 46. I mean is there a lot more of this window that dosn't show in the photograph?

A. Oh, no, that is practically the end.

Redirect examination closed.

Signature of witness waived.

Deposition closed.

JOSEPH DE RAGO (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Joseph De Rago; your age, 34; your residence, 82 Spring Street, Hartford, Connecticut; you are the proprietor of a general store at 72 Union Place, Hartford, Connecticut; is that correct?

A. Yes.

Q. 2. Do you handle tobacco in this store, Mr. De Rago?

A. Yes.

Q. 3. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Beech-Nut Exhibit No. 1, being a package of Beech-Nut cigarettes. Have you sold these cigarettes in this store?

A. Yes.

Q. 4. How long about?

A. Since they come out, when they come was in the spring.

Q. 5. Yes. Mr. De Rago, who did you believe made these cigarettes?

A. Always believe Beech-Nut make it; also call same name, that's Beech-Nut.

Q. 7. Yes. Is that the people who make the gum?

A. Yes, that's it.

Q. 8. Do you sell the Beech-Nut gum?

A. Yes.

Q. 9. Mr. De Rago, have you sold Beech-Nut scrap tobacco in this store?

A. Yes, I have been selling for six years here.

Q. 10. Who did you believe made the Beech-Nut scrap tobacco?

A. I believe just the same, Beech-Nut make Beech-Nut scrap tobacco.

Q. 11. Is this the scrap tobacco I show you? (Mr. Hinton shows witness package of Beech-Nut chewing tobaco.)

A. Yes.

Mr. Hinton: The package shown the witness is produced and offered in this case as Beech-Nut Exhibit No. 3, Beech-Nut Scrap Tobacco.

Q. 12. Mr. DeRago, did you ever tell people in this store that this scrap tobacco was made by the Beech-Nut people?

A. They ask me who makes; I say I think Beech-Nut people make the same thing; they say that is right, Beech-Nut makes everything, that's all.

Q. 13. Now, when, if at all, when did you first find out; when was the first time you found out?

A. Today.

Q. 14. That the Beech-Nut people did not make this product?

A. Today.

Mr. Hinton: You may cross-examine.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. You say you have been buying this scrap tobacco for about six years?

A. Yes.

X-Q. 16. From whom have you been buying it?

A. I bought it from the wholesale house.

X-Q. 17. What is the name of it?

A. Gregier Tobacco Co., they are all over Connecticut, every place.

X-Q. 18. From whom did you buy your Beech-Nut products, like your chewing gum?

A. I buy from Silver Braun, Corn Brothers, Abel, any of them.

X-Q. 19. How many people do you employ in this store?

A. Nobody.

X-Q. 20. Just yourself?

A. Myself and mother.

X-Q. 21. So you didn't buy anything from the Beech-Nut Packing Company itself?

A. No, but still I send through Silver Braun for some of those marshmallows.

X-Q. 22. But you don't buy direct from the Beech-Nut agent?

A. No, only sometime when they come around, I give them an order and send them to the jobber.

X-Q. 23. Give who the order?

A. The Beech-Nut people, and they send them direct to the jobber.

X-Q. 24. During the last six years about how often have you sold this scrap tobacco? (Mr. Cavanagh indicates a package of Beech-Nut chewing tobacco.)

A. I can't tell you that, about every week, when I run short, I buy every week.

X-Q. 25. You have never asked the Beech-Nut man if his concern put out this tobacco?

A. No, only today he told me he didn't.

X-Q. 26. So that you didn't really have any foundation for saying it was made by the Beech-Nut Company?

A. No.

X-Q. 27. Just a guess on your part?

A. No, that's all.

X-Q. 28. You notice the name Lorillard on this package, do you not?

A. Yes.

X-Q. 29. You notice the name P. Lorillard Co. on this cigarette package, do you not?

A. Yes, but this I cannot read, I don't know how to read in English.

X-Q. 30. How long have you been in this country about?

A. About ten years.

X-Q. 31. From Italy?

A. Yes. I never go to school, I couldn't read.

X-Q. 32. You never went to school and studied English?

A. No.

X-Q. 33. You never saw on your Beech-Nut jellies or gum or food products any of those red lines, did you, like on this Beech-Nut scrap tobacco package?

A. No.

X-Q. 34. If a man came into your store and wanted to buy some Beech-Nut jelly or something such as Beech-Nut chewing gum, you wouldn't sell him this Beech-Nut tobacco for chewing gum, would you?

A. No, we can't do it. If he would have taken them I would sell them.

X-Q. 35. If he wanted gum, you wouldn't deliberately deceive him, would you?

A. No.

X-Q. 36. You were just joking when you said that?

A. Yes.

X-Q. 37. You yourself wouldn't go into a store and buy gum for tobacco, would you?

A. No, I wouldn't do that.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 38. Mr. DeRago, can you tell me why it was you supposed that these things were made by the Beech-Nut people?

A. I thought it was, it looked the same thing (witness

points to oval brand on two packages), but I never looked at the name, as I told you, because I can't read and never bother with them. People say Beech-Nut makes, and I say I think so. I don't know. Beech-Nut always make them, because the same name.

Recross-Examination by Mr. Cavanagh.

R-X Q. 39. You spoke about the two beech-nuts on this package. I show you a package of Beech-Nut peanut butter of the Beech-Nut Packing Company; that has got three green leaves, hasn't it?

A. Yes.

R-X Q. 40. And this has two red nuts with no green leaves?

A. Yes.

R-X Q. 41. So that they are not the same, are they?

A. No.

R-X Q. 42. You never took the trouble to look, did you?

A. No, I never took a real look.

Mr. Hinton: I show you a package of Beech-Nut cough drops, which is marked for identification as Plaintiff's Exhibit 4. Is that nut there on three green leaves, or what is the color?

A. You can't tell, you have got no leaves at all here.

Mr. Cavanagh: Do you offer this in evidence?

Mr. Hinton: I will mark it for identification. Do you want me to offer it in evidence? I may want it to go in evidence.

Mr. Cavanagh: Well, mark it for identification.

Signature of witness waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if SOLOMON S. KRAMER was called, he would testify as follows:

I am of legal age, and keep a delicatessen grocery and tobacco store at 84 Church street, Hartford, Connecticut. I have been the proprietor of this store for five months. I have stocked and sold in this store a line of Beech-Nut products, such as jellies, jams, chewing gum and the like. I have also stocked and sold Beech-Nut chewing tobacco, similar to Plaintiff's Exhibit No. 3, and Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1.

I believed, until this morning, that the scrap tobacco and the cigarettes were a product of the Beech-Nut Packing Company, the same people that make the rest of the Beech-Nut products that I carry. Customers frequently come in and ask me for Beech-Nut, and I ask them whether they want the Beech-Nut chewing gum, Beech-Nut chewing tobacco or Beech-Nut cigarettes. One customer came in here and asked me for some cigarettes, and I said, "Why not try Beech-Nut cigarettes, they ought to be good, because I carry the rest of the line."

It is further stipulated that on cross-examination the witness would testify as follows:

I never made a close examination, either of the cigarette or the scrap tobacco package, and I never read the name Lorillard thereon. If a customer came into my store and asked for chewing gum I would not give him cigarettes or scrap tobacco, and I would not myself be fooled into buying cigarettes or scrap tobacco if I wanted chewing gum or any Beech-Nut food product.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if JAMES EUSTACE was called, he would testify as follows:

My name is James Eustace; I am employed at the Sigourney Grocery Company, 97 Asylum street, Hartford, Conn. We sell tobacco products and have carried in stock the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, since they first came out, in the spring this year.

I have sold these cigarettes over the counter myself; for the past month we have been out of these cigarettes. I always believed that these cigarettes were a product of the Beech-Nut Packing Company, the same people who make the chewing gum and other Beech-Nut products, and continued to believe that until August 30, 1921, when I was told by Mr. Ray, a Beech-Nut Packing Company salesman, that the Beech-Nut Packing Company had nothing to do with the cigarettes. The reason for my belief was the brand appearing on the cigarettes.

It is further stipulated that on cross-examination he would testify as follows:

I never made an examination of the package and had not seen the name P. Lorillard Co. on the package. If a customer came into my store and asked for Beech-Nut chewing gum I would not hand him a package of Beech-Nut cigarettes, and I would not be confused or deceived myself into taking cigarettes for chewing gum or Beech-Nut jelly or the like.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if EDWARD GROSS was called, he would testify as follows:

I am a clerk employed by the County Market Co., 270 Trumbull street, Hartford, Connecticut, and am of legal age. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and displayed since the spring of 1921. I believed until the other day that they were a product of the Beech-Nut Packing Company, the same people who make the chewing gum and other Beech-Nut products. I was told the other day by Mr. Ray, a salesman for the Beech-Nut Packing Company, that these cigarettes were not a product of that company. The reason for my belief was the brand on the cigarettes.

On cross-examination the witness would testify as follows:

I never bought a package of Beech-Nut cigarettes and I never made an examination of the package. I never smoked them. I would not confuse Lorillard Beech-Nut cigarettes with Beech-Nut chewing gum, nor would I confuse it with Beech-Nut food products, and I would not accept one of these in place of the other.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if R. A. BROWN was called, he would testify as follows:

My name is R. A. Brown; I am of legal age, and a claim adjuster for the Ocean Insurance Company, located in the Connecticut Mutual Building, Hartford, Connecticut. I have seen the Beech-Nut cigarettes, similar to Plain-

tiff's Exhibit No. 1. When these cigarettes first came out I bought a package because I thought I would get a good smoke, seeing what I thought was the Beech-Nut label on them. I was under the belief that these cigarettes were a Beech-Nut product for about two months until I was told by Mr. Griffin, of New Haven, Connecticut, the Beech-Nut Packing Company's representative, that the Beech-Nut Packing Company had nothing to do with these cigarettes.

On cross-examination the witness would testify as follows:

I have only purchased, as I recall, one package of these cigarettes, and when I purchased them I did not ask for cigarettes of the Beech-Nut Packing Company, but merely for a package of Beech-Nut cigarettes. I did not notice the name P. Lorillard Co. on the package, as I did not examine the package very closely.

I would not be confused or deceived into accepting a package of Beech-Nut cigarettes if I asked the storekeeper for Beech-Nut gum or a Beech-Nut food product, of which there are a number of different brands.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if HERMAN A. DOLGE was called, he would testify as follows:

My name is Herman A. Dolge; I am of legal age; I am the proprietor of a grocery and delicatessen store on Church street, Hartford, Conn. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, displayed and advertised in Hartford since the spring of 1921. I believed that these cigarettes were a product of the Beech-Nut Packing Company, and my reason for this belief was the label or brand on the cigarettes. I knew

the Beech-Nut people put out so many articles, including chewing gum, that I was not surprised at their putting out cigarettes. I remained under the belief that these cigarettes were put out by the Beech-Nut Packing Company until August 28th, 1921, when I was told by the Beech-Nut Packing Company's representative that the Beech-Nut Packing Company had nothing to do with these cigarettes.

On cross-examination he would testify as follows:

I do not smoke cigarettes and do not sell tobacco. I have never purchased a package of Beech-Nut cigarettes, and therefore did not make a particular examination of the advertisement on the cigarette package; consequently did not notice the name P. Lorillard Co. thereon, nor did I make any direct comparison of the label on the Beech-Nut cigarettes with one of the Beech-Nut Packing Company's labels.

I would not be confused or deceived into accepting a package of these cigarettes for a package of Beech-Nut chewing gum or other Beech-Nut food product with which I am familiar.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JOHN F. WHALEN was called, he would testify as follows:

My name is John F. Whalen; I am of legal age, and am a clerk in the store of C. P. Case, grocer and butcher, 597 Albany avenue, Hartford, Connecticut. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and displayed in Hartford, Connecticut, since the spring of 1921. I always believed these cigarettes were a product of the Beech-Nut Packing Company, on account of the label that appears on them, until I was ad-

vised by Mr. Ray, a representative of the Beech-Nut Packing Company, on August 28th, 1921, that the Beech-Nut Packing Company had nothing to do with them. I do not smoke, nor have I ever bought a package of cigarettes.

On cross-examination the witness would testify as follows:

I have never purchased or handled the Beech-Nut cigarettes like the Plaintiff's Exhibit No. 1, and never made any particular examination of the advertising or display matter, and therefore did not notice the name P. Lorillard Co. appearing thereon, and that I never made any comparison of the cigarette labels with the Beech-Nut Packing Company labels.

Furthermore, I would not be confused or deceived into accepting the package of these Beech-Nut cigarettes for Beech-Nut chewing gum or a Beech-Nut food product.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if C. HOUSLING were called, he would testify as follows:

My name is C. Housling; I am of legal age, and am a clerk employed in the store of C. P. Case, 597 Albany Ave., Hartford, Connecticut. I saw the Beech-Nut cigarettes displayed last spring. I thought they were a product of the Beech-Nut Packing Company on account of the label thereon and I bought a package of the cigarettes, expecting to get a good smoke. I never bought another package. I have never seen a package of Beech-Nut scrap tobacco before I was shown one today.

On cross-examination the witness would testify as follows:

When I purchased these cigarettes, I did not ask for cigarettes made or put out by the Beech-Nut Packing Company but simply asked for a package of Beech-Nut cigarettes. I did not examine the package and therefore did not notice the name P. Lorillard Co. appearing thereon, nor did I make any direct comparison of the label on the Beech-Nut cigarettes with the label, such as appears on the products of the Beech-Nut Packing Company, with which I am familiar. I only bought this one package of cigarettes.

I would not be confused or deceived into purchasing or accepting these Beech-Nut cigarettes if I asked the dealer for Beech-Nut chewing gum or for any of the food products of the Beech-Nut Packing Company.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if P. LYNCH was called, he would testify as follows:

My name is P. Lynch; I am of legal age, and am a clerk employed in Burnham's Market, West Hartford, Conn. I have seen Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1. When I first saw these cigarettes I thought they were a product of the Beech-Nut Packing Company and I bought a package and expected to get an exceptional smoke. I am familiar with Beech-Nut products and have always been satisfied with every Beech-Nut product I have bought. I did not buy another package of the cigarettes. I was first informed that these cigarettes were not a product of the Beech-Nut Packing Company by Mr. Ray, a representative

of the Beech-Nut Packing Company, a few days prior to testifying.

On cross-examination the witness would testify as follows:

When I purchased the pack of cigarettes I did not ask for cigarettes made by the Beech-Nut Packing Company but merely for a package of Beech-Nut cigarettes and made no particular examination of the package and therefore did not notice the name P. Lorillard Co. appearing thereon. That I would not be confused or deceived into accepting these Beech-Nut cigarettes as and in the place of Beech-Nut chewing gum or any Beech-Nut food product. That I have never seen a package of Beech-Nut scrap tobacco.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if R. J. ANDREWS was called, he would testify as follows:

My name is R. J. Andrews; I am of legal age, and am employed in the store of J. Burnham, West Hartford, Connecticut. I have seen the Beech-Nut cigarettes advertised and on display in Hartford, Connecticut, since last spring when the cigarettes first came out. I bought a package in the belief that they were a Beech-Nut Packing Company product. I never bought another package of these cigarettes. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Company until I was advised a few days ago by Mr. Ray of the Beech-Nut Packing Company that the Beech-Nut Packing Company had nothing to do with them.

On cross-examination the witness would testify as follows:

I did not ask for Beech-Nut cigarettes of the Beech-Nut Packing Company when I made the purchase but simply asked for a package of Beech-Nut cigarettes. I did not examine the package particularly and therefore did not notice the name P. Lorillard Co. appearing thereon. I would not be confused or deceived into accepting or purchasing a package of these Beech-Nut cigarettes if I asked for and wished Beech-Nut chewing gum or any Beech-Nut food product.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JOHN MEAD was called, he would testify as follows:

My name is John Mead; I am of legal age, and am employed as a clerk in Preston's market on Asylum Street, Hartford, Connecticut. I have seen the Beech-Nut scrap tobacco on display and have bought a few packages of it and always thought it was a Beech-Nut product, made by the same people that make the gum and other Beech-Nut products. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and on display in Hartford, Connecticut, since the spring of 1921 and thought that these were made by the same people who made the Beech-Nut gum and other food products. I was first informed that neither the Beech-Nut scrap tobacco or the Beech-Nut cigarettes were a product of the Beech-Nut Packing Company, on August 30th, 1921, by Mr. Ray, a representative of the Beech-Nut Packing Company.

On cross-examination the witness would testify as follows:

I never made any examination of the Beech-Nut scrap tobacco package and did not notice the name Lorillard thereon. I have never purchased a package of the Beech-Nut cigarettes and have not paid any particular attention to the same. I would not be confused or deceived into buying either Beech-Nut scrap tobacco or Beech-Nut cigarettes in place and instead of Beech-Nut gum or any Beech-Nut food product.

STIPULATION.

It is further stipulated by and between the parties, through their respective counsel, that if JAMES MATREACE was called, he would testify as follows:

My name is James Matreace; I am of legal age, and reside at 80 Village Street, Hartford, Connecticut. I am a clerk in the store of O. Matreace, Hartford, Connecticut, a grocery and general store, and have at various times bought and do buy tobacco supplies for this store. In the spring of 1921 a salesman came around and urged me to stock Beech-Nut cigarettes. When I saw the cigarettes I took them to be the product of the Beech-Nut Packing Company by reason of the label thereon. I put in the cigarettes because I thought they were the Beech-Nut Packing Company's product and would sell because the other Beech-Nut products we had were selling well. I continued to believe that these cigarettes were a product of the Beech-Nut Packing Company until August 28th, 1921, when I was told by Mr. Ray, a salesman for the Beech-Nut Packing Company, that these cigarettes were not the product of the Beech-Nut Packing Company but were the product of

the P. Lorillard Co. I have sold these cigarettes myself over the counter.

On cross-examination the witness would testify as follows:

I am merely an employee in this store and it is a small store, employing about four persons. I do not know from whom I purchased the first of the Beech-Nut cigarettes as I did not ask the salesman what company he represented but I have since bought these cigarettes from jobbers in Hartford. At the time I purchased the first order of cigarettes I did not ask the salesman if they were made by or if they were a product of the Beech-Nut Packing Company nor did I examine them or observe the name P. Lorillard Co. thereon. I know the P. Lorillard Company is a large tobacco concern and I have handled other products of theirs and if I had seen the name P. Lorillard Co. on the package I would have presumed it was their product. I never paid any particular attention to the matter but simply bought the cigarettes from time to time and sold them over the counter. I never made a direct comparison of the label on the Beech-Nut cigarettes with that of the Beech-Nut Packing Company. We are still selling the Beech-Nut cigarettes in this store. We sell certain products of the Beech-Nut Packing Company, such as food products, and if a man came into this store and asked me for a food product of the Beech-Nut Packing Company I would not hand him or sell him the Beech-Nut cigarettes in place of the food products but would give him what he asked for, nor would I myself be confused or deceived into taking Beech-Nut chewing gum or Beech-Nut food products for and in the place of the Beech-Nut cigarettes or vice versa.

HARRY W. AVERY (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Harry W. Avery; you are 34 years of age; your residence is South Windham, Connecticut; you are a salesman employed by the Beech-Nut Packing Company; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Plaintiff's Exhibit No. 1. Have you seen these cigarettes before; if so, when did they first appear in your territory?

A. I have seen them before, I should say last spring, about March.

Q. 3. What is your territory, Mr. Avery?

A. Eastern Connecticut, the four eastern counties, Windham, Tolland, Middlesex and New London counties.

Q. 4. Did you see these cigarettes in stores and advertising and posters of the cigarettes?

A. Yes, I have.

Q. 5. To what extent have you seen these displayed?

A. I have seen the cigarettes displayed to a very great extent in many stores, in practically all the stores in fact. I have seen a great deal of poster advertising and I have seen some newpaper advertising.

Q. 6. Have you heard any comments, remarks or inquiries as you went around on your route, about these cigarettes; if so, please state what these comments, remarks or inquiries were?

A. I have heard comments and remarks. The question has been asked me many, many times, "How long have

you been in the cigarette business?" "If they are as good as the rest of your products they will certainly sell."

Q. 7. Have you ever been asked for these cigarettes?

A. I have. I have been asked many times for samples of Beech-Nut cigarettes.

Q. 8. Will you tell me what has happened when you have been asked for samples of Beech-Nut cigarettes?

A. A man named Timmons—he called to me when I was standing beside my machine—my company car.

Q. 9. What is on that car?

A. The Beech-Nut label and besides that the Beech-Nut Packing Company is printed on there in big gold letters—letters, I should say, 6 inches high. Mr. Timmons asked me for samples. I gave him samples of Beech-Nut gum. He said, "No, I didn't mean gum, I meant cigarettes."

Q. 10. Where was this, and when was this?

A. Willimantic, at the corner of Main and Bridge street, about a week and a half ago, less than two weeks ago.

Q. 11. Have you had other requests for samples of cigarettes?

A. I have many times been asked by truck drivers on the road, by young men standing in the streets when I stopped in front of stores.

Q. 12. You have testified to comments, remarks and inquiries which you have heard about these cigarettes and indicated the nature thereof. Will you give me a conservative estimate of the number of times this has happened?

A. Why, I should say conservatively hundreds of times. I have no means of getting at the exact number, but it is an everyday occurrence, a frequent occurrence.

Q. 13. Is it still going on?

A. It is, yes.

Q. 14. Can you give me some more particular instances of cases where you have heard this kind of comment, remarks or inquiries? I do not want any instances except those where you can give me definitely the names of the persons who made the comments or remarks, the place and approximately when it happened.

A. Mr. Bidwell, of the Bishop & Bidwell Co., wholesale grocers, of Norwich, I should say about two weeks ago, asked me how long we had been in the cigarette business. I said, "We are not in the cigarette business." He said, "I thought you were in the cigarette business." I said, "I have sold——"

Q. 15. I don't want the whole conversation. Can you give me any other instances of this character?

A. Mr. Pendleton, clerk in the Mohican Hotel, in New London. This was possibly last April, it was shortly after they came out that he said this: "How long have you been in the cigarette business? How long have you been making cigarettes?" Mr. Hall, F. Lewis Hall, he is the State Factory Inspector in Connecticut, told me, I should say two weeks ago; shall I state what he told me in his exact words, or just what he told?

Q. 16. Well, I don't want a long conversation, if you can remember what the man said, tell it.

A. He said, "I have been using your cigarettes." I said, "They are not our cigarettes." He said, "I thought I was helping you by buying your cigarettes."

Q. 17. All right. Give me another one.

A. Mr. Foss, Frank Foss, he is judge of the Police Court in Willimantic.

Q. 18. Where?

A. Willimantic.

Q. 19. What did he say?

A. He said, "I have been helping you out by buying your cigarettes." I said, "They are not our cigarettes." He said, "I thought they were."

Q. 20. Can you remember any other definite instances of this character at the present time?

A. Mr. Johnson, Frank Johnson, of the M. P. Johnson Co., of New London, asked me recently—I can't give you the exact date, I can't recall just when it was—asked me how long we had been in the cigarette business; how long we had been making cigarettes?

Q. 21. Yes.

A. I have been asked this question many, many times, innumerable times, where I can't recall the person or the date.

Q. 22. I show you a package of Beech-Nut scrap tobacco (Mr. Hinton shows witness a package of Beech-Nut chewing tobacco), which is in this case as Plaintiff's Exhibit No. 3. Have you seen this scrap tobacco displayed in your territory, Mr. Avery?

A. I have.

Q. 23. To what extent have you seen it displayed in comparison with the cigarettes?

A. Not nearly as much I should say as the cigarettes; not nearly as much I should say.

Q. 24. Have you seen it, however, many times?

A. I have.

Q. 25. Did you ever see the name of the manufacturer on this scrap tobacco?

A. I have.

Q. 26. When did you first see the name of the manufacturer on the scrap tobacco?

A. Yesterday.

Q. 27. Did you ever previously buy a package of this scrap tobacco?

A. I did.

Q. 28. How long ago was that?

A. I should say it was nearly five years ago.

Q. 29. Why did you buy this package of scrap tobacco, do you remember?

A. The label attracted my attention. I noticed it in a store. I thought it was the same label as ours; it appeared to me as being the same label as ours.

Q. 30. When did you first know who made this scrap tobacco?

A. Yesterday.

Q. 31. Have you ever heard any comments, remarks or inquiries or the like about this scrap tobacco?

A. I have.

Q. 32. And what has been the nature of those remarks?

A. The remark has been made to me many times, "I am surprised to see your label on a package of goods of that nature."

Q. 33. Can you give me any particular instances where you can state the names of the persons who made the remarks; remarks or comments or inquires made to you with respect to the scrap tobacco?

A. Recently, while at A. M. Bowers' store, in Eastford, Connecticut, Mr. Bowers' son said, "How long have you been in the tobacco business?" I said, "We are not in the tobacco business." He said, "I thought you were."

Q. 34. I don't want the entire conversation, Mr. Avery. Can you give any other instances?

A. Yes, in the store of De Garra & Son, New London, Mr. De Garra's brother said, "How long have you been making tobacco?" He also combined that with cigarettes. He seemed surprised to learn that we did not make the tobacco.

Q. 35. Can you recall any other instances of this?

A. There have been many, many instances that I can't recall.

Q. 36. I think that is all, I may have one or two questions later.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 37. How long have you been employed by the Beech-Nut Packing Company?

A. Very nearly six years.

X-Q. 38. You are familiar with their complete line of products?

A. I am.

X-Q. 39. Do you handle the entire line of products?

A. I do.

X-Q. 40. Through this territory of Connecticut, as I understand it?

A. Eastern Connecticut; it is called the Eastern Connecticut territory.

X-Q. 41. You have referred to a number of conversations you had with different parties about Beech-Nut cigarettes and Beech-Nut scrap tobacco, which are here in evidence. As I understand it, in no instance did you repeat the entire conversation you had with the parties, did you?

A. I did not, no, not the entire conversation, because it drifted off into other things.

X-Q. 42. And two or three times Mr. Hinton stopped you and told you he did not want the entire conversation about the matter, didn't he?

A. Well, that was possibly so, yes.

Mr. Hinton: I simply stopped the witness because I did not think a long conversation would be competent evidence in this case.

Mr. Cavanagh: Objection is now made to all the testimony of this witness relative to any conversations he had with other parties relative to Beech-Nut scrap tobacco or Beech-Nut cigarettes on the ground that same is incompetent, and, furthermore, is not including the entire conversation, but merely detached portions thereof.

X-Q. 43. When did you first examine a package of those cigarettes?

A. I should say in March, last spring, 1921. I couldn't say definitely the exact date, it might have been April.

X-Q. 44. Did you look at the package carefully?

A. I did.

X-Q. 45. You saw the name P. Lorillard Co. on the package, did you?

A. I did.

X-Q. 46. You knew then it was Lorillard's product?

A. I knew before then it was not our product. Of course, when I saw the name P. Lorillard Co., I knew it was a Lorillard product?

X-Q. 47. And that it was not a product of the Beech-Nut Packing Company?

A. I did know it was not a product of the Beech-Nut Packing Company.

X-Q. 48. Before you ever saw a package?

A. I did.

X-Q. 49. You simply heard the cigarette was on the market?

A. I did not, I heard nothing about it.

X-Q. 50. Well, just tell me exactly how you first found out these Beech-Nut cigarettes were not a Beech-Nut product.

A. I knew it was not a Beech-Nut Packing Company product because the company always sent us samples and data on new products they are putting out.

X-Q. 51. Now, just tell me how you first came to know of this Lorillard Beech-Nut cigarette.

A. I saw it in a store.

X-Q. 52. All right, we will start there; you saw it in a store?

A. I did.

X-Q. 53. You had heard of it before then?

A. I had not.

X-Q. 54. When you saw it in the store, you looked at it, didn't you?

A. I did.

X-Q. 55. Then you saw it was a Lorillard cigarette, and not the Beech-Nut Packing Company's cigarette?

A. Before I saw it was a Lorillard cigarette, the label appeared to me as being our label. I bought it for the purpose of seeing who made it, and also for the purpose of sending a package in to the house.

X-Q. 56. So that the first thing you ever knew about that cigarette at all was when you saw it?

A. Yes

X-Q. 57. And you immediately purchased a pack?

A. I did.

X-Q. 58. You then saw it was not a Beech-Nut Packing Company product?

A. After an examination I did, yes.

X-Q. 59. As soon as you examined it?

A. Yes.

X-Q. 60. Now, you have spoken something about a label; you have a label on your car, haven't you?

A. I have.

X-Q. 61. Will you just describe that label to me?

A. That is a label, the label itself is a circular label, an oval label, it has Beech-Nut food products on it. It has a nut on it, and in very, very fine black letters at the bottom—I wouldn't say very fine, but in fine letters at the bottom Beech-Nut Packing Company, Canajoharie, N. Y.

X-Q. 62. Now, describe that oval to me.

A. In what respect, Mr. Cavanagh?

X-Q. 63. As far as the width or dimensions or color are concerned.

A. Why, that oval on my car, I should say, was a foot and a half long and possibly a foot high. It is quite a big oval, it is not the standard letters that they use.

X-Q. 64. What is the color of the oval?

A. It is red and gold.

X-Q. 65. It has a red band in it?

A. There is some green in it, some black in it.

X-Q. 66. There is a red band, isn't there?

A. There is, yes.

X-Q. 67. How wide is that red band?

A. Why, I couldn't say exactly in inches. Possibly two and a half inches, possibly a little less than that. The label on my car, Mr. Cavanagh, I tell you frankly, is not the standard Beech-Nut advertised label, it was a label printed on there in New Haven. It may not be exactly like the standard Beech-Nut label.

X-Q. 68. I show you, Mr. Avery, a small jar of Beech-Nut peanut butter (Mr. Cavanagh shows witness jar of Beech-Nut peanut butter), which is in this case as marked for identification, Defendant's Cross-Exhibit No. 7, and it has a label on it. Can you tell me whose product that is?

A. The Beech-Nut Packing Company's.

X-Q. 69. And that is the Beech-Nut standard label?

A. That is the standard label.

X-Q. 70. Now, this label has a wide red band on it, has it?

A. It has.

X-Q. 71. And you always recognize that in connection with the Beech-Nut products, don't you?

A. Why, possibly so, yes, I am so familiar with the Beech-Nut label that I perhaps wouldn't notice the red label.

X-Q. 72. But this red label has printed on it, it is a wide red label with printing on it?

A. Yes.

X-Q. 73. Isn't it one of the salient things that would strike your eye in the Beech-Nut label?

A. Yes, it is, but those labels become faded, I have found in many instances where the red was entirely faded out.

X-Q. 74. On old goods?

A. Yes, on old goods that have been wet.

X-Q. 75. But that has the brand printed on it?

A. Yes, when they left the factory.

X-Q. 76. And that wide red band is not found on the Beech-Nut cigarettes?

A. No, that wide red band isn't on it.

X-Q. 77. With the printing on it?

A. No.

X-Q. 78. Now, you are a Beech-Nut salesman; when you saw that label you know that wasn't the standard label of the Beech-Nut Packing Company, didn't you?

A. I didn't see that label in the condition the package is in now when I saw that label.

X-Q. 79. You saw the word Beech-Nut?

A. Yes, I saw the word Beech-Nut; that was what attracted my attention.

X-Q. 80. That attracted your attention?

A. Yes.

X-Q. 81. So, when you picked that up, you saw it wasn't your label?

A. Yes, I would know it wasn't our label.

X-Q. 82. Just before we leave the cigarette, have you ever bought any of these cigarettes?

A. Yes.

X-Q. 83. And smoked them?

A. Smoked one package.

X-Q. 84. You don't prefer that brand, do you?

A. I do not, not because it is made by Lorillard, that is not the idea, but the flavor doesn't appeal to me.

X-Q. 85. You smoked other cigarettes of Lorillard's make?

A. I say "yes," I have smoked a great many different kinds of cigarettes. I have probably undoubtedly smoked Lorillard's cigarettes.

X-Q. 86. You have smoked Murads?

A. Yes.

X-Q. 87. Moguls?

A. Yes.

X-Q. 88. Egyptian Deities?

A. Yes.

X-Q. 89. And, of course, you know, as a smoking man, that various individuals have various tastes and preferences to brands?

A. I do.

X-Q. 90. You have never heard of the Beech-Nut Packing Company selling tobacco products, have you?

A. I never did.

X-Q. 91. Cigarettes or scrap tobacco either?

A. No.

X-Q. 92. And I take it that when any of these parties that you have mentioned, asked you about the Beech-Nut cigarettes or Beech-Nut scrap tobacco, as to whether the Beech-Nut Packing Company had put it on the market, or had gone into the tobacco business, you told them it wasn't your brand?

A. I did.

X-Q. 93. You told them it was the Lorillard Company?

A. I did not.

X-Q. 94. What did you tell them?

A. I have probably in some instances told them the cigarette was Lorillard's, but I have simply denied we put the cigarette out or the tobacco. In some instances I told them possibly that Lorillard did make the cigarette.

X-Q. 95. Well, as a salesman, if a man came to you and said that he wanted to get from you a dozen cartons of

these Beech-Nut cigarettes—of the Beech-Nut cigarettes—you wouldn't take that order?

A. No, I would not.

X-Q. 96. You would simply tell that man, as an honest salesman, that your company did not make the cigarette?

A. No, sir.

X-Q. 97. You never have taken such an order for them?

A. No, sir.

X-Q. 98. Now, on this scrap tobacco package, to cut this matter short, you never, in all your connection with the Beech-Nut Packing Company, saw any Beech-Nut product resembling that in ornamentation or dress, did you?

A. I have never—I, of course, would know that was not the Beech-Nut label.

X-Q. 99. Yes, but I mean you have never seen a Beech-Nut Packing Company product with those red radiating lines in a sunburst arrangement, have you?

A. I have not.

X-Q. 100. They are very prominent on that package?

A. They are.

X-Q. 101. And meet on a single line from a blue oval?

A. Yes, sir.

X-Q. 102. You don't know of any arrangement on any of your Beech-Nut packages like that, do you?

A. I do not, no.

X-Q. 103. And as I understood, it was about five years ago you first purchased a package of this?

A. I couldn't say approximately. I could tell exactly by looking up old correspondence with the firm, I could tell the exact date.

X-Q. 104. I mean approximately, Mr. Avery; I don't want to hold you too exactly in this examination.

A. I should say roughly five years ago.

X-Q. 105. When you say you examined this package, you saw the name Lorillard on it?

A. No.

X-Q. 106. Then you didn't examine it very carefully?

A. I did and I didn't. If the name was there, I evidently overlooked it.

X-Q. 107. You knew the P. Lorillard Co. was a large tobacco manufacturing concern, did you not?

A. I do.

X-Q. 108. And if you had really examined this package, you would have noticed that it had on it—that it was made by Lorillard?

A. I didn't notice that.

X-Q. 109. You would have noticed the name P. Lorillard Co. on the front?

A. If the name Lorillard was on it I evidently overlooked it, because I bought a package yesterday for the express purpose of finding out what name was on it.

X-Q. 110. You have been assisting counsel for the Beech-Nut Packing Company in collecting evidence in this case, haven't you?

A. No, sir, aside from being chauffeur for his machine; that's all. I drove the machine around a lot for him, and I went into a store with him once.

X-Q. 111. So you haven't attempted to get any evidence except once?

A. I went into a store with him and he asked me not to go into any more.

X-Q. 112. Yesterday, on the street in the city of Hartford, didn't you stop a gentleman, who looked like a Hebrew peddler?

(Witness interjects.) No, sir; he stopped himself—

X-Q. 113. I stand corrected. Didn't a peddler stop

at your car when Mr. Cavanagh was present and try to sell some cigarettes?

A. Yes, he did.

X-Q. 114. And didn't you have some conversation with him about them?

A. Yes, I recall that now; I didn't think of it at the time you asked the question.

X-Q. 115. And then didn't you go to Mr. Hinton and tell him about this peddler?

A. I can't recall just what I said to him.

X-Q. 116. You thought he might be a witness?

A. Yes, I thought he might be a witness.

X-Q. 117. So you would help him out?

A. Yes, I didn't think of that at first, but the man's testimony wasn't used.

X-Q. 118. Before you went with the Beech-Nut Packing Company, did you ever sell any other products?

A. I sold crackers and other things.

X-Q. 119. Did you ever sell tobacco products?

A. In retail stores.

X-Q. 120. But I mean in your capacity as a road salesman visiting the trade?

A. No.

X-Q. 121. You simply sold them in retail stores along with other things?

A. Yes.

X-Q. 122. If you went into a customer's store and he gave you an order, say, for 100 boxes of Beech-Nut gum or 50 cases of Beech-Nut peanut butter, would you send that man, in filling his order, 100 cartons of Beech-Nut cigarettes or 100 cartons of Beech-Nut scrap tobacco?

A. No.

X-Q. 123. In other words, you wouldn't send to that man a tobacco product in the place of any of the Beech-Nut products which you are now selling or handling at this time, would you?

A. I would not.

X-Q. 124. Did you ever know of any customer or person who went into a store and said, "I want a package of cigarettes made by the Beech-Nut Packing Company"?

A. I do not.

X-Q. 125. And was handed a package of these Lorillard cigarettes?

A. I do not; that is, not asked in that way, no.

X-Q. 126. And you never knew of any person who wanted gum or any other Beech-Nut Packing Company product which you handle at this time and who was confused or deceived into taking the Beech-Nut cigarette or Beech-Nut scrap tobacco in the place of it, do you?

A. Why, I do not; no, I don't know of a case where they went in to buy gum and took cigarettes instead. No, I do not. A person wanting gum would not necessarily want cigarettes.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 127. Mr. Cavanagh has asked you about this Hebrew peddler, who peddled cigarettes, who came up to you yesterday and you testified that you called me over and talked to him. Why did you call me over to talk to him?

A. Why did I call you over?

R-D. Q. 128. Yes.

A. I called you over to talk to him because I asked him if he had Beech-Nut cigarettes. He said, "No, I am all sold out." I said, "Who makes them?" He said, "The Beech-Nut Company." I called Mr. Hinton over to talk to him then.

Re-direct examination closed.

Re-Cross Examination by Mr. Cavanagh.

R-X Q. 129. This party was rather a suspicious looking customer, wasn't he?

A. Why, I held on to my watch.

Signature of witness waived.

Deposition closed.

E. IRVING RAY (sworn by Mr. Krause), a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is E. Irving Ray, your age is 31, your residence is 50 Union Street, Meriden, Connecticut, you are a salesman for the Beech-Nut Packing Company; is that correct?

A. Yes.

Q. 2. How long have you been employed by the Beech-Nut Packing Company, Mr. Ray?

A. About a year ago, the 15th of last February.

Q. 3. What territory do you cover?

A. Northern Connecticut.

Q. 4. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes), which is in this case as Plaintiff's Exhibit No. 1. Do you remember when these cigarettes first came out in your territory?

A. Why, about this spring, I should say, in March.

Q. 5. Have you heard any comments, remarks or inquiries about these cigarettes as you have gone about your work; if so, please indicate the nature of these comments, remarks or inquiries?

A. I have heard hundreds of different people that I have seen, such as clerks, say, "Well, I see you people are putting out cigarettes now. What next line are you

going into?" and "How are the cigarettes selling with you?" and many other different comments of the same similar sort.

Q. 6. Do you drive a Beech-Nut Packing Company car?

A. No, except when I am with Mr. Peters in his car.

Q. 7. Will you kindly give me some particular instances of your having heard this kind of comments or remarks? I want you to give me only instances where you can state definitely the name of the person and accurately what he said.

A. Well, Mr. Austin in Waterbury, at the Hotel Kingsbury, on my purchase of a package of Camels, didn't seem to understand why I shouldn't smoke my own brand of cigarettes and passed a remark to that effect.

Q. 8. Do you remember what his exact words were?

A. As near as I can remember, he says, "I should —" oh, he says, "We are stocking your brand of cigarettes now, don't you want a deck of them?" I says, "No," I says, "I prefer Camels." "Well," he says, "I don't know why you don't smoke your own brand."

Q. 9. Did you tell him that the Beech-Nut Packing Company did not make these cigarettes?

A. I did after the conversation.

Q. 10. Can you give me any other instances?

A. Why, Mr. Austin's son, on being offered a Camel by me, stated he didn't see why I didn't smoke Beech-Nut cigarettes and he didn't smoke cigarettes himself, but he didn't see why I didn't smoke my own brand of cigarettes.

Q. 11. All right. Give me another instance.

A. Why, Mr. Young and Mr. Andrew of M. J. Burnham's, West Hartford, asked me how long we had been in the tobacco game, the cigarette game, and I told him they weren't our product.

Q. 12. What's that?

A. I told him they weren't our product after that.

Q. 13. All right. Can you remember any more?

A. Mr. Harry Eustace of the Sigourney Grocery Company asked me how they were selling, as near as I can remember, and he asked me if they were made by us and I told him they weren't.

Q. 14. Any others?

A. Mr. Loury, out to C. P. Case's, asked me about the cigarettes and—well, his conversation was I see that we bring out a cigarette and couldn't understand it when I told him it wasn't a Beech-Nut cigarette.

Q. 15. Do you recall any further instance of this same sort of thing? Please give the name of the man and try to tell exactly what he said; also where it was.

A. Mr. Mazacotti in Meriden asked me how—he said, "That Beech-Nut cigarette should sell," seeing that the rest of the products did, gum for instance, mostly. Mr. Cashman, Mulberry Street, Hartford, asked me a couple of times about the cigarettes. I informed him in the first instance, I remember; he asked me about how long we were making them. I guess that's about all I can recall at this time.

Q. 16. How long did you say you have been working for the Beech-Nut Packing Company?

A. A year about the 15th of last February, I started.

Q. 17. Prior to your being employed by the Beech-Nut people, had you ever seen this Beech-Nut scrap tobacco (Mr. Hinton indicates package of Beech-Nut chewing tobacco), which I now show you, which is in this case as Defendant's Cross-Exhibit No. 1.

A. Yes, I had an instance—

Q. 18. Do you remember whose product you thought it was?

A. Why, I didn't give it any thought until I was

about to go to work for this company. I felt it would be one of the products I would sell at the time. I didn't know but I thought it was, being Beech-Nut, it was a Beech-Nut product at that time. Of course I—

Q. 19. What's that?

A. I had not thought otherwise at the start until I took up this work; I thought the tobacco was a product of the Beech-Nut Company.

Q. 20. To what extent have you seen Beech-Nut scrap tobacco displayed in your territory in comparison with the cigarettes?

A. Not to anywhere near great an extent as the cigarettes. To a certain extent, of course.

Q. 21. That is all for the direct examination. Now Mr. Cavanagh will have a few questions.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 22. Mr. Ray, you have related a number of instances of people, who spoke to you about the Beech-Nut cigarette and in connection with that, whether it was put out by the Beech-Nut Packing Company. Do you know of your own knowledge if any of these people took the trouble to examine that package of cigarettes before they asked you that question?

A. No, I don't.

X-Q. 23. You smoke, don't you?

A. Yes, lots of them.

X-Q. 24. Do you smoke cigarettes?

A. Yes.

X-Q. 25. Will you kindly mention some of the brands you have smoked?

A. Why, I think for the past three years I have smoked Camels; previous to that—well, I have smoked them pretty near as soon as they come out; I don't know just how long it has been.

3363

X-Q. 26. Did you ever smoke Murads or Moguls?

A. Perhaps once or twice; never to any great extent.

X-Q. 27. Egyptian Deities?

A. I don't believe I have ever smoked Egyptian Deities.

X-Q. 28. Do you know of the P. Lorillard Co., do you?

A. Why, yes.

X-Q. 29. You know they are a large tobacco manufacturing concern and put out various brands of cigarettes?

A. Yes.

X-Q. 30. This name, P. Lorillard Co., on this package of cigarettes would indicate to you that it was one of their brands?

A. Yes.

X-Q. 31. And if the name Beech-Nut Packing Company is not on that package any place, that would indicate to you that it is not their cigarettes, would it not?

A. Well, it would, yes, if I examined the package closely and found P. Lorillard on it.

X-Q. 32. But on all products of Beech-Nut Packing Company you handle—take, for instance, this glass jar of peanut butter (Mr. Cavanagh shows witness glass jar of Beech-Nut peanut butter) which I show you and which is in this case as Defendant's Exhibit No. 7 for identification, the name Beech-Nut Packing Company, Canajoharie, N. Y., appears on it?

A. It does.

X-Q. 33. And that is the practice with all their products, as far as you know?

A. Yes.

X-Q. 34. Do you handle the Mohawk and Erie and Holly brands for the Beech-Nut Packing Company?

A. Yes, but I have never sold any—they handle them, the company itself, but I have never sold any but the Erie.

X-Q. 35. That doesn't bear the Beech-Nut label, similar to this on the peanut butter, does it?

A. No, not that I know of.

X-Q. 36. You have seen the goods?

A. Yes, oh yes.

X-Q. 37. Do you chew tobacco? You never have chewed any of this Lorillard Beech-Nut scrap?

A. No.

X-Q. 38. When did you first see a package of this Lorillard Beech-Nut scrap?

A. It is a long time ago. I don't know; I can't just recall how many years; it must have been a few years ago.

X-Q. 39. You didn't pay any attention to it?

A. No.

X-Q. 40. You didn't examine it, did you?

A. No, I never did.

X-Q. 41. Now, as I understand it, this Beech-Nut label on the peanut butter is a good representation of their standard label, as far as you know?

A. Yes.

X-Q. 42. And that label contains a wide red band with printing on it, above and below the oval, does it not?

A. Yes, it does.

X-Q. 43. Now, as you look at this Beech-Nut scrap tobacco package, to which Mr. Hinton called your attention, you see it has got a single blue lined oval, from which wide radiating red lines run out like a sunburst, do you not?

A. Yes.

X-Q. 44. You don't know of any Beech-Nut product

that you handle that has any such a dress or decoration, do you?

A. Not the sunburst part, no, I don't.

X-Q. 45. And the sunburst runs out from a single lined blue oval?

A. No, I don't.

X-Q. 46. Now, on this package of Beech-Nut cigarettes you don't find a wide red oval band with any printing on it, do you?

A. No, not on close examination, no.

X-Q. 47. But just look at the thing; you are familiar with the Beech-Nut label, of course?

A. No.

X-Q. 48. That don't look like your Beech-Nut label?

A. No, but if I wasn't so close, if I looked at it at a distance, the Beech-Nut would look just the same.

X-Q. 49. Is it the beech-nut that attracts your attention or the wide red band?

A. The word "Beech-Nut" naturally and the cluster on it.

X-Q. 50. But this cluster on the peanut butter, the Beech-Nut Packing Company has a single nut imposed on three green leaves, has it not?

A. Yes.

X-Q. 51. And here there are two nuts without any leaves and with red and gold?

A. Yes.

X-Q. 52. Is that right?

A. Yes.

X-Q. 53. Now, we will get back to that outline of the oval; isn't it a fact, Mr. Ray, that one of the things that would attract your attention is the fact that the Beech-Nut Packing Company label has a wide red oval?

A. Not necessarily. I wasn't attracted by that; I never gave that a thought; the red oval part was simply

—the beech-nut is exactly the same except that it is red here and white here, to me.

X-Q. 54. Do you mean the word beech-nut?

A. The word beech-nut, yes.

X-Q. 55. That was what you were talking about in your last answer?

A. Yes. But on examining it, I know, of course.

X-Q. 56. But I was talking about that red oval. Now you have ridden around with Mr. Peters, in his car, haven't you?

A. Yes.

X-Q. 57. And he has a Beech-Nut sign on the side of that car?

A. Yes.

X-Q. 58. And haven't there been times when you were on the street and were looking for his car, when you would see that red oval at a distance and recognize his car among the others?

A. Why, yes, I think, as near as I can remember, now, Mr. Peters is a full body of red.

X-Q. 59. But you can see that at a distance, that red oval?

A. Why, yes, you can see it at a distance.

X-Q. 60. I understand you sell the Beech-Nut Packing Company's products, do you not?

A. Yes.

X-Q. 61. Their complete line?

A. Yes.

X-Q. 62. That is, you sell all their products; you sell chewing gum and ginger ale?

A. Yes.

X-Q. 63. And things of that sort?

A. Yes.

X-Q. 64. Did you ever know of any person who wanted to purchase a Beech-Nut food product or Beech-

Nut chewing gum or Beech-Nut ginger ale and who was confused or deceived into accepting a package of this Beech-Nut scrap tobacco or Beech-Nut cigarettes in place of their food products?

A. No, I can't say that I do know of any such specific instance of that sort.

X-Q. 65. Would you, yourself, if you went into a store and wanted to buy, say, a package of Beech-Nut chewing gum or a package of this Beech-Nut peanut butter, which I show you (Mr. Cavanagh indicates a glass jar of Beech-Nut peanut butter), you wouldn't be fooled into taking a package of cigarettes for the chewing gum or peanut butter when you wanted those?

A. No.

X-Q. 66. You never knew of any person being fooled on goods like that?

A. No.

X-Q. 67. And you don't know of any instance where a person went in and said, "I want a package of cigarettes, made by the Beech-Nut Packing Company," and the man sold him the Lorillard cigarettes?

A. No; I can't say I do.

X-Q. 68. You yourself never tried to tell anybody that the Beech-Nut Packing Company made these cigarettes?

A. No.

X-Q. 69. You told them they were made by—?

A. Why, I told them Lorillard.

X-Q. 70. In other words, as a fair salesman, when inquiries were made, you always told them who the goods were made by?

A. Yes.

X-Q. 71. You were speaking of a man by the name of Cashman who asked you a couple of times about this?

A. Yes.

X-Q. 72. On the first occasion, what did he ask you?

I don't want the exact words, just substantially what he asked you.

A. Well, I don't know as I can tell you the exact words. I know he asked me in a certain way how long we had been putting out cigarettes, and of course, as he was very busy, I walked along. I didn't stop to talk to him.

X-Q. 73. What did you tell him?

A. I didn't talk to him at that time at all. There was another time when he asked me in regard to the cigarettes; I told him it was a Lorillard product.

X-Q. 74. So that the first time he just put that question to you as you went by?

A. No. I very seldom have a talk with Mr. Cashman, for any length of time. He is a very busy man.

X-Q. 75. At any time anybody would ask you and you had time to talk to him, you told them they were not made by the Beech-Nut Packing Company, but by the Lorillard Co.?

A. Yes.

X-Q. 76. You have been assisting counsel for the Beech-Nut Packing Company in looking up and collecting evidence in this case, haven't you? That is, interviewing parties?

A. I have not interviewed them to any extent. I have introduced Mr. Hinton to parties.

X-Q. 77. That you have talked to first?

A. I haven't talked to people with Mr. Atkinson.

X-Q. 78. You and Atkinson went around and saw parties who you thought might know something about the case and then referred them to Mr. Hinton?

A. Yes.

Cross-examination closed.

Signature of witness waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties, through their respective counsel, that if T. J. LENAHAN was called, he would testify as follows:

My name is T. J. Lenahan; I am of legal age; I am the proprietor of a cigar store near the railroad station in Hartford, Connecticut, and employ two people. I have handled the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1. I have heard people say over the counter a considerable number of times in connection with these cigarettes, "What are these people going to come out with next? If these cigarettes are as good as the gum, they are all right." I have handled Beech-Nut scrap tobacco, similar to plaintiff's exhibit, for about two years, and I have been selling very little of this. I never noticed the name P. Lorillard Co. on the package of scrap tobacco. I buy through the jobbers and did not know who makes the scrap tobacco.

On cross-examination the witness would testify as follows:

I never took the trouble of examining the scrap tobacco package to see what name was on it, and therefore if I had examined it, I would have seen Lorillard's name there and would know it was a product of the P. Lorillard Co., well known tobacco manufacturers, and further than this, I myself, did not believe that the tobacco was a product of the Beech-Nut Packing Company, but didn't pay any attention to the matter, and, not having examined the package, did not know who it was made by.

As to the cigarettes, I know them to be a product of P. Lorillard Co., and not of the Beech-Nut Packing Company. I buy my supplies through the jobbers and handle various brands of their cigarettes and tobacco products,

such as the Murads and Moguls, and, in fact, all the well known brands of cigarettes on the market today.

I never told any customers that the cigarettes or tobacco were made by the Beech-Nut Packing Company and never sold the same as a product of the Beech-Nut Packing Company.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
} In Equity. No. 3056.

CERTIFICATE.

State of Connecticut, County of New Haven, ss.

I, Herbert J. Krause, a Notary Public, within and for the State of Connecticut, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of John A. Peters, James J. Cashman, Jr., Robert G. Greene, Nathan Hammerman, James J. Marrinan, T. J. Branigan, Adam Sattig, Sanford Hawkins, Alexander C. Gardner, Newton Harrison, John F. Griffin, Joseph De Rago, Harry W. Avery, E. Irving Ray, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at New Haven, West Haven, Milford and Hartford, Connecticut, beginning August 29, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cava-

nagh during the taking of said testimony; that the testimony was taken in New Haven, West Haven, Milford and Hartford, beginning at 12 o'clock noon, August 29, 1921; and ending at 2 o'clock in the afternoon, September 1, 1921; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition, and except for the depositions which were stipulated as appears in the record.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies taken in accordance with the attached bill, amounting to $139.69.

In witness whereof, I have hereunto set my hand and official seal, this 25th day of October, 1921.

HERBERT J. KRAUSE,
Notary Public.

[SEAL.]

My commission expires February 1st, 1926.

State of Connecticut, County of New Haven, ss.

I, Alfred N. Wheeler, Clerk of the County of New Haven, and Clerk of the Superior Court in and for said county, do hereby certify that the said court is a court of record. That Herbert J. Krause, Esquire, whose name is subscribed to the certificate or proof of acknowledgment of the annexed instrument, was at the time of taking the same a Notary Public in and for said county, residing in the County of New Haven, duly commissioned and sworn, and qualified to act as such; that as such Notary Public he was at the time of taking such acknowledgment duly authorized by the laws of the State of Con-

necticut to take the acknowledgments and proofs of deeds or conveyances for lands, tenements or hereditaments in said State of Connecticut; that I am well acquainted with the handwriting of said Herbert J. Krause, Esquire, and verily believe his signature to said certificate or proof of acknowledgment is genuine.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at New Haven, in said County of New Haven, State of Connecticut, this 25th day of October, A. D. 1921.

ALFRED N. WHEELER,
Clerk.

[SEAL.]

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity. No. 3056.

Depositions taken on behalf of plaintiff pursuant to notice and by agreement of counsel, before Louis M. Altman, a Notary Public for the State of Connecticut, acting as Special Examiner by consent of counsel, on September 8, 1921, at Stamford, South Norwalk and Bridgeport, Connecticut.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for defendant.

JOHN MORELLI, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. John Morelli; 50; 22 Union street, South Norwalk, Connecticut; fruit business.

Q. 2. Your fruit store is located at?

A. 81 North Main street, South Norwalk.

Q. 3. You handle tobacco products?

A. Yes, I do.

Q. 4. I show you a package of Beech-Nut cigarettes and Beech-Nut scrap tobacco, which are in this case as Plaintiff's Exhibits Nos. 1 and 3. Have you handled these products?

A. Yes, I do.

Q. 5. Do you ever hear customers come into the store and make remarks about these products?

A. They come in and say, "What is that Beech-Nut scrap tobacco?" and I say, "Yes," and they say, "Who puts that up, the Beech-Nut Company?" I say, "No. No, it is either the American Tobacco Company or the Lorillard Company," and then they'd say, "Oh, I thought it was the Beech-Nut Company."

Q. 6. How many times has this happened?

A. Oh, quite a few times. At first no one knew nothing about it. Now they don't ask so much; they know it isn't the Beech-Nut Company.

Q. 7. That is, the ones you have talked to?

A. Yes.

Q. 8. You have, then, told people that this scrap tobacco isn't put out by the Beech-Nut Company?

A. Oh, yes; I do.

Cross-Examination by Mr. Cavanagh.

X-Q. 9. The Lorillard Company's name is on this cigarette package, isn't it?

A. I never knew it was put up by Lorillard.

X-Q. 10. That is, the name of the tobacco company?

A. Yes.

X-Q. 11. On the scrap tobacco it is also Lorillard on the package?

A. Yes, I see.

X-Q. 12. You always tell the customers that it isn't put out by the Beech-Nut Company?

A. Yes, I do.

X-Q. 13. But that it is put out by the tobacco company?

A. I always tell them it is a P. Lorillard or American Tobacco Company tobacco.

X-Q. 14. And you would not sell a customer tobacco or cigarettes like these Beech-Nut cigarettes or the Beech-Nut scrap tobacco of the Lorillard Company if he wanted

chewing gum or the food products of the Beech-Nut Company?

A. No, I wouldn't.

X-Q. 15. You would not consider them the same class of goods?

A. No, I guess not.

X-Q. 16. You never knew of the Beech-Nut Packing Company ever putting out any tobacco products?

A. No.

Signature waived.

Deposition closed.

GEORGE F. MOULTON, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. George F. Moulton; retail druggist; 43 Washington street, South Norwalk, Connecticut; 55 years.

Q. 2. Do you handle tobacco products in this store?

A. Cigars and cigarettes.

Q. 3. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Have you handled these here?

A. Yes.

Q. 4. How long have you handled them?

A. Several months.

Q. 5. Whose product did you think these cigarettes were prior to yesterday?

A. Beech-Nut people, of course.

Q. 6. Do you now think they are a Beech-Nut product?

A. From what you told me, no.

Q. 7. When did I tell you that they were not?

A. Yesterday.

Q. 8. Have you yourself sold these cigarettes over the counter?

A. I have, yes.

Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Whose product would you take that to be?

A. Beech-Nut, of course.

Q. 10. What do you mean by Beech-Nut?

A. Made by the Beech-Nut Packing Company.

Q. 11. Why would you take that to be a Beech-Nut product?

A. From the name and label on it and the trade-mark.

Q. 12. Have you ever seen this scrap tobacco before today?

A. No.

Q. 13. Have you ever seen it displayed around anywhere in this town or elsewhere?

A. No, I have not.

Cross-Examination by Mr. Cavanagh.

X-Q. 14. From whom do you buy these Beech-Nut cigarettes?

A. Jobbers.

X-Q. 15. Ever hear of the P. Lorillard Company?

A. Yes, tobacconists.

X-Q. 16. You notice P. Lorillard Company's name on the package?

A. I do now, yes.

X-Q. 17. You notice the name Lorillard on the scrap tobacco?

A. I do now, yes.

X-Q. 18. So when you first saw that package, or when you handled them first, you didn't pay any attention to the name, just glanced at the package?

A. Well, Beech-Nut was the prominent name.

X-Q. 19. If you had seen Lorillard's name on them you would have known it was the product of the tobacco company, wouldn't you?

A. Yes.

X-Q. 20. Do you sell Beech-Nut products here—chewing gum and the like?

A. Yes, indeed.

X-Q. 21. If you went into a store you wouldn't be confused or deceived into taking Beech-Nut mints or Beech-Nut chewing gum for or in place of Beech-Nut cigarettes or scrap tobacco?

A. Not in place of them, no.

X-Q. 22. You would consider them a different class of goods, made by some company only foreign to the other, so far as the class of goods goes?

A. Yes.

Signature waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if TRACY N. COLLINS were called he would testify as follows:

My name is Tracy N. Collins; I am of legal age, and the proprietor of a grocery and general store, and restaurant located in Noroton, Conn. I have stocked and sold Beech-Nut scrap tobacco similar to Plaintiff's Exhibit No. 3 for about two years, and I have stocked and sold Beech-Nut cigarettes similar to Plaintiff's Exhibit No. 1 since these cigarettes came out in this territory, which was in the spring of 1921. I always believed that both the scrap tobacco and the cigarettes were made by the Beech-Nut Packing Company, the same people who

make the chewing gum and other food products, until I was told by Mr. Hinton, on September 7, 1921, that the Beech-Nut Packing *Company did not make either* of these two products.

On cross-examination witness would testify as follows:

I bought the Beech-Nut scrap tobacco and the Beech-Nut cigarettes from jobbers, and am still buying and selling these products. I never noticed the name Lorillard or P. Lorillard Company on the packages, as I did not take the trouble to look at them, and as I now see from looking at the package that the name Lorillard's appears on the scrap tobacco and P. Lorillard Company on the cigarette package, and from this I would understand these to be a product of P. Lorillard Company, the tobacco manufacturers. I would not be confused or deceived into selling this scrap tobacco or the cigarettes in the place or instead of the chewing gum, or any of the Beech-Nut food products of the Beech-Nut Packing Company, nor would I be myself deceived into accepting gum or food products in the place of a tobacco product, and *vice-versa.*

WILLIAM P. MELIA, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is William P. Melia; your age is 32; your residence is 305 Laurel avenue, Bridgeport, Connecticut, and you are a salesman for the Beech-Nut Packing Company; is this correct?

A. Yes.

Q. 2. How long have you been employed by the Beech-Nut Packing Company, and what territories do you cover?

A. Two years I have been with the Beech-Nut Company, covering the territory from Greenwich back to Danbury.

Q. 3. What counties would this be?

A. Fairfield County.

Q. 4. Connecticut?

A. Yes.

Q. 5. I show you a package of cigarettes, which is in this case as Plaintiff's Exhibit No. 1, being a package of Beech-Nut cigarettes. When did these cigarettes come out in this territory?

A. In this territory? I should judge about six months ago.

Q. 6. Have you since that time seen these cigarettes displayed in store windows and advertised by posters and the like?

A. Yes, sir, I have.

Q. 7. Do you drive a car in your work?

A. I drive a Beech-Nut car—a car with the Beech-Nut label on the side.

Q. 8. Have you heard comments or remarks from the people you have encountered in your work since these cigarettes came out, about these cigarettes?

A. About these cigarettes? Yes, sir.

Q. 9. Please state the nature of comments, inquiries and remarks which you have heard.

A. Some would say, "Say, how long have you been making cigarettes?" Other people would ask for samples, and would say, "When did you start to make cigarettes?" Others would say, "Well, I hope these will be as good as the gum."

Q. 10. I wish you would give me a strictly conservative estimate of the number of remarks of this general character which you have heard since these cigarettes came out.

A. What do you mean "Since these cigarettes came out?"—about the total number I have heard as I have gone over my territory?

Q. 11. Yes, in so far as you can estimate it.

A. I should say a thousand times easy.

Q. 12. How many would you get in a day?

A. Well, that would all depend on the trade you were calling on. If you are calling on delicatessen trade and fruit stores, you would probably get about thirty-five or forty; if you call on hotels and drug stores you would get an average of a hundred. That would be taking in the people in the rear who are as a rule always looking for samples from a man when he enters the place, regardless of the line he carries.

Q. 13. And these people would ask you for samples; is that what you mean?

A. Yes.

Q. 14. Of what?

A. Beech-Nut cigarettes.

Q. 15. Have you seen the Beech-Nut scrap tobacco similar to Plaintiff's Exhibit No. 3 displayed at all in this territory?

A. I have some, yes.

Q. 16. To what extent have you seen it displayed in comparison with the cigarettes?

A. Well, not as much, for I don't see very much of it.

Q. 17. Will you give me an illustrative instance of some particular instance that you can remember, if you can, of people who asked you for cigarette samples?

A. Well, for instance, I go to the Elks' Club quite a lot, and we go down to bowl. And since these cigarettes first came out, they say, "Why don't you bring us around some samples of your cigarettes?" I have had instances on the road, too; I had one only on my last trip up to Reading. I was in a store demonstrating candy goods,

and I had a few samples of Beech-Nut gum in my pocket. Two ladies drove up in a car, as apparently all in that section are very wealthy people. Two girls got out, and after I had given them samples of the gum they walked out to the car, but came back and asked in a whisper for a few samples of Beech-Nut cigarettes.

Q. 18. How long ago was this, Mr. Melia?

A. This was a month ago.

Q. 19. Did you get the names of those two girls?

A. No, I did not; but the lady who owned the store knows they asked for the cigarettes.

(Last portion of witness' answer objected to as hearsay.)

Cross-Examination by Mr. Cavanagh.

X-Q. 20. What products do you sell for the Beech-Nut Company in this territory?

A. Full line.

X-Q. 21. That includes food products?

A. That includes food products, chewing gum, mints —confectionery line right straight through.

X-Q. 22. And also ginger ale?

A. Ginger ale, yes, sir.

X-Q. 23. Do you handle any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 24. Do you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 25. You never knew the Beech-Nut Packing Company ever put out cigarettes or scrap tobacco or chewing tobacco, did you?

A. No, sir.

X-Q. 26. You never sold for the Beech-Nut Packing Company any product which was packed or made up in a cigarette package like this?

A. No, sir.

X-Q. 27. Likewise you never sold any tobacco for the Beech-Nut Packing Company put up in a package like the Lorillard scrap tobacco, did you?

A. No, sir.

X-Q. 28. You say that there are hundreds and perhaps about a thousand people who have asked you if the Beech-Nut Packing Company was putting these out?

A. Yes, sir.

X-Q. 29. Did you keep track of this number?

A. No, sir; I used to make a record of the cigarette inquiries when they first came out and a fellow on Water street was handling them.

X-Q. 30. So you have kept track of the number of people who have asked you?

A. No, I haven't. Just as I told you, when they started to come out from my own observations, I used to keep a little record for my own information, as about fifty or sixty people would ask me right along.

X-Q. 31. And they asked you if the Beech-Nut Packing Company was putting out cigarettes?

A. How long they had been.

X-Q. 32. I understand that the Beech-Nut Packing Company has put out a new food product every now and then?

A. Yes, sir.

X-Q. 33. Well, you haven't had an average of fifty or sixty people a day asking how long they have been putting these out?

A. No, if you are a good, live salesman you are supposed to tell them and show them samples.

X-Q. 34. You never had all these thousand inquiries from this territory of yours in Connecticut with Beech-Nut ginger ale when it was first put out, did you?

A. No, sir; but I would not say that I wouldn't have the inquiries.

X-Q. 35. And if you were down in the basement of this club in the bowling alleys that you speak of, you didn't have all your friends asking for ginger ale samples?

A. Off and on I have had people asking for ginger ale samples.

X-Q. 36. But not to the same extent as the cigarettes?

A. No, I didn't have any cigarettes to give out.

X-Q. 37. But you didn't go down into the bowling alley of your club, for instance, and generally hand out samples of ginger ale?

A. I didn't give a sample of ginger ale down in the club.

X-Q. 38. Not in bottles and not to individuals?

A. No; I talked to the manager and handed him a sample.

X-Q. 39. But you didn't make a practice of giving away your products in samples to individual members at the club?

A. No, sir.

X-Q. 40. Isn't it a fact from your experience as a club member, that the men or fellows at the club will take an interest in a thing like a cigarette where they wouldn't in food products or ginger ale; that is, they would want samples of cigarettes when they wouldn't want them of the other?

A. Yes, sir.

X-Q. 41. You would naturally attribute that to the fact that men are universally the same and would want cigarettes where they wouldn't want to bother about ginger ale?

A. Well, if I stopped in at the bowling alley usually they would say, "Give me a sample of Beech-Nut gum." and I have continuously given out samples there and built up a nice business, and never go in without leaving samples of gum.

X-Q. 42. And you have found that the men would also then turn around and ask for samples of the Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 43. Did you ever take the trouble to look at that package?

A. Yes, sir.

X-Q. 44. You saw the name P. Lorillard Company on it, didn't you?

A. Yes, sir.

X-Q. 45. You know who the Lorillard Company is?

A. Yes, sir.

X-Q. 46. And when you examined the package of scrap tobacco you saw the name Lorillard on that, didn't you?

A. No, sir. I didn't look at the scrap tobacco; didn't bother with it.

X-Q. 47. When these people asked you for samples of Beech-Nut cigarettes, that is, the various people you met in your business (I am requiring you to say no particular ones, but just in your traveling generally)—what did you tell them?

A. I told them we never made cigarettes.

X-Q. 48. Told them that they were made by Lorillard Company, didn't you?

A. Yes, sir.

X-Q. 49. Beech-Nut?

A. Well, they would say, for instance, if it is in a store, a man handling thousands of packages never knew they were Lorillard's product, but was under the impression also that they were Beech-Nut.

X-Q. 50. What man handling thousands of packages do you mean?

A. What man?

X-Q. 51. Yes.

A. An Italian fellow in Stamford who had a fruit stand.

X-Q. 52. Do you know if he sold thousands of packages of them?

A. I never saw him buy less than eight or nine cartons.

X-Q. 53. You don't know whether he ever looked to see if Lorillard's name was on the package?

A. That I can't say.

X-Q. 54. You don't know what gave him this impression?

A. No, sir; I have been going there off and on to sell my line to Abrams, back of the Hotel Davenport. He used to handle them right along, and brought a package out one day, and said, "I am handling all the Beech-Nut products," and I said, "That is not ours."

X-Q. 55. You don't know anything yourself about why he might have thought they were Beech-Nut?

A. No, I don't know anything about it.

X-Q. 56. You never told any people that the Beech-Nut Packing Company was putting out these cigarettes, did you?

A. No, sir.

X-Q. 57. And you have never yourself tried to sell this product or taken orders for these Beech-Nut cigarettes on behalf of the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 58. If you went into a store and wanted to buy some Beech-Nut chewing gum or other Beech-Nut food product, you wouldn't be confused or deceived into accepting Beech-Nut scrap tobacco or the Beech-Nut cigarettes in place of the chewing gum or other food product, would you?

A. No, sir.

X-Q. 59. You would consider them different classes of goods, wouldn't you?

A. Yes, sir, entirely.

X-Q. 60. You say your whole territory covers Fairfield County?

A. Yes.

X-Q. 61. You sell in Stamford?

A. Yes, sir; Greenwich, South Beach, Stamford, Darien, Noroton, Norwalk, Southport, Westport, Bridgeport, Fairfield.

X-Q. 62. You don't sell to the United Cigar Stores up here or to Schultes?

A. No, sir.

Signature waived.

Deposition closed.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if EDWARD ABRAMS were called in he would testify as follows:

My name is Edward Abrams; I am of legal age, and am proprietor of a news and tobacco-stand in the Davenport Hotel, Stamford, Connecticut, and of a cigar store at 33 Bank street, Stamford, Connecticut. I work in both places and sell goods therein. I have sold the Beech-Nut cigarettes similar to Plaintiff's Exhibit No. 1, since they came on the market in this territory, and always believed them to be the product of the Beech-Nut Packing Company until I was told, about September 5, 1921, by Mr. Atkinson, a representative of the Beech-Nut Packing Company, that this company had nothing to do with this product. I had never before seen a package of Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco, until I was shown one the other day.

On cross-examination the witness would testify that he never examined a package of cigarettes and never paid any attention to the same, as he buys his goods from jobbers, and not direct from the manufacturers; that if he had seen the name P. Lorillard Company on the package, he would have known that it was a product of P. Lorillard Company, tobacco manufacturers, as he knows that the P. Lorillard Company is a large tobacco manufacturing concern; that he is still buying and selling the cigarettes, and that if a customer came into his store and wanted to purchase Beech-Nut chewing gum, which he handles, he would not sell him, and has never sold any customer, Beech-Nut cigarettes for and in place and instead of Beech-Nut chewing gum, and that he himself could not be confused or deceived into accepting Beech-Nut cigarettes, or Beech-Nut scrap tobacco, for and in place of the Beech-Nut chewing gum; and *vice-versa*.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Co.,
vs.
P. Lorillard Company. } In Equity. No. 3056.

CERTIFICATE.

State of Connecticut, County of Fairfield, ss. Stamford.

I, Louis M. Altman, a Notary Public in and for the State of Connecticut, acting as Special Examiner, by consent of counsel, hereby certify that the foregoing depositions of John Morelli, George F. Moulton, Tracy N. Collins, William P. Melia and Edward Abrams, were taken in behalf of the Beech-Nut Packing Company, pursuant to agreement by and before me, beginning on September 8, 1921, at Stamford, Connecticut, and ending the

same day; that the depositions were taken at Stamford, Connecticut, South Norwalk, Connecticut, and Bridgeport, Connecticut; that the opposing party was represented by counsel during the taking of the testimony; that the depositions were taken stenographically and transcribed under my supervision by Helen E. Woods, a public stenographer well known to me; that I am not related by blood or marriage to either of the parties to this cause and have no interest therein.

I further certify that I have been paid $35.41 as fees for attendance and taking of the depositions, and that the same is a fair, just and reasonable fee.

In witness whereof I have hereunto set my hand and official seal this 27th day of September, 1921.

LOUIS M. ALTMAN.

[SEAL.]

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity. No. 3056.

Depositions taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before S. E. Harvey, a Notary Public within and for the County of Cook and State of Illinois, acting as Special Examiner by consent of counsel, at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, Chicago, Illinois, beginning the thirty-first day of October at one o'clock P. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, attorneys for the Beech-Nut Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard Company.

ROY B. SOUTHERN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Roy B. Southern, your age is 38, your residence is 4641 Lake Park Avenue, Chicago, you are a salesman for the Beech-Nut Packing Company and have been employed by the Beech-Nut Packing Company since December, 1920?

A. Yes.

Q. 2. What territory do you cover, Mr. Southern?

A. From 75th Street, south, including Will County, Illinois.

Q. 3. I show you a package of Beech-Nut scrap tobacco, being Plaintiff's Exhibit No. 3, in this case. Have you seen this tobacco displayed since you have been working for the Beech-Nut Packing Company?

A. Yes, sir.

Q. 4. As you have been going about your work, have you ever heard comments, remarks or inquiries about this scrap tobacco? If so, what has been their character?

A. Well, "Have you people been making Beech-Nut tobacco?" "How long have you been making Beech-Nut tobacco?" "I didn't know you had been making Beech-Nut tobacco." "Have you a sample of Beech-Nut tobacco?"

Q. 5. From whom have you heard these comments, remarks and inquiries? I mean from what class of people.

A. Grocerymen and working people. Paving crews.

Q. 6. How frequently have you heard such comments, remarks and inquiries?

A. Numerous remarks. Several daily.

Q. 7. Can you give me any particular instances where you have heard such comments, remarks, and inquiries? I want only the instances where you can state definitely where the instance occurred and have a very definite recollection of what was said, and who said it.

A. Some that I can call to memory—Paul Meyers of Madison, Illinois, groceryman. When I called on him he said. "Hello, Beech-Nut. Give me two cartons of scrap tobacco. That's all I want this trip." I informed him we did not make the scrap tobacco, but was unable to convince him. He said if some other company was making Beech-Nut tobacco he would make Beech-

Nut sausage. Another case: C. B. Johnson in Joliet. When I called on him he said, "Hello, Beech-Nut, give me some tobacco and cigarettes. I have been waiting for you to give you an order." Called on a man in Palos Park. After I left the store there was a paving crew working just below. They stopped me and wanted some samples of scrap tobacco and asked me why I didn't keep this groceryman supplied.

Q. 8. Were you driving an automobile at the time?

A. Yes, sir.

Q. 9. What, if anything, was on the automobile?

A. Beech-Nut Pure Food Products.

Q. 10. Was this automobile where the paving crew could see it?

A. Yes, sir.

Q. 11. Well, give me some more instances, if you can remember them.

A. Along in January, I believe it was, or February, I stopped in an ex-saloon in Lemont, near beer account, to sell them some ginger ale. Was passing my samples. He says, "I can't use that, but I can use two or three cartons scrap tobacco if you have them with you." Numerous others. I don't recall right now. But there were several others.

Q. 12. I now show you a package of Beech-Nut cigarettes, being Plaintiff's Exhibit No. 1, in this case. Will you please state how long, to your knowledge, these cigarettes have been displayed in the territory that you cover?

A. I first noticed them about two months before today.

Q. 13. Will you please state briefly what your experience has been in connection with the Beech-Nut cigarettes?

A. I have numerous inquiries, asking if they were

made by us, and why I don't tell them I handle cigarettes and give them some samples. "How long have you been making them," and so on.

Q. 14. How many times would you say that has happened? I want a conservative estimate.

A. I should judge ten or fifteen times a day.

Q. 15. Can you give me any particular instances of such comments, remarks and inquiries concerning the Beech-Nut cigarettes?

A. Well, Mr. Zwyers, the butcher at Thompkins & Son—I called in his place—asked me why I hadn't told him we were making cigarettes and give him some samples. Said he told cigarette salesman when he called he would get all the samples of cigarettes he wanted when I called. Another case. Called on Charles Larson in Roseland, 113 and Vincennes. He said, "Hello, Beech-Nut. You are the very fellow I wanted to see. If you people are making cigarettes I want to cancel that ten case drop shipment I have on the road." Another case, I believe, that I recall in Blue Island. His name is Sck————. Called on him last week. Asked him how the Beech-Nut line was going. He said he was selling lots of gum and tobacco, but the cigarettes weren't moving so fast, although he told his trade they were good, because they were all three made by the same company. I believe that is about all I recall right now that I can give names of. Several others. Mr. Stube in Blue Island is another. I was talking to one of his grocery salesmen about Beech-Nut cigarettes and Mr. Stube came up and I saw fit to inform him that we didn't make them. Seemed very much surprised to think that they were not a product of Beech-Nut Packing Company. I believe that is all I can recall right now.

Q. 16. Have there been other instances of this character in connection with cigarettes and scrap tobacco,

besides those which you have specifically enumerated?

A. Yes. I have inquiries every day. I believe that's all that I know names and addresses of.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. I understand that you have been with the Beech-Nut Packing Company since about December, 1920?

A. Yes, sir.

X-Q. 2. As a salesman?

A. I have.

X-Q. 3. You visit the trade, don't you?

A. Grocery trade. Yes, sir.

X-Q. 4. Approximately, how many stores do you visit in your territory?

A. A day?

X-Q. 5. No. Just total approximately.

A. Four hundred.

X-Q. 6. And how many do you visit a day?

A. From fifteen to twenty-five.

X-Q. 7. How long have you known of that Beech-Nut scrap tobacco, Plaintiff's Exhibit 3, to be on the market?

A. I guess two years.

X-Q. 8. So you knew it was on the market before you entered the employ of Beech-Nut Packing Company?

A. I had just seen it.

X-Q. 9. Do you smoke?

A. Yes, sir.

X-Q. 10. Do you chew?

A. No, sir.

X-Q. 11. Did you ever smoke any Beech-Nut cigarettes?

A. One.

X-Q. 12. Did you ever buy a package of them?

A. No, sir.

X-Q. 13. You note the name Lorillard on that scrap tobacco package?

A. The fact someone showed it to me. I believe Mr. Vosburg showed it to me. I don't recall who showed it to me.

X-Q. 14. Never bought a package?

A. No, sir.

X-Q. 15. So you had no occasion to look at it all during those two years?

A. No, sir.

X-Q. 16. Will you describe the sign you say is on your automobile?

A. Beech-Nut (in oval) Pure Food Products.

X-Q. 17. That oval is a red band, is it not?

A. No; it was gold.

X-Q. 18. In order to save time, I show you one of the labels of the Beech-Nut Packing Company. Does the sign on your wagon resemble that in general?

A. On the back and each door. Not on the sides.

X-Q. 19. What is on the door?

A. On each door and on the back, this label.

X-Q. 20. So substantially that label does appear on you automobile?

A. Yes, but not on the sides.

X-Q. 21. And on the sides you have the words Beech-Nut Food Products. Now, just what do you sell for the Beech-Nut Packing Company?

A. I sell gum, candy, peanut butter, beans, catsup, chili sauce, mustard, alimentary paste products.

X-Q. 22. Did you ever sell any tobacco products?

A. No, sir.

X-Q. 23. Did you ever know the Beech-Nut Packing Company to sell any tobacco products?

A. No.

X-Q. 24. Did you ever know the Beech-Nut Packing Company to sell any product that was packaged exactly like the scrap tobacco?

A. No.

X-Q. 25. Likewise, did you every know the Beech-Nut Packing Company to sell any goods packaged like packages of cigarettes?

A. No.

X-Q. 26. Is it your practice when you call on the trade to give them samples of your various products?

A. Every time I call.

X-Q. 27. You give away samples to the grocers and trade in general?

A. Yes, sir. To the trade in general.

X-Q. 28. And do you give samples away to people on the streets that ask for them?

A. Everybody we meet, if it is convenient, we can.

X-Q. 29. Where was it you said this paving crew was?

A. Palos Park, Illinois.

X-Q. 30. Had you ever given that crew any samples before?

A. No, sir.

X-Q. 31. How long does it take you to get around through your trade, to cover the territory of your four or five hundred customers?

A. Four or five weeks.

X-Q. 32. And when these customers ask you about Beech-Nut tobacco, do you tell who it was made by?

A. Not as a rule. Just told them we didn't make tobacco and cigarettes.

X-Q. 33. Never had any more conversation about it? Simply told them you did not make it?

A. Yes.

X-Q. 34. Is that the way the incident happens? They look and see who does make it?

A. Yes, sir.

X-Q. 35. Did you ever see a carton of Beech-Nut scrap tobacco?

A. Yes.

X-Q. 36. How large is it?

A. I should judge 8 wide, 14 the other and probably 18 the other.

X-Q. 37. Do you know the names of any of the men on that paving crew?

A. I do not.

X-Q. 38. You haven't seen that crew since that time?

A. No, sir.

X-Q. 39. As one who smokes, could you be confused into buying a package of those Beech-Nut cigarettes for a food product or for chewing gum?

A. I might by the name. If I was used to chewing chewing gum.

X-Q. 40. Then you consider tobacco to be the same as food?

A. Gum is not food.

X-Q. 41. Do you consider tobacco the same as chewing gum?

A. I consider the habit the same as chewing gum.

X-Q. 42. You don't know the difference between chewing gum and tobacco?

A. Oh, sure!

X-Q. 43. Then if you wanted some tobacco and a man handed you a package of chewing gum, you would take it for tobacco?

A. If I wanted some chewing tobacco and I chewed Beech-Nut gum, I might buy Beech-Nut tobacco, thinking it was good like the gum.

X-Q. 44. I am not asking you what you would think it was good like; would you take the tobacco for the gum?

A. No.

X-Q. 45. Different kinds of goods, are they?

A. Yes. Tobacco is tobacco and gum is gum.

X-Q. 46. What was the name of that party you mentioned in Madison?

A. Paul Meyers.

X-Q. 47. And the man in Joliet was Johnson?

A. C. V. Johnson, 500 College Street.

X-Q. 48. Then there was another man named Zwyers?

A. Yes, sir.

X-Q. 49. Then, those people say, "Hello, Beech-Nut"?

A. Every time I enter store, that is first thing they say.

X-Q. 50. They don't call you by your own name?

A. No. Rarely ever.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 1. Who is Mr. Vosburg?

A. Division manager for the Beech-Nut Packing Company.

ALBERT B. LEWIS, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Albert B. Lewis, your age is 46, your residence is 510 W. 72nd Street, Chicago, you are a salesman for the Beech-Nut Packing Company. Is that correct?

A. Yes.

Q. 2. How long have you been employed as salesman by the Beech-Nut Packing Company and in what territory?

A. Fourteen years. At the present from the loop to 75th Street, in Chicago, Illinois.

Q. 3. I show you package of scrap tobacco, being Beech-Nut Scrap Tobacco, Plaintiff's Exhibit No. 3. Have you seen this tobacco displayed in your territory? If so, how long?

A. About four or five years.

Q. 4. Have you, as you were going about your work, heard comments, remarks and inquiries about this scrap tobacco? If so, in about what numbers?

A. I have heard any number. Say several hundred times during that time.

Q. 5. From whom?

A. From retailers that I call on, such as grocers, druggists, confectioners, tobacco dealers, and a number of inquiries from personal acquaintances that are not retailers.

Q. 6. Will you please give me an illustration of the kind of comments, remarks and inquiries you have heard? What they would say to you?

A. In entering a store I am generally greeted, "Hello, Beech-Nut! I see you are putting out Beech-Nut tobacco." "How long have you been putting out tobacco?" It is the general impression that Beech-Nut tobacco is a Beech-Nut product of the Beech-Nut Packing Company.

Q. 7. I wish you would give me an illustrative definite instance of this character.

A. One recently. In calling on a Mr. Ballard I was asked by him, "I see you are putting out Beech-Nut tobacco and cigarettes." Mr. Christiansen, who works for him, says, "Yes, I saw the tobacco and cigarettes at the cigar store." To convince them that they were not a Beech-Nut product, I bought a package of cigarettes at the United Cigar Store right near them. In

making the purchase I asked the clerk if Beech-Nut cigarettes were as good as the Beech-Nut gum they were putting out. He said, "Just as good."

Q. 8. Where was this cigar store?

A. 1528 E. 53rd Street.

Q. 9. What is its name?

A. United Cigar Store.

Q. 10. What streets is it on?

A. 53rd.

Q. 11. Is it on the corner?

A. No. 1528. Near corner of Lake Park Ave.

Q. 12. Do you know what building it is in?

A. Holland Hotel.

Q. 13. Now, have you heard comments, remarks and inquiries about the Beech-Nut Cigarettes, Plaintiff's Exhibit No. 1, a package of which I show you?

A. I have had more inquiries about the cigarettes than I have had about tobacco. They are more widely displayed and more advertised. Practically same inquiries as were made, only more so.

Q. 14. You have said in your testimony that your customers have greeted you, "Hello, Beech-Nut!" To what extent do they greet you that way?

A. Practically all of them. Very seldom I find a man that will ever call me by my name. Sometimes it is a personal friend and he will call me by my name. Not one out of twenty-five will call me by my name.

Q. 15. Approximately, how many stores do you call on, Mr. Lewis?

A. Why, there would be at least one thousand.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. As I understand you, Mr. Lewis, you have been a salesman for the Beech-Nut Packing Company for about fourteen years?

A. Yes, sir.

X-Q. 2. What line of their products do you sell?

A. Everything that they put out.

X-Q. 3. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No.

X-Q. 4. No cigarettes nor scrap tobacco?

A. No.

X-Q. 5. When you visit a store, one of your customers,—he gives you an order for whatever Beech-Nut products he wants?

A. Yes. The goods I try to sell him.

X-Q. 6. What I mean is he gives you his entire order for any Beech-Nut stuff. He doesn't buy through any jobbers?

A. He does. We do our business through jobbers.

X-Q. 7. Why do you visit the store?

A. We take the orders through the jobbers.

X-Q. 8. I do not quite follow you. Would you just detail for me the procedure that you follow from getting an order from a man until the goods is delivered to him?

A. We call on retailer, whatever line of business it is. We take his order, sell him what he can use in our line, ask him what jobber he wishes that delivered through. Then that order is turned over to the jobber.

X-Q. 9. Then, as I understand it, you, a salesman for the Beech-Nut Packing Company, will take the order personally and direct and then deliver the goods through the jobber?

A. The jobber delivers the goods.

X-Q. 10. You come into personal contact with customers?

A. Yes.

X-Q. 11. You never sold any of these customers tobacco?

A. No.

X-Q. 12. You never took an order from any of them for tobacco?

A. No.

X-Q. 13. You never told any of the customers that this Beech-Nut scrap tobacco or Beech-Nut cigarettes were made by Beech-Nut Packing Company?

A. Absolutely not. Told them that it was not.

X-Q. 14. Who did you tell them it was made by?

A. I have shown them it was made by P. Lorillard.

X-Q. 15. All of the Beech-Nut Packing Company products which you sell, so far as you know, bear the name of the Beech-Nut Packing Company on them?

A. In some way, some place on them.

X-Q. 16. I understood you to say that you handled all Beech-Nut products. Under what other trade-marks or trade names other than that shown by Beech-Nut red band label like this Beech-Nut bacon label which is marked for identification, Defendant's Cross Exhibit 8, are some of the Beech-Nut goods sold? I will make myself a little clearer. Do you sell Mohawk goods for the Beech-Nut Packing Company?

A. The Mohawk Brand, you mean. They have it, but we never sell that in Chicago territory. It is listed on our price list.

X-Q. 17. The same as to the Erie Brand for the Beech-Nut Packing Company. The Erie Brand. This also appears on your price list?

A. Yes, sir.

X-Q. 18. You never sold or took orders for any goods of the Beech-Nut Packing Company that were put up in a package like that tobacco scrap package, did you?

A. No.

X-Q. 19. And you never sold any of their goods in a package that looks like the cigarette package?

A. No.

X-Q. 20. The cigarette package has a sort of individuality of its own?

A. Looks like a cigarette package.

X-Q. 21. If you went into a store and you wanted some chewing gum, could you be confused and deceived into taking scrap tobacco or cigarettes in place of chewing gum?

A. No.

X-Q. 22. Because it is entirely different goods?

A. If I went in for chewing gum, they couldn't give me chewing tobacco for chewing gum.

X-Q. 23. Likewise, you wouldn't take chewing gum if you wanted chewing tobacco or cigarettes?

A. Absolutely not.

X-Q. 24. You regard them as different goods?

A. I do.

Cross-examination closed.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 1. Would you say that a Beech-Nut ham had an individuality of its own as regards the appearance of the package?

A. You could tell a ham by its wrapping.

R-D. Q. 2. How about Beech-Nut canned goods? Would you mistake any Beech-Nut canned goods for a Beech-Nut ham?

A. No. I could tell. If a label was the same as a Beech-Nut label I might be confused into thinking that was a Beech-Nut Brand.

Re-Cross Examination by Mr. Cavanagh.

R-X Q. 1. Beech-Nut ham and Beech-Nut canned goods are both food products?

A. Yes.

R-X Q. 2. They are eaten and taken into the stomach?

A. Yes.

R-X Q. 3. At the dinner by the kids and the women and the rest of the family?

A. Absolutely.

R-X Q. 4. Never heard of them eating tobacco?

A. They take it in their mouths.

R-X Q. 5. Did you ever hear of them taking it into the stomach?

A. No. No more than gum.

R-X Q. 6. You don't consider gum to be tobacco?

A. No.

Deposition closed.

Signature waived.

ALBERT LEVY, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. At the present time?

Q. 2. Yes, sir.

A. Albert Levy; 55; Oak Park, Illinois; candy jobber.

Q. 3. Where is your place of business?

A. 181 West Lake Street.

Q. 4. Do you carry chewing gum, mints and the like, Mr. Levy?

A. I do.

Q. 5. State if you know whether tobacco jobbers carry these products.

A. Many do.

Q. 6. Will you please state when your attention was first directed to the Beech-Nut scrap tobacco, a package

of which I now show you, being Plaintiff's Exhibit No. 3?

A. Several years ago.

Q. 7. What happened then?

A. My first impression on seeing same was that it was another product of the Beech-Nut Packing Company.

Q. 8. Do you remember what it was that you first saw?

A. A cut out sign covering a large space in the window of a cigar store.

Q. 9. What was on that sign, do you remember?

A. No.

Q. 10. After you saw the cut out sign, did you subsequently see on display in different places package of this scrap tobacco?

A. Which scrap tobacco?

Q. 11. This scrap tobacco we are talking about. (Shows witness Plaintiff's Exhibit No. 3.)

A. Yes.

Q. 12. How long did you continue to believe that the Beech-Nut scrap tobacco was another product put out by the Beech-Nut Packing Company?

A. Until quite recently.

Q. 13. And how were you advised or informed quite recently that this belief was erroneous?

A. By the agent of Beech-Nut Packing Company calling upon me in his regular line of work, who in a general conversation informed me that they did not manufacture nor were they interested.

Q. 14. Had you prior to being definitely informed by the agent of the Beech-Nut Packing Company ever seen the name Lorillard's which appears on the top of this package of scrap tobacco?

A. I did.

Q. 15. Will you please state the circumstances under which you first saw this name "Lorillard's"?

A. Having occasion to purchase some cigars at a cigar store on 47th Street near Vincennes Ave., Chicago, I purchased my cigars and then was about to enter a room in the rear of the cigar store and noticed this package of tobacco on sale in the glass show case. Curiosity prompted me to look at the label. Then noticed the name of Lorillard on the top of same.

Q. 16. If you can remember, I would like to have you say how close about were you to the package when you first noticed the name "Lorillard's" on it?

A. Twelve or fifteen inches.

Q. 17. Do you mean that your eyes were that close to it?

A. Yes.

Q. 18. Now, after you had observed this name "Lorillard's" on the package, what did you then conclude as to the origin or responsibility for this tobacco?

Mr. Cavanagh: Objected to as simply calling for an opinion on the part of the witness.

A. I was under the impression that either Lorillard was making this tobacco for the Beech-Nut people or possibly had some arrangement for the use of the name.

Q. 19. And you were first definitely advised that the Beech-Nut Packing Company had nothing to do with this product, when?

A. In general conversation with their agent, Mr. Vosburgh, some time in October.

Q. 20. I wish you would tell me if you remember approximately how long before this general conversation it was that you had detected the name "Lorillard's" on the package? I don't want anything but an approximation.

A. Several years.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Mr. Levy, how long have you been in the confectionery business, approximately?

A. Over twenty years.

X-Q. 2. Do you sell any products of the Beech-Nut Packing Company?

A. I do.

X-Q. 3. What do you sell? Name them.

A. Beech-Nut gum, Beech-Nut mints, all flavors, Beech-Nut candy, all flavors, and possibly several other numbers off and on.

X-Q. 4. They all relate to the confectionery business?

A. Yes, sir.

X-Q. 5. Do you buy your goods through an agent of the Beech-Nut Packing Company or do you order direct from firm in Canajoharie?

A. Both.

X-Q. 6. You always get them from or through somebody connected with the Beech-Nut Packing Company?

A. Yes.

X-Q. 7. Do you sell tobacco?

A. No, sir.

X-Q. 8. You do not handle it at all?

A. No, sir.

X-Q. 9. You never ordered any tobacco through any of the Beech-Nut Packing Company people, did you?

A. No, sir.

X-Q. 10. You never heard of Beech-Nut Packing Company selling tobacco?

A. No, sir.

X-Q. 11. Do you use tobacco?

A. Smoke cigars.

X-Q. 12. You don't use cigarettes or you don't chew scrap tobacco?

A. No, sir.

X-Q. 13. Did you ever buy a package of Beech-Nut cigarettes?

A. No, sir.

X-Q. 14. Did you ever buy a package of Beech-Nut scrap tobacco?

A. No, sir.

X-Q. 15. You never had occasion to handle packages of Beech-Nut cigarettes or scrap tobacco—take in your hand and look at them?

A. Once.

X-Q. 16. When was that?

A. Several years ago.

X-Q. 17. Is that the occasion you spoke of when you noticed the name "Lorillard's"?

A. Yes, sir.

X-Q. 18. Did you ever hear of Lorillard Company—tobacco manufacturers?

A. Yes. To the best of my knowledge and belief.

X-Q. 19. You saw that name "Lorillard's" on there. So far as that name went you connected it with that tobacco company?

A. Directly or indirectly.

X-Q. 20. Well, the name "Lorillard's" on there wouldn't connect that up with any other tobacco company?

A. It didn't mean anything to me.

X-Q. 21. It meant the name Lorillard. You could read it?

A. I did.

X-Q. 22. You did not buy the tobacco at the time?

A. I did not.

X-Q. 23. Had no use for it?

A. No, sir.

X-Q. 24. You say it was several years ago when you first looked at this package of scrap tobacco and saw name "Lorillard's" on it?

A. Yes, sir.

X-Q. 25. And it was just recently that in the course of general conversation you were informed that the Beech-Nut Packing Company did not make this scrap tobacco?

A. Yes, sir.

X-Q. 26. So several years elapsed between those two occasions—between the time you first saw it and the time you were so told that the Beech-Nut Packing Company did not make the tobacco?

A. Yes, sir.

X-Q. 27. The matter wasn't of any particular interest to you to find out who made it?

A. No, sir.

X-Q. 28. You weren't selling tobacco, you weren't buying it?

A. No, sir.

X-Q. 29. And you didn't give it any thought?

A. I did give it a thought.

X-Q. 30. But you didn't give it enough thought during those years since you first saw the package to ask one of the Beech-Nut men, whom I presume you met frequently in the course of business, who makes the tobacco?

A. I did not ask any question about the tobacco.

X-Q. 31. Do you buy confectionery from other manufacturers outside of the Beech-Nut Packing Company?

A. I do.

X-Q. 32. Did you ever know in the confectionery business for one manufacturer to put the name of another manufacturer on its package of goods—I am not speaking of jobbers. I am speaking of one manufacturer to put another manufacturer's name on its goods.

A. I do not understand the question.

X-Q. 33. Did you personally ever know of the P.

Lorillard Company to make any tobacco products for the Beech-Nut Packing Company?

A. I did not.

X-Q. 34. Likewise you never heard of the Beech-Nut Packing Company making any products for P. Lorillard Company?

A. I did not.

X-Q. 35. You know these concerns are both manufacturing concerns, do you not?

A. I know Beech-Nut Packing Company is. I don't know that the Lorillard Company exists.

X-Q. 36. You say you do not know that the Lorillard Company exists?

A. No.

X-Q. 37. You have heard of them?

A. I have heard of them.

X-Q. 38. You said in one of your answers in your direct examination substantially that you thought that Lorillard might have been making this tobacco for the Beech-Nut Packing Company. If you didn't know that the Lorillard Company was in existence, how did you figure out that they were making tobacco for the Beech-Nut Packing Company?

A. Very simply. By the fact that I had reason to believe that many years ago the Lorillard concern had sold out and that simply the name of Lorillard remained.

X-Q. 39. So you really didn't know anything about the situation as concerned the Lorillard Company?

A. I did not. Definitely no.

X-Q. 40. If you went into a store and wanted to buy some chewing gum, could you be fooled or confused into accepting some chewing tobacco or cigarettes in the place of gum?

A. I cannot answer that question.

X-Q. 41. You mean to say you do not know the difference between tobacco and chewing gum?

A. I do.

X-Q. 42. You would not take chewing gum for tobacco?

A. I would not.

X-Q. 43. They are different goods, aren't they?

A. Yes, sir.

X-Q. 44. As you as a confectioner know they are different goods?

A. I do.

X-Q. 45. You know it from common sense standpoint?

A. I do.

Deposition closed.

Signature waived.

JOHN E. WATSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is John E. Watson; your age is 31; your residence is 3819 Michigan Ave., Chicago; your occupation is druggist, and your place of business is 679 North Clark Street, Chicago; is that correct?

A. Yes.

Q. 2. Mr. Watson, how long have you been in this drug store at 679 North Clark Street?

A. Perhaps two months.

Q. 3. What is your position there?

A. I am head prescription druggist in charge of place.

Q. 4. Prior to taking charge of this store at 679 North Clark Street, Chicago, what were you doing?

A. Manager of R. B. Sherry's, at 31st and Indiana.

Q. 5. What kind of a store is that?

A. It is a drug store.

Q. 6. How long have you been working in drug stores?

A. Nine years.

Q. 7. In the course of that time, have you sold cigarettes, cigars and other such products, and confectionery?

A. Yes, sir.

Q. 8. Have all the drug stores you worked in carried cigars, cigarettes, tobacco, chewing gum and confectionery?

A. All of them.

Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3, being a package of Beech-Nut scrap tobacco. Have you ever sold this product over the counter?

A. Yes, sir.

Q. 10. How long have you sold it over the counter?

A. I would be right in saying five years and perhaps more.

Q. 11. I wish you would tell me whether you have sold very little of it or a good deal.

A. I have had in most places good business on it.

Q. 12. Do you now know who makes this Beech-Nut scrap tobacco?

A. No.

Q. 13. Prior to a few weeks ago, who did you believe made this Beech-Nut scrap tobacco?

A. I presumed it was put out by Beech-Nut Company, like the chewing gum.

Q. 14. Have you ever had occasion to talk about this scrap tobacco to your customers and, if so, what would you tell them about it?

A. I would tell them it was put out by same company as Beech-Nut gum was.

Q. 15. Was this true for the whole period of the five years?

A. Yes, sir.

Q. 16. Do you now believe that this scrap tobacco is made by Beech-Nut Packing Company—now this minute?

A. Well, I really don't know, because I never looked up on it. I always sold it.

Q. 17. Do you now believe that this is a Beech-Nut product or not? What do you believe about it now?

A. I suppose that it is.

Q. 18. You have said that you worked in the Sherry drug store prior to coming to your present store. Before that, where did you work?

A. Connor's, at 39th and Indiana.

Q. 19. Is that a drug store?

A. Yes, sir.

Q. 20. Is a big or small drug store?

A. Large drug store.

Q. 21. How do your present sales of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3, compare with the sales that you had at Connor's drug store, for instance?

A. There is no comparison, because we haven't the tobacco displayed as we had at Connor's.

Q. 22. How was it displayed at Connor's store?

A. It was in a front case where it could be seen—the minute you walked to the cigar counter you could see the tobacco displayed in the case.

Q. 23. How is it placed now?

A. It is back behind the cigar counter, in a cabinet. No display at all.

Q. 24. Did a representative of the Beech-Nut Packing Company recently come to see you, do you remember?

A. Yes.

Q. 25. Did he tell you whether or not the Beech-Nut people made this tobacco?

A. I don't remember who he said made it. The best I remember he said cigarettes and tobacco weren't put up by the same people.

Q. 26. Were or were not?

A. Were not.

Q. 27. How long ago was that?

A. Perhaps three weeks ago.

Q. 28. Now, I direct your attention, Mr. Watson, to Beech-Nut cigarettes, in this case as Plaintiff's Exhibit No. 1, and show you a package thereof. Whose product did you think these were?

A. I presumed they were put up by same people as Beech-Nut scrap tobacco and gum.

Q. 29. How long have you handled these cigarettes?

A. A short while.

Q. 30. Have you yourself sold them over the counter?

A. I have sold a few.

Q. 31. Who makes the cigarettes, do you know?

A. I cannot say that I do.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you smoke, Mr. Watson?

A. Yes, sir.

X-Q. 2. What do you smoke?

A. Cigars and cigarettes, both.

X-Q. 3. Do you chew?

A. No.

X-Q. 4. Did you ever buy any of that Beech-Nut scrap tobacco?

A. No.

X-Q. 5. You have bought it from wholesaler for drug company?

A. Yes.

X-Q. 6. Did you ever buy any Beech-Nut Packing Company products?

A. I bought scrap tobacco and the gum.

X-Q. 7. I am asking you did you ever buy any products of the Beech-Nut Packing Company?

A. I want to get you right. Is Beech-Nut scrap tobacco the Beech-Nut Packing Company products?

Mr. Cavanagh: Mr. Watson, I cannot answer that question for you, but I will try to clarify the situation. You have bought Beech-Nut chewing gum. From whom did you buy that?

A. I bought Beech-Nut gum from several stores.

X-Q. 8. Did you buy from Beech-Nut Packing Company man?

A. I cannot say that I did. Usually buy from jobbers.

X-Q. 9. You never had Beech-Nut Packing Company man call on you to sell gum?

A. If they have, I cannot say that I bought it.

X-Q. 10. Likewise, you don't know whether you ever bought any mints from the Beech-Nut Packing Company man?

A. I don't think I have.

X-Q. 11. Did you ever hear of P. Lorillard Company?

A. Who?

X-Q. 12. P. Lorillard, tobacco manufacturers.

A. I don't know whether I have. If I have, I haven't bought anything from them that I remember of.

X-Q. 13. As I understand it, you never bought a package of this Beech-Nut tobacco for your own use?

A. No.

X-Q. 14. Did you ever look at that package?

A. I have noticed it.

X-Q. 15. Did you ever see the name "Lorillard" on it?

A. Never paid any particular attention to it. As a matter of fact, it is same as Bull Durham. Didn't pay any attention to it.

X-Q. 16. Just simply sell it as so much tobacco?

A. That's the idea.

X-Q. 17. Does the same apply to the cigarettes?

A. Yes.

X-Q. 18. You never noticed name P. Lorillard Company on those cigarettes?

A. Never paid any particular attention to it.

X-Q. 19. These cigarettes come in cartons, do they not?

A. Same as other cigarettes.

X-Q. 20. They come in a carton like this—200—that I show you?

A. To the best I remember, that's the way they come.

X-Q. 21. Do you ever open up any of these cartons yourself?

A. Yes, sir, I have.

X-Q. 22. Did you ever read the printed slip that comes in them?

A. No.

X-Q. 23. Never even looked at it?

A. No. I never read those things.

X-Q. 24. So when you told people that you thought that the scrap tobacco and cigarettes were made by same people who made gum, you didn't have anything on which to base that?

A. No.

X-Q. 25. You had never asked any of the Beech-Nut salesmen who made it?

A. No.

X-Q. 26. I understand that you sell chewing gum in the store, do you not?

A. Yes, sir.

X-Q. 27. You never sold any person chewing gum when they asked you for cigarettes or scrap tobacco?

A. No.

X-Q. 28. In other words, they are entirely different classes of goods?

A. Why, sure.

X-Q. 29. You would not yourself be confused into taking chewing gum or mints for cigarettes or tobacco?

A. Not gum for tobacco.

X-Q. 30. Or mints either?

A. No.

Deposition closed.

Signature waived.

WILLIAM H. SAGE, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is William H. Sage; you are 54 years old; your residence is 121 Wheaton avenue, Wheaton, Illinois; your occupation is druggist?

A. Yes, sir.

Q. 2. Where are you employed now?

A. 421 North Clark street.

Q. 3. In what capacity?

A. Registered pharmacist.

Q. 4. Do you sell goods over the counter in that store?

A. Yes.

Q. 5. How long have you been selling goods over the counter in drug stores?

A. In any drug store?

Q. 6. Yes.

A. Twenty-five years.

Q. 7. Have you been selling for the past five or six years, and do you now sell cigarettes, chewing tobacco and cigars?

A. I haven't—only for the past two years have I been selling tobaccos and cigarettes.

Q. 8. Well, in the last two years that you have been selling tobacco and cigarettes have you been personally handing these goods out to the customer?

A. Yes, sir.

Q. 9. Have you in the past two years sold over the counter Beech-Nut chewing tobacco, similar to the package I now show you, Plaintiff's Exhibit No. 3?

A. Yes, sir.

Q. 10. Will you please state by whom you believed this chewing tobacco to be put out, up to the past few weeks?

A. I always supposed it was put out by same people who manufactured chewing gum called Beech-Nut chewing gum.

Q. 11. Do you now believe that this product is manufactured by the same people who manufacture the chewing gum?

A. I understand it is manufactured by Lorillard Company.

Q. 12. How and when did you obtain the information that this product was manufactured by the Lorillard Company?

A. In a conversation with a customer some two or three weeks ago my attention was called to the Beech-Nut cigarettes now put out by Lorillard Company. In that conversation I was informed that they were not put out by Beech-Nut people. Up to that time I was under the belief that all three of the products, the chewing gum, chewing tobacco and Beech-Nut cigarettes were all manufactured by the same people.

Q. 13. Do you remember having ever discussed the Beech-Nut scrap tobacco with your customers, and if so, do you remember what you told them about its origin?

A. I recall in conversation talking about cigarettes. Some customer stated that the cigarettes were a superior quality of cigarettes, and also that the chewing tobacco was. I made the statement that all of the products manufactured by the Beech-Nut Packing Company were of superior quality, stating at that time that their chewing gum with us had largest sale of any chewing gum on the market.

Q. 14. Do you recollect whether or not at previous times you have made similar statements during the two years that you were handling the scrap tobacco?

A. Yes. I suppose it's been something the same. I probably made the statement other times. I don't know how many times.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Mr. Sage, do you chew?

A. No, sir.

X-Q. 2. Tobacco, I mean?

A. No, sir.

X-Q. 3. Did you ever personally buy a package of Beech-Nut scrap tobacco to chew?

A. No, sir.

X-Q. 4. Do you buy for your store?

A. I do the ordering. I am not the buyer. Mr. Healy, the proprietor, does the buying.

X-Q. 5. From whom do you order your Beech-Nut chewing gum?

A. Chewing gum we buy from wagon or from wholesale druggist.

X-Q. 6. What wagon is that; what concern?

A. I know his name, but cannot think of it. An individual. Don't recall his name. Oppenheimer, or something like that.

X-Q. 7. Don't buy direct from manufacturer?

A. No.

X-Q. 8. What is name of manufacturer of that gum?

A. I don't know that. Beech-Nut Products Company, or something of that kind.

X-Q. 9. You never took the trouble to look on a package and see the name of the company?

A. No. I know it is Beech-Nut something. I don't recall.

X-Q. 10. Did you ever hear of the P. Lorillard Company?

A. Oh, yes.

X-Q. 11. They are large manufacturers of tobacco, are they not?

A. Yes.

X-Q. 12. On this package of Beech-Nut cigarettes you see the name P. Lorillard?

A. Yes, sir.

X-Q. 13. That would indicate it is that tobacco company?

A. Yes.

X-Q. 14. And likewise on this Beech-Nut scrap tobacco you find the name Lorillard?

A. I didn't notice this until after a conversation with this gentleman.

X-Q. 15. As a matter of fact, when you told the party that the same people that put out the gum were putting out scrap tobacco and cigarettes, you had never really looked into the matter?

A. No.

X-Q. 16. Wasn't of any particular interest to you?

A. No. None whatever.

X-Q. 17. You continued to sell the cigarettes and the scrap tobacco, as well as the gum?

A. Yes, sir.

X-Q. 18. And you never made any inquiries from parties that you thought might know who put them out?

A. I was never interested in the manufacturer.

X-Q. 19. From standpoint of selling it meant nothing to you?

A. Oh, no.

X-Q. 20. If a person came into your store, Mr. Sage, and he wanted to buy some of the Beech-Nut scrap tobacco or Beech-Nut cigarettes, you would not hand him Beech-Nut gum for cigarettes?

A. I have.

X-Q. 21. Sold him one for the other?

A. You said pass it. People have come in and said give me a package of Beech-Nut. I have thrown out package of Beech-Nut gum, and they then said they wanted tobacco.

X-Q. 22. Did you ever have a person come in and say, "I want a package of Beech-Nut cigarettes," and you handed him gum?

A. Oh, no. People come in frequently—customers frequently say, "A package of Beech-Nut," and mean either tobacco or chewing gum. That happens every day. We have to ask them what they want. Whether they want chewing gum or tobacco.

X-Q. 23. When a man comes in and says, I want a package of Beech-Nut, and you hand him, say, gum, when subsequent events show he wanted cigarettes, what does he do?

A. That doesn't usually happen in cigarettes, as it does in chewing tobacco. A man in asking for Beech-Nut cigarettes usually says cigarettes, but man asking for chewing tobacco usually says "Beech-Nut," throwing down a quarter. The same thing in gum.

X-Q. 24. Suppose you give him the gum, when it subsequently appears that he wanted the chewing tobacco?

A. He says I want the tobacco, or I want the chewing gum.

X-Q. 25. In other words, he knows it's different—that there is a difference between the chewing gum and the chewing tobacco.

A. Immediately.

X-Q. 26. And he immediately says he wants the chewing tobacco?

A. Yes.

X-Q. 27. So he is not confused for an instant with the gum and the tobacco?

A. The customer is never confused. The clerk behind the counter is confused many times when man merely says he wants "Beech-Nut."

X-Q. 28. You yourself would not be confused or deceived into taking a package of Beech-Nut chewing gum when you really wanted either Beech-Nut cigarettes or scrap tobacco?

A. Oh, no.

X-Q. 29. They are entirely different classes of goods, are they not?

A. Oh, yes.

Cross-examination closed.

Deposition closed.

Signature waived.

A. H. CARLSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is A. H. Carlson; you are 23 years old; your residence is 5347 North Paulina Street, Chicago; you are employed by Thomas E. Wilson Company, sporting goods, is that correct?

A. Yes, sir.

Q. 2. In what capacity are you employed by the Thomas E. Wilson Company?

A. Bill clerk.

Q. 3. How long have you been with this concern?

A. Five months.

Q. 4. And what were you doing before that?

A. I was part owner of a cigar store.

Q. 5. Where was that cigar store located?

A. It was located at 5222 North Clark Street, Chicago.

Q. 6. How long did you have that store, Mr. Carlson?

A. Practically one year.

Q. 7. Did you sell scrap chewing tobacco in that store?

A. Yes, sir.

Q. 8. Please name some of the brands of scrap chewing tobaccos that you sold?

A. Honest Scrap, Polar Bear, Beech-Nut, Union Workman.

Q. 9. Which of these was your best seller?

A. Off-hand, I would say Beech-Nut.

Q. 10. Is the Beech-Nut scrap tobacco that you sold the same as this package I now show you, which is in

this case as Plaintiff's Exhibit No. 3, is this the Beech-Nut tobacco?

A. Yes, sir.

Q. 11. During the time that you were selling this tobacco over the counter, whose product did you think it was?

A. I was always under the impression that it was a product of the Beech-Nut Packing Company.

Q. 12. Did you ever tell your customers that it was a product of the Beech-Nut Packing Company?

A. Yes, I have.

Q. 13. Do you now believe that it is a product of the Beech-Nut Packing Company?

A. No.

Q. 14. You were first informed that it is not a product of the Beech-Nut Packing Company by whom?

A. As I remember the circumstances, a representative of the Beech-Nut Packing Company was in the store and we were discussing certain products. I believe the Beech-Nut scrap tobacco came under the question and then he told me that it was not one of their products.

Q. 15. Did you then ascertain whose product it was? Did you then find out who did make it?

A. Oh, yes.

Q. 16. Now, Mr. Carlson, of course you cannot give the exact number, but about how many times a day do you suppose you handed the Beech-Nut scrap tobacco out to customers in the store?

A. That is a hard question to answer. But you see part of the time I was in the store and the other part my partner was there. It may be that during the time I was there I would pass as many as five packages or more over the counter.

Q. 17. Did you sell Camel cigarettes over the counter?

A. Yes, sir.

Q. 18. In what quantities—many or few?

A. A great many, I would say.

Q. 19. What is written on a package of Camel cigarettes underneath the picture of the camel?

A. I do not know.

Q. 20. Have you sold Lucky Strike cigarettes over the counter?

A. Yes, sir.

Q. 21. Have you sold many or few?

A. A great many.

Q. 22. What is written on a package of Lucky Strike cigarettes underneath the red panel with the word Lucky Strike?

A. I don't know. I do know that it is a product of the American Tobacco people. I know that for a fact.

Q. 23. Now, who makes Murad cigarettes?

A. A Greek name—Anagyros or something like that.

Q. 24. Who makes Egyptian Deities?

A. The same concern.

Q. 25. Who makes Honest Scrap tobacco?

A. I don't know.

Q. 26. You know who makes Polar Bear tobocco?

A. No, sir.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Mr. Carlson, how long were you in the tobacco business?

A. One year.

X-Q. 2. And what line of business were you in before that?

A. I wasn't in business before that. I was clerk in the office.

X-Q. 3. You were about 22 years old when you went into the tobacco business?

A. Yes.

X-Q. 4. I understand you to say that you sold this Beech-Nut scrap tobacco.

A. Yes.

X-Q. 5. Did you buy any of that tobacco? You did the buying?

A. Yes. I or my partner. Either one.

X-Q. 6. Who was your partner?

A. His name was G. E. Lindell.

X-Q. 7. What is his address?

A. I don't know his present address.

X-Q. 8. Could you give me an idea?

A. I know he lives on Hermitage Ave., near Hermitage.

X-Q. 9. Is that in Chicago?

A. Yes.

X-Q. 10. When you bought this Beech-Nut tobacco, from whom did you buy it?

A. Hesser Bros., jobbers.

X-Q. 11. What is their address?

A. I don't know their address. They are located on Halsted and Fullerton.

X-Q. 12. Are they wholesale jobbers?

A. Yes, sir.

X-Q. 13. When this tobacco would be delivered to your store, it would be in a large carton, would it not?

A. Yes.

X-Q. 14. About what were the approximate dimensions or sizes of those cartons?

A. I wouldn't be able to state that. Unusually large carton.

X-Q. 15. How many packages like this package would it hold?

A. I believe two or three dozen.

X-Q. 16. You are not sure?

A. No. You see it is five months since I have been in the business and of course I have forgotten things.

X-Q. 17. You weren't in the business long enough to become acquainted with the size and contents of the cartons?

A. Perhaps at that time I was. It has slipped my mind now.

X-Q. 18. As a matter of fact, Mr. Carlson, did you ever read any of the writing or printing on that carton?

A. No.

X-Q. 19. Did you ever take the trouble to read the printing on this Beech-Nut package?

A. I did after I had been told it wasn't a product of the Beech-Nut Packing Company.

X-Q. 20. Yes. Well, now you were in the tobacco business. You have heard of P. Lorillard Company?

A. Yes.

X-Q. 21. They are big well-known tobacco manufacturers?

A. Yes.

X-Q. 22. Did you buy any products from the Beech-Nut Packing Company?

A. I don't know whether we ever did buy anything direct.

X-Q. 23. You don't recall?

A. No.

X-Q. 24. On this package of scrap tobacco you see the name Lorillard, don't you?

A. Yes.

X-Q. 25. As a person engaged in the tobacco business that would mean that was a P. Lorillard Company?

A. Yes.

X-Q. 26. If you take the trouble to glance at that you would know that it was Lorillard tobacco?

A. Yes.

X-Q. 27. And you knew from general information at least that the Beech-Nut Packing Company was in the food product business?

A. Yes, sir.

X-Q. 28. Making Beech-Nut bacon and Beech-Nut chewing gum, and preserves and things of that sort?

A. Yes.

X-Q. 29. Wouldn't you as a tobacco man prefer to have tobacco made by well-known tobacco concerns than by a food concern?

A. I don't understand the question.

X-Q. 30. As a tobacco man, one engaged in the business, wouldn't it be your preference to use tobacco made by a tobacco concern than by a food concern?

A. Oh, certainly.

X-Q. 31. They would know more about the blends and details going with the tobacco?

A. Yes, they would.

X-Q. 32. You know of four concerns, the American Tobacco Company, the P. Lorillard Company, Liggett & Myers, and R. J. Reynolds. You have heard of those concerns?

A. Yes.

X-Q. 33. They are all top notchers and old concerns in the tobacco business?

A. Yes.

X-Q. 34. As a matter of fact when you bought this tobacco, you never made any inquiry to see who made it?

A. No.

X-Q. 35. You knew it was a good seller?

A. Yes.

X-Q. 36. And even after you found out that the Beech-Nut Packing Company did not make this, you continued to buy it and sell it?

A. Yes, sir.

X-Q. 37. And the very fact that Lorillard's name was on it would be a guarantee that it was good tobacco and you would continue to buy and sell it?

A. I presume so.

X-Q. 38. In other words, it didn't make a particular difference so far as that went whether it was somebody else so long as it was guaranteed by a good concern?

A. Yes.

X-Q. 39. You never had any person come in and say I want a package of Beech-Nut tobacco made by the Beech-Nut Packing Company, did you?

A. No, I didn't.

X-Q. 40. When you were buying this tobacco you never had any tobacco jobber come in and tell you that this was made by Beech-Nut Packing Company when you bought it?

A. No, sir.

X-Q. 41. So when you thought it was made by Beech-Nut Packing Company that was simply a general impression on your part without making any inquiry or study or examination at all?

A. Yes.

X-Q. 42. You had nothing to go on in forming that opinion? That is, if you had looked at the name Lorillard you would have known it was Lorillard tobacco; is that right?

A. Yes, I understand that.

X-Q. 43. You never saw any product of the Beech-Nut Packing Company with red radiating lines like on that package, did you?

A. I don't recall any.

X-Q. 44. If you see those red lines in the window, 10 feet off, you know that is Beech-Nut tobacco?

A. I wouldn't say that.

X-Q. 45. It's a general impression. It would seem to be Beech-Nut. As a tobacco man it would not look to you like a package of Honest Scrap, would it?

A. Sure not. It is not so much, the red lines, as that "Beech-Nut,"—sort of a trade-mark in the center.

X-Q. 46. You mean that word "Beech-Nut"?

A. Yes, and the formation of it.

X-Q. 47. Well, when that package is 10 feet off, or 20 feet off, in the window, the big package you have seen them, have red radiating lines, stand out like barber sign. You could tell it by the red radiating lines when you couldn't tell it by the wording?

A. Yes. That's true.

X-Q. 48. You never knew of any of these other brands to have these red radiating lines on them?

A. I don't know of any.

X-Q. 49. Did you ever take the trouble to look at a Beech-Nut Packing Company label?

A. No.

X-Q. 50. You don't know whether the oval on the Beech-Nut Packing Company mark is red or blue?

A. I don't know.

X-Q. 51. You don't know whether the Beech-Nut Packing Company mark has two red beech-nuts on it, do you?

A. No, sir.

X-Q. 52. Now, I will show you a mark of the Beech-Nut Packing Company, which is their label and is in this case as Defendant's Cross-Exhibit No. 8. Those two labels don't look very much alike?

A. Not when you compare them.

X-Q. 53. It was that word Beech-Nut that attracted your attention?

A. Yes, sir.

X-Q. 54. And the way that our tobacco products are displayed—some nailed high on the fences, some stuck

in the windows, the cartons piled up, as a matter of fact, it would be the red radiating lines which would be the Beech-Nut tobacco of Lorillard Company?

A. Yes.

X-Q. 55. Do you smoke yourself?

A. Yes, I smoke.

X-Q. 56. Have you seen the Beech-Nut cigarettes?

A. I have noticed a few of my friends carrying them around. Never smoked any myself.

X-Q. 57. You know it is a red package?

A. Yes, sir.

X-Q. 58. That looks like a package (Mr. Cavanagh shows witness a package of Beech-Nut cigerettes)?

A. Yes, sir.

X-Q. 59. That package has P. Lorillard on it?

A. Yes, sir.

X-Q. 60. That means to you that that is a package of Lorillard cigarettes?

A. Yes, sir.

X-Q. 61. Now, as I understand, you never looked at the large carton of Beech-Nut scrap tobacco to see if Lorillard's name was on it?

A. I believe I said I did before. After my opinion was corrected, when the Beech-Nut representative spoke to me about it, then I examined the package.

X-Q. 62. So the minute you looked at the package you saw Lorillard's name on it and knew it was Lorillard?

A. Yes.

X-Q. 63. If you had looked at that package when it first came into the store you would have known it was Lorillard?

A. Yes, sir.

X-Q. 64. You never took the trouble to look at it, then?

A. No.

X-Q. 65. What was this Beech-Nut man doing in your store? Was he just in there to buy some tobacco?

A. No, I believe he was in there to sell me some gum or some other candies, the candies in the package.

X-Q. 66. Do you remember buying anything from him?

A. I don't recall that.

X-Q. 67. Now, as one that's been in the tobacco business and as a person of good ordinary common sense, if you went into a store and you wanted a package of scrap tobacco or a package of cigarettes, could you be fooled or deceived into letting the dealer hand you a package of chewing gum, if you wanted cigarettes?

A. No, sir.

X-Q. 68. They are entirely different classes of goods?

A. Yes, sir.

X-Q. 69. You handled candy?

A. Yes, sir.

X-Q. 70. And chewing gum?

A. Yes.

X-Q. 71. You never tried to sell a man chewing gum when he wanted tobacco?

A. Sure not.

X-Q. 72. You don't think you could sell a man of ordinary common sense candy for tobacco?

A. Would be foolish to try to.

X-Q. 73. You never opened up a carton of the Lorillard cigarettes?

A. No, sir.

X-Q. 74. You did not handle those at the time?

A. They weren't distributed then.

X-Q. 75. I think that is all.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 1. You were asked on cross-examination substantially as follows: "You never even glanced at the package of tobacco?" and I understood you to say that that was true. Did you reach for it in the store with your eyes closed?

A. Well, no, not that. I wouldn't take the trouble to examine the package closely every time I sold a package.

R-D. Q. 2. Would you consider chewing gum to be a food product?

A. Yes.

R-D. Q. 3. Why do you think chewing gum is a food product?

A. If it is not a food, we certainly all chew it. It is something to chew or eat, anyway.

R-D. Q. 4. I now call your attention to Defendant's Cross-Exhibit No. 8, and Plaintiff's Exhibit No. 3, being a Beech-Nut bacon label, and the Beech-Nut scrap tobacco package. Do you find a blue outline oval on each of these labels?

A. I find one on the tobacco package. I see one there also.

R-D. Q. 5. Do you find the word "Beech-Nut" just underneath inside the oval, hyphenated, in blue type, on either or on both of those packages?

A. On both.

R-D. Q. 6. Do you find a beech-nut underneath the hyphenated word "Beech-Nut"?

A. I do not understand.

R-D. Q. 7. Do you find a beech-nut cluster or representation of a beech-nut underneath the word "Beech-Nut" inside the oval?

A. Yes.

R-D. Q. 8. Now, referring to the part outside the blue line oval on both of these labels, what are the colors?

A. Solid red on the one, and red and white on this tobacco package.

R-D. Q. 9. Do you find any white in the red band in Defendant's Cross-Exhibit No. 8?

A. Yes.

R-D. Q. 10. You have testified on cross-examination that these labels were not similar when you compared them. After having now looked at the labels again, would you say that they were more similar than they were different, or more different than they were similar? It is a very difficult thing to answer, but give me your opinion.

A. When you examine them closely, you, of course, see there is a similarity between the two.

R-D. Q. 11. Which do you find in these labels to be more conspicuous, the similarities between the two or the differences between the two?

A. The similarities.

R-D. Q. 12. That's all.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 1. Mr. Carlson, I just want you to give me your frank, honest opinion about this thing. You recognize that as the Beech-Nut Packing Company label, that wide red band and yellow leaves on the cluster?

A. Yes, sir.

R-X Q. 2. If you saw it 2 feet away or 10 feet away you would recognize that as Lorillard scrap tobacco package?

A. I would recognize it as Beech-Nut scrap tobacco.

R-X Q. 3. What would make you recognize that as Beech-Nut scrap tobacco?

A. The fact that Beech-Nut is in the center of it.

R-X Q. 4. What else at a distance?

A. The red and white colors arranged in a particular manner.

R-X Q. 5. The way the Beech-Nut tobacco is arranged?

A. Yes.

R-X Q. 6. And those lines running out from that oval?

A. Yes.

R-X Q. 7. That would make you recognize that package?

A. Yes.

R-X Q. 8. You don't find any such thing as that on that Beech-Nut Packing Company bacon label?

A. No, I don't.

R-X Q. 9. And it strikes your eye as that same impression, does it?

A. When you consider the two that way, you can see the differences. It strikes your eye.

R-X Q. 10. It hits you like blow between the eyes, doesn't it?

A. You have seldom any cause to make the comparison that way.

R-X Q. 11. If this red Beech-Nut Packing Company oval, with the words printed on it, was on a blue package, like that tobacco, you would recognize that, too?

A. No, sir.

Question is objected to as calling for an opinion.

R-X Q. 12. You spoke of a blue oval here on the Beech-Nut Packing Company bacon label. You don't find any red lines radiating from the oval, do you?

A. No, sir.

R-X Q. 13. Now, you spoke about you didn't examine the package closely. Isn't it a matter of fact that you never looked at the package to see name Lorillard on it? You are a tobacco man and you stated that you knew the Lorillard Company, and you stated that you never looked to see whether Lorillard was on it or not.

A. I never looked closely to see that their name was on there except after I was informed by Beech-Nut Packing Company representative that it wasn't their prodduct.

R-X Q. 14. You never looked at it to see whose name was on it?

A. No, sir.

R-X Q. 15. Will you take that package and see if you can find Beech-Nut Packing Company's name on it?

A. No, I cannot find it.

R-X Q. 16. So, if I would come into your store when you first got this tobacco and asked you to look at the package and tell me if Lorillard or Beech-Nut tobacco, who would you have told me?

A. Lorillard.

Recross-examination closed.

Re-Re-direct Examination by Mr. Hinton.

R-R-D. Q. 1. Mr Carlson, you have testified that you have told customers that the tobacco was a product of the Beech-Nut Packing Company. Did those customers ask you to look the package over and then tell them whose product it was?

A. No, sir. I had always been under the impression that it was a Beech-Nut product.

Re-redirect examination closed.

Re-Re-cross-Examination by Mr. Cavanagh.

R-R-X Q. 1. You had been under that impression without ever looking at the package to tell whose it was?

A. Yes, sir.

Deposition closed.

Signature waived.

ARTHUR E. FECHTER, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Arthur E. Fechter; your residence is 521 North Clark street; you are 59 years old; and you are the proprietor of a drug store; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3. Have you ever sold this product over the counter in your store, Mr. Fechter?

A. I have.

Q. 3. How long have you sold it over the counter?

A. About two years.

Q. 4. Up to within very recently, whose product did you believe it was?

A. Beech-Nut Company.

Q. 5. Do you now believe that it is a product of the Beech-Nut Company?

A. I know it is not.

Q. 6. How did you get your information that it was not?

A. One of the salesmen told me it wasn't.

Q. 7. One of whose salesmen?

A. I don't know who they are. I don't give salesmen much attention. I am bothered with them all day long. Don't know who he was.

Q. 8. Do you remember, Mr. Fechter, whether he stated to you at the time what company he represented?

A. No.

Q. 9. Do you know now who makes this scrap tobacco?

A. I do not.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you sell cigarettes and other tobacco supplies?

A. I do.

X-Q. 2. Do you sell such cigarettes as the Murad?

A. I do.

X-Q. 3. The Mogul?

A. I do.

X-Q. 4. Do you sell any Beech-Nut cigarettes?

A. I do.

X-Q. 5. Who do you get these tobacco supplies from?

A. Sol Blum?

X-Q. 6. Do you get all your tobacco supplies from this Sol Blum?

A. All cigarettes—I do.

X-Q. 7. Do you sell chewing gum?

A. I do.

X-Q. 8. Beech-Nut chewing gum?

A. I do.

X-Q. 9. Who do you get that from?

A. I get that from the wholesale candy man or wholesale drug house.

X-Q. 10. You don't get it from Sol Blum?

A. No, I don't.

X-Q. 11. He's the tobacco man?

A. Yes.

X-Q. 12. Do you get the cigarettes and this Beech-Nut tobacco from Sol Blum?

A. Yes. I haven't sold enough tobacco and cigarettes to talk about.

X-Q. 13. Did you ever hear of the P. Lorillard Company tobacco people?

A. Yes.

X-Q. 14. You have handled some of their goods?

A. I think so.

X-Q. 15. Did you ever take the trouble to look at that package and examine it?

A. No.

X-Q. 16. Do you still continue to buy this tobacco?

A. Certainly.

X-Q. 17. You don't have any interest in who it was made by?

A. No.

X-Q. 18. You noticed Lorillard's name on package?

A. I do now.

X-Q. 19. That would indicate to you that that was Lorillard's product?

A. I presume so.

X-Q. 20. I show you a carton of Beech-Nut cigarettes, which is in this case as Defendant's Cross-Exhibit No. 9. Have you bought cigarettes like that in cartons?

A. Well, I bought Beech-Nut cigarettes. Haven't bought enough to remember. Haven't handled cigarettes only couple of weeks. Not in charge of that department.

X-Q. 21. Never paid any attention to cigarettes?

A. No.

X-Q. 22. If you went into a store and wanted a tobacco product, such as this scrap tobacco, or a package of cigarettes, could you be fooled into taking chewing gum in place of scrap tobacco or cigarettes?

A. No. I shouldn't think so.

X-Q. 23. Entirely different class of goods?

A. I wouldn't take gum for tobacco or cigarettes.

X-Q. 24. And if a man wanted to buy some cigarettes and asked you for cigarettes or scrap tobacco, you wouldn't hand him gum?

A. What kind of a darn fool question is that? You don't take me for a damn fool, do you? I won't listen to that stuff.

(Witness got up and walked out of room and left office. Said he wouldn't listen to such "Damn fool stuff.")

Mr. Hinton: If Mr. Cavanagh desires to continue the cross-examination, an immediate subpœna will be served upon the witness, who was voluntarily attending, and he will be produced for further examination.

Mr. Cavanagh: That is not necessary.

Deposition closed.

Signature waived.

CHARLES O. LARSON, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Charles O. Larson; 11419 Prairie Ave., Chicago; grocer; 33.

Q. 2. I show you a package of Beech-Nut scrap tobacco which is in this case as Plaintiff's Exhibit No. 3, and a package of Beech-Nut cigarettes which is in this case as Plaintiff's Exhibit No. 1. Will you please tell me when you first saw either or both of these products?

A. The tobacco I saw several years ago and the cigarettes I have just seen here just last month or so.

Q. 3. Taking the cigarettes up first, when you saw these cigarettes, by whom did you believe they were made?

A. By the Beech-Nut Packing Company that puts out food products.

Q. 4. Did a Beech-Nut salesman subsequently call upon you?

A. After I saw the cigarettes, he called.

Q. 5. And you remember whether you said anything to him about them?

A. As near as I can recollect, I said "Hello, Beech-Nut." That is the name we generally call them by. Heard his name and seen his name several times on orders but recall him more as "Beech-Nut." "You are the very man we are looking for. Since when has Beech-Nut Packing Company been putting out cigarettes? If so, I am off of you for life."

Q. 6. Would you recognize the man's name if I spoke it?

A. Yes.

Q. 7. Is it Southern?

A. That's it. I recollect that by his Southern brogue he has.

Q. 8. When you made this remark to the Beech-Nut Packing Company salesman, were you joking?

A. No, sir. I am very much opposed to cigarettes.

Q. 9. Would you as a matter of fact stop handling Beech-Nut products if the Beech-Nut Packing Company were in fact getting out cigarettes?

A. If I thought they were.

Mr. Cavanagh: That is objected to as immaterial.

Q. 10. Now about the scrap tobacco, Plaintiff's Exhibit No. 3, whose product did you think this was?

A. I never gave that much thought. Had seen it and never thought much of it, until I saw the Beech-Nut cigarettes and then it dawned on me very forcibly.

Q. 11. Whose product did you think it was?

A. Naturally the same as the other.

Q. 12. Product of whom?

A. Beech-Nut Packing Company.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you sell the Beech-Nut Packing Company line of products?

A. Some of them.

X-Q. 2. Do you sell chewing gum?

A. Yes, sir.

X-Q. 3. Do you sell some of their food products?

A. Yes, sir.

X-Q. 4. Do you sell tobacco?

A. No, sir. None whatever.

X-Q. 5. Neither cigarettes or chewing tobacco?

A. No, sir.

X-Q. 6. Do you smoke cigarettes?

A. No, sir. I wouldn't be caught with one in my mouth.

X-Q. 7. Do you chew tobacco?

A. No, sir.

X-Q. 8. Do you use tobacco in any form?

A. Smoke cigars.

X-Q. 9. You are opposed to cigarettes and chewing tobacco?

A. I cannot stand smell of cigarettes.

X-Q. 10. You don't like chewing tobacco?

A. I am not directly opposed to that as I am cigarettes, although I never have tasted it.

X-Q. 11. Did you ever buy a package of those Beech-Nut cigarettes?

A. No, sir.

X-Q. 12. Did you ever buy a package of that Beech-Nut scrap tobacco?

A. No, sir. Have no use for it.

X-Q. 13. Did you ever take the trouble to look at a package?

A. Have looked at it tonight. Never took trouble to closely examine it.

X-Q. 14. You never prior to tonight took trouble to read printing on the package?

A. No, sir. I am not interested.

X-Q. 15. I suppose the same applies to the cigarettes?

A. Yes, sir.

X-Q. 16. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. No, sir.

X-Q. 17. You don't deal with any or buy any goods from any tobacco jobbers at all?

A. Wholesale jobbers and grocers, they handle tobacco.

X-Q. 18. You don't buy any tobaccos yourself?

A. No, sir.

X-Q. 19. You have no interest in either the scrap tobacco or the cigarettes?

A. None whatever.

X-Q. 20. The only reason that you felt that you wouldn't buy any more Beech-Nut Packing Company products was because you thought they might put out cigarettes and you were opposed to cigarettes?

A. Yes, sir.

X-Q. 21. If you went into a store, and wanted to buy Beech-Nut Packing Company food product or Beech-Nut gum, could you be fooled into taking either that Beech-Nut scrap tobacco or the cigarettes in the place of the food product or gum?

A. I hope not.

X-Q. 22. Likewise if a customer came into your store

and asked for Beech-Nut gum or food product, would you try to hand him that Beech-Nut tobacco or cigarettes?

A. Not unless I was drunk.

X-Q. 23. You consider them entirely different classes of goods?

A. Absolutely.

Deposition closed.

Signature waived.

JOHN SABELIS, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is John Sabelis; your age is 29; your residence is 11524 Eggleston Ave., Chicago; your occupation is clerk. Is that correct?

A. Yes.

Q. 2. What were you doing between the months of July, 1919, and the summer of 1921?

A. Working for the Harvester Company.

Q. 3. The International Harvester Company?

A. Yes, sir. West Pullman works.

Q. 4. What kind of work?

A. Efficiency department.

Q. 5. Did you ever work in the commissary department?

A. Yes, sir. Department took charge of that.

Q. 6. What did you sell in the commissary department?

A. Tobacco, candies, gum, later on we took on overalls and shoes.

Q. 7. Did you sell chewing tobaccos?

A. Yes, sir.

Q. 8. What brands did you sell of scrap chewing tobaccos?

A. Beech-Nut, Mail Pouch, Scrap.

Q. 9. You have mentioned the Beech-Nut scrap chewing tobacco. Was that this tobacco that I now show you, which is in this case as Plaintiff's Exhibit No. 3? Is this the same as that you sold?

A. Yes, sir.

Q. 10. Did you yourself pass out this tobacco to the customers who bought it?

A. Yes, sir.

Q. 11. I mean did you sell it over the counter?

A. Yes, sir.

Q. 12. Mr. Sabelis, during this period of approximately two years, who did you think made this chewing tobacco?

A. I thought that the Beech-Nut Peanut Butter Company and Beech-Nut chewing gum made it. I thought that came from the same company.

Q. 13. How many packages a day of this chewing tobacco do you suppose you personally handed out over the counter? Of course I want an average.

A. About fifty packages of Beech-Nut chewing tobacco.

Q. 14. Do you know who makes this chewing tobacco?

A. No, sir. I don't.

Q. 15. Did you ever notice the name of the manufacturer anywhere on the package?

A. No, sir.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Did you ever look for the name of the manufacturer on it?

A. No, sir. I don't chew myself and I am not interested.

X-Q. 2. So you weren't interested in what appeared on the package?

A. No, sir.

X-Q. 3. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. I believe I have.

X-Q. 4. Will you look at that package? You see the name "Lorillard" on it, do you not?

A. Yes, sir. I do.

X-Q. 5. These packages of tobacco—when you were selling them over the counter—you took them out of a large carton, didn't you?

A. Yes, sir.

X-Q. 6. And that carton contained, we will say generally speaking, several dozen of these packages, that carton also had a large number of red radiating lines like on this package?

A. Yes, sir.

X-Q. 7. You never took the trouble to notice any of printing on that package, whether it had name "Lorillard" on it?

A. No, sir.

X-Q. 8. You weren't at all interested in what was on it or who made the tobacco?

A. No, sir.

X-Q. 9. I understood you to say that you also sold chewing gum and candy and different things like that?

A. Yes, sir.

X-Q. 10. This commissary department is a sort of

general store—I mean what we would liken to a general store?

A. For employees only.

X-Q. 11. They sold everything from clothing to tobacco and different articles?

A. Not clothing. Overalls and work shoes.

X-Q. 12. You sold those?

A. Yes, sir.

X-Q. 13. You never had a man or a customer come up to you and ask you for some chewing gum and you handed him over a package of this chewing tobacco?

A. I have.

X-Q. 14. You have sold a man chewing tobacco when he said he wanted gum?

A. I have had a man ask me for a package of Beech-Nut.

X-Q. 15. And without designating whether he wanted gum or tobacco. But when a man said I want a package of Beech-Nut chewing gum, you wouldn't hand him a package of tobacco?

A. No, sir.

X-Q. 16. You wouldn't do so?

A. No.

X-Q. 17. In other words, you know the difference between tobacco and chewing gum?

A. Yes, sir.

X-Q. 18. You would think that if customer was of ordinary intelligence, he would know the difference?

A. Yes, sir.

X-Q. 19. You, yourself, if you went into a store and you wanted chewing gum, you couldn't be fooled into taking a package of this tobacco for gum?

A. No, sir.

X-Q. 20. You would think the man crazy to try to sell it?

A. I sure would.

X-Q. 21. All that's because they are entirely different classes of goods?

A. Yes, sir.

Deposition closed.

Signature waived.

DARRELL S. BOYD, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories, propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Your name is Darrell S. Boyd, your age is 31; your residence is Winnetka, Illinois; your occupation is lawyer; your office is in the Corn Exchange Bank Building, corner of LaSalle and Adams; is that correct?

A. Yes.

Q. 2. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Have you ever purchased a package of these cigarettes?

A. Yes, I have purchased a number.

Q. 3. When, and where, did you purchase them, do you remember?

A. All the purchases I have made have been at the cigar stand in the lobby of the Corn Exchange Bank Building, corner Adams and LaSalle. Purchases have ranged every three or four days for the last month.

Q. 4. Do you know who runs that cigar stand?

A. It's run by one of those chain tobacco stores. I am not sure—either Breitung or Shelby. I think it is Breitung.

Q. 5. Did you make these purchases from a clerk whom you had previously seen there?

A. You refer to any one purchase? I ordinarily purchase them from same clerk, who is behind stand prac-

tically every day, and at most times of the day except at lunch hour, when he is relieved.

Q. 6. Did you have any conversation with the clerk when you were making your purchase?

A. I made a purchase of a package of cigarettes about three weeks ago—just as I was coming back from lunch. I had noticed these advertisements and I don't know but what I had some conversation with you on the train or somewhere before that. I was curious to know what he would say about the maker of the product, so when I purchased the package of cigarettes I asked him if the cigarettes were made by the same company who marketed the Beech-Nut bacon and the other well known Beech-Nut products. He said that it was—that they were the product of the same company that got out Beech-Nut bacon and Beech-Nut candies and Beech-Nut gum and various other Beech-Nut products. I then called his attention—I picked up the package and called his attention to the name P. Lorillard underneath. I said, "If that's the case what do you make of this? What does P. Lorillard on the label mean?" And he said, "Oh, they are all made by the same company." I said, "The P. Lorillard Company is not the company that gets out Beech-Nut bacon." He said, "No. But they are all the same concern. The Beech-Nut bacon company owns or controls the P. Lorillard Company. It's all the same crowd."

Q. 7. Have you had any other conversation with any other clerk selling Beech-Nut cigarettes, or made any other purchases of Beech-Nut cigarettes besides the one you have just described?

A. No. I have never made any purchases of Beech-Nut cigarettes except at this counter.

Q. 8. Have you made any inquiries about Beech-Nut cigarettes from any other tobacco clerks?

A. Not from any other tobacco clerks.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. What did you say your occupation was?

A. Lawyer.

X-Q. 2. Where are your offices located?

A. Corn Exchange Bank Building.

X-Q. 3. Are you in any way connected with the Beech-Nut Packing Company?

A. No.

X-Q. 4. How did you happen to start this conversation with this clerk; what led you to do that?

A. I think the reason I started it was because I knew the controversy was on. I think I had some casual conversations with Mr. Hinton.

X-Q. 5. Do you live near Mr. Hinton?

A. Live in the same town.

X-Q. 6. That's out at Winnetka?

A. Yes. Winnetka.

X-Q. 7. When you went into this store, you knew that the cigarettes were the product of the P. Lorillard Company?

A. I knew they were.

X-Q. 8. So you weren't yourself laboring under any misapprehension on that point?

A. No.

X-Q. 9. You started this conversation?

A. I started the conversation.

X-Q. 10. How large a store is this?

A. Just a counter in the lobby. Say about 10 feet long, possibly.

X-Q. 11. And you know this clerk's name?

A. I don't know his name, no.

X-Q. 12. How old a chap is he?

A. I should say a man about 50 years old. Gray-haired gentleman. Behind the counter to my recollection for three or four years.

X-Q. 13. Just a clerk at the place?

A. I assume he is.

X-Q. 14. What do they sell at that counter besides tobacco?

A. They sell gum and candy, and have some apples, I believe, on display.

X-Q. 15. One of these little stands like you usually see in office buildings?

A. Yes. A cigar stand.

X-Q. 16. Little retail stand?

A. Little retail stand.

X-Q. 17. You say you don't know the name of the concern that runs that stand?

A. I am not sure whether it's Schulte or Breitung. If you look in the telephone book you will find it.

X-Q. 18. You have stated that you are a lawyer. This clerk didn't show you any documentary evidence, or what you might call authentic data in support of his statement, did he?

A. No. Just sort of gossip across the counter. If I may explain my motives there a little more fully. I was not collecting evidence from this clerk with any thought of testifying, but I was curious to know how far these venders of tobacco were fooled on the proposition that it was marketed by the Beech-Nut bacon crowd. I had been rather curious when I first saw the advertisements. I knew some ordinary purchasers were fooled. I was rather curious to see how far that went.

X-Q. 19. In your instance here it appears to have been a question on the part of this clerk as to the ownership of the companies, as to who controlled the companies?

A. No. It was a pure question of whose product this was.

X-Q. 20. I understand you showed him the name P. Lorillard on that?

A. That was after I had asked him whose product it was.

X-Q. 21. Then you showed him the name P. Lorillard on the package?

A. After I had asked him whose product it was?

X-Q. 22. Yes.

A. He told me it was a Beech-Nut product.

X-Q. 23. I understand that.

A. Marketed by same crowd that got out bacon and gum. Then I showed him the label and was curious to know how he would get around that, and he maintained his stand even then, and waved me aside with the proposition that it was all controlled by the same interests. I had no incentive to pursue argument any further.

X-Q. 24. Then you didn't ask him if he knew of the P. Lorillard Company, did you?

A. No.

X-Q. 25. Nor the size of that concern?

A. No.

X-Q. 26. Or call his attention to the length of time the Lorillard Company had been in existence?

A. No.

X-Q. 27. 160 years?

A. I didn't know that.

X-Q. 28. I show you the package of cigarettes. Will you read the last two lines on that panel?

A. Yes.

X-Q. 29. What does it say?

A. "P. Lorillard Company. Established 1760." First time I ever noticed that.

X-Q. 30. So you didn't go into any of these questions at all?

A. No. I wasn't interested in the case. I was just interested in his personal reaction.

X-Q. 31. You wouldn't consider tobacco or cigarettes

to be the same class of goods as food products, so that you would take one for the other—tobacco instead of bacon for Sunday morning breakfast?

A. Hardly.

X-Q. 32. Because they are different kinds of goods?

A. No. Because I don't like cigarettes for breakfast.

X-Q. 33. They are different kinds of goods?

A. I don't think tobacco is food.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 1. What is the address of the Corn Exchange Bank Building?

A. 134 South LaSalle street.

R-D. Q. 2. What is 136 South LaSalle street?

A. That must be the entrance of the bank. The bank entrance proper is one door to the south. Both enter into the same lobby.

R-D. Q. 3. In the Chicago telephone book I notice a list of seventeen Breitung stores, including one at 136 South LaSalle street. Is the Albert Breitung whose name here appears the chain cigar store man whom you referred to?

A. Yes.

Mr. Hinton: That's all.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.

M. W. RYAN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Will you please state your name, age, residence, and occupation?

A. M. W. Ryan; 31 years; 504 Douglas avenue, Elgin, Illinois; employed by the National Vending Service Company, looking after the stock.

Q. 2. You are here in response to subpœna, are you not?

A. Yes, sir.

Q. 3. To whom do you supply stocks?

A. Stands operated by National Vending Service Company on the elevated roads.

Q. 4. How many of these stands are there?

A. I will say there are about sixty-two. We add and subtract.

Q. 5. Do you stock these stands with Beech-Nut scrap tobacco, in evidence as Plaintiff's Exhibit No. 3, a package of which I now show you?

A. Yes, sir.

Q. 6. In stocking these dealers with this tobacco, can you tell me what your experience has been?

A. They have asked if it is a product taken care of and manufactured by same company that makes gum and candy.

Q. 7. Could you give me an idea of how often that has happened in any way?

A. It has happened many times.

Q. 8. And what have you told them?

A. I have had to tell them that the product was not made by the same company that made the gum.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you know the P. Lorillard Company puts out that tobacco?

A. Yes, sir.

X-Q. 2. Do you do any of the buying for your concern?

A. I look after that.

X-Q. 3. And you buy that tobacco from Lorillard agency, do you not?

A. Well, through their local office.

X-Q. 4. From P. Lorillard?

A. Yes, sir.

X-Q. 5. You know it is the Lorillard Company's product?

A. Surely.

X-Q. 6. This concern that you work for, just what is its line of business?

A. They vend newspapers and magazines on the elevated roads. Not all, but a part of them.

X-Q. 7. Newspapers, magazines, candies and tobacco, cigarettes, chewing tobacco, and things of that sort? Now, these stands that have asked you if this scrap tobacco was made by the same company that made Beech-Nut gum and food products, you don't know whether they ever took the trouble to look at package and see Lorillard's name on it, as far as you know?

A. I cannot say as to that.

X-Q. 8. As far as you know, you don't know whether they ever took trouble to look on package and see who made it?

A. No.

X-Q. 9. You still continued to deliver this tobacco to these stands?

A. Whenever they wanted it.

X-Q. 10. People who have asked the question as to

whether it was made by the people who make Beech-Nut gum and food products, they still continue to take that tobacco, even after you tell that it is Lorillard's?

A. I don't know if they are the same people or not. We send it every time they want it.

X-Q. 11. You have steady demand?

A. Well, right along.

X-Q. 12. How long have you been delivering that tobacco to the stands, approximately?

A. I haven't been with them very long. I can't say as to how long it was.

X-Q. 13. How long have you personally?

A. Two years, January.

X-Q. 14. All that time you have been delivering this tobacco?

A. Yes, sir.

X-Q. 15. You also deliver gums and candies?

A. Yes, sir.

X-Q. 16. If a customer of one of these stands ordered some Beech-Nut chewing gum or Beech-Nut candy, you wouldn't deliver this Beech-Nut tobacco in place of candy or gum—you wouldn't confuse the two?

A. They specify Beech-Nut gum or Beech-Nut tobacco.

X-Q. 17. If they wanted Beech-Nut gum you wouldn't give them tobacco?

A. Not unless they made a mistake in store in sending it in.

X-Q. 18. You yourself know the difference between chewing gum and tobacco?

A. Absolutely.

X-Q. 20. Absolutely different kinds of goods?

A. Yes.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.

EUGENE C. SULLIVAN, a witness on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Eugene C. Sullivan; 7632 North Marshfield; 31; advertising salesman.

Q. 2. By whom are you employed?

A. Chicago Elevated Advertising Company.

Q. 3. You are here in response to a subpœna, are you not?

A. Yes, sir.

Q. 4. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3. Have you ever seen a similar package of scrap tobacco or an advertising display thereof?

A. I have never seen a package of tobacco until today. I have, however, seen a window cut-out reproducing the package, a little larger than the actual size, if I recall.

Q. 5. How big was the window cut-out, do you suppose?

A. I should imagine in length—it was made up of three panels. The right and left panels were probably, to my recollection, a foot wide, the center one about two and one-half feet wide. It was two and a half feet high or three feet high.

Q. 6. Now, when you saw that cut-out, whose product did you think was being advertised?

A. I happened to be going along East Illinois street, near the Pugh warehouse. I saw, in a rather dilapidated water front saloon, an equally dilapidated cut-out. In my recollection it was red and white. It was new to me,

and being an advertising man and observant of all new products, it caught my attention, at least the name "Beech-Nut" did. I was first impressed that probably it was a product of the Beech-Nut Packing Company, but on closer inspection, due to the cheapness of the cut-out itself, I was immediately impressed that it couldn't be a printing job or a lithographing job, such as quality maintained by Beech-Nut Packing Company, so I immediately assumed that it was not a product of the Beech-Nut Packing Company.

Q. 7. I call your attention to the word "Lorillard's," which appears on the top of this package. When did you first see that name "Lorillard's"?

A. Today, when you called my attention to it.

Q. 8. That's all.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Did you ever buy any of this Beech-Nut scrap tobacco?

A. No.

X-Q. 2. Prior to today you never had a package in your hand to look at it?

A. No.

X-Q. 3. Did you read the printing matter on that lithograph sign you spoke of?

A. The chances are I did. At this late day I couldn't recall if I did or not.

X-Q. 4. Did you see Lorillard's name on it?

A. No.

X-Q. 5. You couldn't say whether or not Lorillard's name was on that?

A. No.

X-Q. 6. How close were you to the sign when you saw it?

A. It was in a window, must have been about 3 feet away.

X-Q. 7. Did you ever hear of the P. Lorillard Company?

A. No.

X-Q. 8. How long have you been in the advertising business?

A. About fifteen years, off and on.

X-Q. 9. Do you solicit orders for advertising?

A. Yes.

X-Q. 10. And you never heard of P. Lorillard Company?

A. No, sir. I believe they are Eastern manufacturers, so I naturally wouldn't be interested.

X-Q. 11. Do you do any tobacco advertising?

A. I personally?

X-Q. 12. Do you solicit orders for any tobacco advertising?

A. No, sir.

X-Q. 13. Have you ever handled any tobacco advertising accounts?

A. No, sir. I am working on one now. Near as I ever got to it.

X-Q. 14. Have you ever heard of the American Tobacco Company?

A. Yes, sir.

X-Q. 15. Liggett & Myres?

A. Yes, sir.

X-Q. 16. R. J. Reynolds Tobacco Company?

A. Yes, sir.

X-Q. 17. Yet you never heard of the oldest of them, P. Lorillard Company?

A. No, sir.

X-Q. 18. Did you ever hear of Climax tobacco?

A. Yes.

X-Q. 19. Did you ever hear of "Between the Acts"?

459

A. Yes, sir.

X-Q. 20. Murad cigarettes?

A. Yes, sir.

X-Q. 21. Mogul cigarettes?

A. Yes, sir.

X-Q. 22. Sensation tobacco?

A. No, sir.

X-Q. 23. Union Leader?

A. No, sir.

X-Q. 24. Muriel cigars?

A. Yes, sir.

X-Q. 25. You have heard of Egyptian Deities?

A. Yes, sir.

X-Q. 26. You have heard of this Beech-Nut tobacco?

A. Only on these two occasions.

X-Q. 27. Now as an advertising man, wouldn't you say that a firm that manufactured and marketed those tobacco brands I have just mentioned to you ought to be a pretty big and pretty well-known firm?

A. Yes, sir.

X-Q. 28. And you would expect an advertising man to know of them?

A. Not necessarily.

X-Q. 29. You knew the other three tobacco concerns I have mentioned?

A. Yes.

X-Q. 30. Knew those the minute I mentioned them, quite well?

A. No, not quite well. You couldn't tack me down to where I have seen those. I don't even know who makes Camel cigarettes and I smoke them all the time.

X-Q. 31. What accounts in the advertising do you work particularly for?

A. We don't specify on anything. I have, however, been fortunate in handling bank accounts and amusement places.

X-Q. 32. Programs?

A. No. Elevated advertising.

X-Q. 33. Theatrical programs?

A. No.

X-Q. 34. Ball rooms?

A. Those have been what I specialize in and exploitation of moving picture features.

X-Q. 35. So you have never paid any attention at all to the tobacco advertising, have you?

A. No, sir, for the simple reason that I assumed and accepted that the main office of most of them was in New York. My territory is Chicago.

X-Q. 36. You never made any study of this industry as connected with advertising to find out its possibilities and its probabilities?

A. No, sir.

X-Q. 37. You never made any attempt to get any of those advertising accounts for your territory?

A. No, sir. It is not our policy to cover the eastern territory. It is already covered by eastern office.

X-Q. 38. You mean to say that your eastern office would handle advertising of tobacco products in Chicago?

A. Absolutely.

X-Q. 39. You wouldn't pay any attention to that at all?

A. No, sir.

X-Q. 40. You say that this sign that you saw in the window had a three panel advertisement. What appeared on that beside the word "Beech-Nut"? Could you describe that sign in general?

A. Only what I gave you. The only thing I recall now is that it was red and white.

X-Q. 41. Don't know whether it had a blue girl on it or not?

A. No, sir. I don't recall what the side panels had at all. The only thing I recall is what the center panel had.

X-Q. 42. You don't know whether the red and white represented a package?

A. Yes. I recall that.

X-Q. 43. Was the package held by girl?

A. I couldn't recall that. I don't know details of sign.

Deposition closed.

Signature waived.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } 3056.

Stipulation.

It is stipulated by and between the parties through their respective counsel that if the parties whose names are appended hereto were called to testify in this case they would each testify as follows:

Direct Examination.

I am of legal age, a grocer, doing business at the address given in the appended list. I do not handle tobacco products. I have never stocked and sold Beech-Nut scrap tobacco (Plaintiff's Exhibit No. 3). I was recently shown a package of this Beech-Nut scrap tobacco by a person whose name and business connection I did not then know, but whom I now know to be a representative of the Beech-Nut Packing Company, and asked whose product it was. I immediately, without

looking to see whose product it was, took it to be a product of the Beech-Nut Packing Company by reason of the name Beech-Nut and the label appearing thereon.

I was subsequently informed that this product was not a product of the Beech-Nut Packing Company.

Cross-Examination.

I have never bought or sold goods like the scrap tobacco package or the cigarette package referred to and having no interest therein never looked at the package to see whose product it was, and never read the wording thereon and therefore never saw the name Lorillard on them. I never bought, sold, or saw a product of the Beech-Nut Packing Company packaged or put up like Plaintiff's Exhibit No. 3, Scrap Tobacco. I have never been offered any Beech-Nut tobacco product by any Beech-Nut salesman, nor have I ever been advised by Beech-Nut tobacco salesmen that the Beech-Nut Packing Company was making tobacco products of any kind. I would never confuse either scrap tobacco or cigarettes with chewing gum or any Beech-Nut food product nor would I accept one of these products in the place of the other, as I regard these as entirely different classes or kinds of goods, and I would think that anyone who would accept a package of scrap tobacco or a package of cigarettes in the place and stead of chewing gum or any Beech-Nut food product would be crazy.

M. A. Landolf, Vernon & 63rd Streets, Chicago.
Mr. Dietz, Vernon & 63rd Streets, Chicago.
Chas. G. Voelker, Cor. S. Michigan Avenue & 61st St., Chicago.
H. A. Newman, 211 43rd Street, Chicago.
J. K. Larkin, 48 43rd Street, Chicago, C/o Roberts & Larkin.

Chris Flamburas, United Fruit Market, 3829 Broadway, Chicago.
Fred Masak, 6148 N. Clark Street, Chicago.
F. C. Dammeran, 3176 Broadway, Chicago.
Aug. Digeser, 3710 Broadway, Chicago.
W. V. Moore, Riverside, Illinois.
A. R. Owen, Riverside, Illinois.
W. W. Meyer, 1108 W. Chicago Ave., Oak Park, Ill.
Mr. Miller, 2308 N. Clark Street, Chicago.
C. H. Beese, 701 Murray Avenue, Chicago.
Mr. Kosche, 511-13 Main Street, Evanston, Ill.
M. Guttziet, 601 Dempster Street, Evanston, Ill.
Mr. Taylor, 530 Davis Street, Evanston, Ill.
G. C. Shiebe, Davis Street, Evanston, Ill.
Mrs. Scheffert, C/o Mr. Weiss, Cor. Madison & Springfield, Chicago.
J. H. Blostein, 912 N. Wells Street, Chicago.
Mr. Stowers, North Avenue, Chicago.
Geo. H. Puchner, Lake Street, Oak Park, Illinois.
Mr. Pries, C/o Aug. Leitz, 111 Oak Park Ave.
Mrs. Vogel, 57 E. Chicago Avenue, Chicago.
F. McHale, 1010 N. State Street, Chicago.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Beech-Nut Packing Co.
RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } 3056.

Stipulation.

It is stipulated by and between the parties through their respective counsel that if the persons whose names and addresses are appended hereto were called to testify in this case, they would each testify as follows:

Direct Examination.

I am of legal age, a grocer, doing business at the address given in the appended list. I do not handle tobacco of any kind and have never sold tobacco. My store is a grocery store in a residence neighborhood. I have never stocked and sold Beech-Nut scrap tobacco (Plaintiff's Exhibit No. 3).

I have, however, seen the packages of scrap tobacco, identical with the aforesaid exhibit, displayed in stores and have seen poster advertising thereof for several years. I always believed that the scrap tobacco was a product of the Beech-Nut Packing Company until I was advised to the contrary by a Beech-Nut Packing Company representative.

I have within the past several weeks seen on display packages of Beech-Nut cigarettes corresponding to Plaintiff's Exhibit No. 1 and have seen a great deal of poster advertising of these Beech-Nut cigarettes. I believed that these cigarettes were a product of the Beech-Nut Packing Company until I was advised to the con-

trary by a Beech-Nut Packing Company representative.

My reason for the aforesaid belief with respect to both the scrap tobacco and cigarettes is the name "Beech-Nut" and label on the scrap tobacco and the cigarettes.

Cross-Examination.

I have never bought or sold goods like the scrap tobacco package or the cigarette package referred to and having no interest therein never looked at the packages to see whose products they were and never read over the wording on the advertisements, and therefore never saw the name Lorillard's or P. Lorillard Co. on them. I never bought, sold, or saw a product of the Beech-Nut Packing Company, packaged or put up like Plaintiff's Exhibit No. 3, Scrap Tobacco, or Plaintiff's Exhibit No. 1, Cigarettes. I have never been offered any Beech-Nut tobacco product by any Beech-Nut salesman, nor have I ever been advised by Beech-Nut tobacco salesmen that the Beech-Nut Packing Company was making tobacco products of any kind. I would never confuse either scrap tobacco or cigarettes with chewing gum or any Beech-Nut food product nor would I accept one of these products in the place of the other, as I regard these as entirely different classes or kinds of goods and I would think that anyone who would accept a package of this scrap tobacco or a package of these cigarettes in the place and stead of chewing gum or any Beech-Nut food product would be crazy.

James Wilkinson, 84 Sangamon Ave., Chicago.
S. Cross, 10200 Avenue A, Chicago.
D. Lawlor, 345 East 43rd Street, Chicago.
Mrs. A. Sterner, 942 East 55th Street, Chicago.
C. W. Stenbeck, Cor. Broadway & Irving Park Blvd., Chicago.

C. E. Neumann, Broadway, Chicago.
John Bornhoffen, Devon Market & Grocery, Devon Ave., Chicago.
N. Weil, 3554 N. Halsted Street, Chicago.
A. Tennebaum, 3207 Broadway, Chicago.
M. Harris, 668 N. Clark Street, Chicago.
C. Diamond, 2126 Clark Street, Chicago.
J. Wilson, 3138 Broadway, Chicago.
S. Oris, N. Clark & Elm Streets, Chicago.
Frank Jirachek, 7212 National St., West Allis, Wisconsin.
Mr. Kiep, 1107 Chicago Street, Joliet, Illinois.
S. P. Gerdl, 1909 Central Avenue, Evanston, Illinois.
Mr. Cazel, 817 Davis Street, Evanston, Illinois.
Mr. Winters, 620 Davis Street, Evanston, Illinois.
N. Young, Kuhn Grocery, 1446 Wells St., Chicago.
Fred Blase, 314-16 Lake Street, Oak Park, Illinois.
Frank Katz, 866 N. State Street, Chicago.
Chas. Norstedt, 803 N. State Street, Chicago.
Ernest Alm, 1010 S. Michigan Ave.
Otto Freuzen, Elliott & Stanley Ave., Berwyn, Illinois.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Beech-Nut Packing Co.
RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

I Sarah E. Harvey, a notary public within and for the County of Cook, and State of Illinois, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Roy B. Southern, Albert B. Lewis, Albert Levy, John E. Watson, William H. Sage, A. H. Carlson, Arthur E. Fechter, Charles O. Larson, John Sabelis, Darrell S. Boyd, M. W. Ryan and Eugene C. Sullivan, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and notice, before me, at Chicago, Illinois, beginning October 31, 1921; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand by me and thereafter reduced by me to typewriting; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, Chicago, Illinois, beginning at 1:00 P. M., October 31, 1921, and ending November 7, 1921, at 6:00 P. M.; that I am not connected by blood or marriage with either of the parties hereto, or interested directly or indirectly in the matter in controversy; and that the signature of each of the witnesses to his deposition was waived by consent of counsel.

SARAH E. HARVEY.

[SEAL.]

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
} Equity No. 3056.

Depositions on behalf of plaintiff, taken pursuant to notice and agreement of counsel, before Alice M. Rankin, a Notary Public in and for Cook County, State of Illinois, acting as Special Examiner, by consent of counsel, beginning on Monday, October 30, 1921, at 2 o'clock P. M., at Chicago, Cook County, Illinois.

Present: Sebastian Hinton, Esquire, representing the plaintiff; R. B. Cavanagh, Esquire, representing the defendant.

Whereupon the following proceedings were had:

WILLIAM I. THOMAS, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Please state your name, age, residence and occupation.

A. My name is William I. Thomas; I live at 5431 Kimbark; 54 years old; grocery business.

Q. 2. Where is your place of business located?

A. 931 East 47th.

Q. 3. Do you chew tobacco, Mr. Thomas?

A. Yes.

Q. 4. How long have you chewed tobacco?

A. About twenty—thirty years.

Q. 5. I show you a package of scrap tobacco, being a package of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3 in this case. Have you ever chewed this brand of tobacco, and if so, for how long?

A. Tobacco?

Q. 6. Yes.

A. I have chewed that off and on for the last five years.

Q. 7. Prior to the spring of 1921 whose product did you think this was?

A. I supposed it was the Beech-Nut people that put out stuff such as bacon and chili sauce and all that class of stuff.

Q. 8. During the time that you have chewed this tobacco have you carried it around with you in your pockets, and taken it out when you wanted a chew?

A. Yes.

Q. 9. Do you now think that this tobacco is put out by the Beech-Nut Packing Company?

A. Do I now?

Q. 10. Yes.

A. No. Not since I have been made wise to it last spring.

Q. 11. And do you know who put you wise to it last spring?

A. Some young fellow; I don't know who he was; come into the store there one day and he said he represented the Beech-Nut people, and I told him that we handled the Beech-Nut people's goods. He says, "Do you handle Beech-Nut chewing tobacco?" I says, "No, but I use it." He says, "Do you use it?" I says, "Yes, I have been using it over"—I told him then, I believe, about four years. "Do you think we put this out?" he says. I says, "Yes. Don't you?" He says, "No, it is not our goods."

Q. 12. Have you previously seen these cigarettes which

I now show you, being Beech-Nut cigarettes, Plaintiff's Exhibit No. 1?

A. Well, I have seen that since I have had this conversation with that young man. Then I took it for granted it was that same tobacco concern that was using the Beech-Nut brand.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 13. Mr. Thomas, when was the last time you bought this Beech-Nut tobacco like Exhibit 3?

A. About three weeks ago, I think. I have got a big part of it in the drawer there yet.

X-Q. 14. But you have been buying it since you found out it was made by Lorillard Company?

A. Oh, yes.

X-Q. 15. It is good tobacco?

A. Yes, I like it.

X-Q. 16. You like it, don't you?

A. Yes.

X-Q. 17. Did you ever hear of the P. Lorillard Company?

A. Oh, yes.

X-Q. 18. They are large tobacco manufacturers, are they not?

A. Yes.

X-Q. 19. Put out a nice class of goods?

A. Yes.

X-Q. 20. You notice the name Lorillard on this package, do you not?

A. I do on this one. I have never noticed it before.

X-Q. 21. Never took a good look at it, did you, now?

A. No. All I was looking for was tobacco.

X-Q. 22. If you had noticed the name "Lorillard's," you would have connected it with the tobacco?

A. Why, evidently, yes.

X-Q. 23. Do you sell tobacco in your store?

A. No.

X-Q. 24. You sell food products?

A. We had a store down at 55th street where we sold tobacco and sold Beech-Nut. I never noticed, though; my son run the place, for I was working out, but I never noticed the maker's name.

X-Q. 25. You bought your goods from a jobber, did you?

A. Oh, yes.

X-Q. 26. Or did you buy it direct from the P. Lorillard Company?

A. No; I bought from an agent here in Chicago.

X-Q. 27. Did you buy it in a large carton?

A. In cartons, yes.

X-Q. 28. You didn't notice whether the name "Lorillard" was on the carton or not?

A. I never noticed; no, sir.

X-Q. 29. If you had seen that name you would have known it was the tobacco company, would you not?

A. I think I would; yes, sir.

X-Q. 30. You handle Beech-Nut Packing Company products in your store where you work now, do you not?

A. Yes. We handle a few candies, and, oh, several items there; we handle Beech-Nut peanut butter.

X-Q. 31. Different Beech-Nut items?

A. Yes.

X-Q. 32. Do you do any buying for this store?

A. No, sir.

X-Q. 33. If you went into a store and wanted a package of scrap tobacco to chew, would you be deceived or fooled into taking chewing gum for scrap tobacco, if you wanted scrap tobacco?

A. Oh, no.

X-Q. 34. You would consider it an entirely different class of goods, would you not?

A. Why, yes.

Mr. Cavanagh: That is all.

Deposition closed.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

A. V. BOBB, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Please state your name, age, residence and occupation.

A. 5536 Kimbark; 26; butcher.

Q. 2. Where is your place of business, Mr. Bobb?

A. 1362 East 47th.

Q. 3. Do you run the meat market?

A. Yes, sir.

Q. 4. At your place of business?

A. Yes, sir.

Q. 5. Do you chew tobacco, Mr. Bobb?

A. Yes, sir.

Q. 6. What brand have you chewed for the last four or five years, do you remember?

A. Why, Beech-Nut was one of them, and Golden Twins, Climax.

Q. 7. Is the Beech-Nut that you refer to the Beech-Nut scrap tobacco which I now show you, and which is in this case as Plaintiff's Exhibit No. 3; is that the Beech-Nut scrap?

A. Yes, sir.

Q. 8. How often, do you suppose, in the last five years

you have purchased this Beech-Nut scrap tobacco; I mean, how many times a week?

A. Now, I would not say whether it is four years or not—five years, but it is pretty close to it; about four years that I can remember; the year before I went into the army; around four years.

Q. 9. I want an idea of how frequently you would purchase this tobacco?

A. About once a week, maybe twice a week.

Q. 10. And by whom did you believe that this product was put out?

A. By the Beech-Nut Packing Company, Canajoharie, New York.

Q. 11. And how long did you continue to believe that?

A. Up until about—well, three months ago.

Q. 12. And how did you find out that that was not true?

A. By one of the salesmen, one of the Beech-Nut salesmen; he come into the store and I asked him about it; I asked him who puts up the Beech-Nut cigarettes, and he told me Lorillard's. I said, "I thought you was putting it out," and he said, no he didn't.

Q. 13. I show you a package of cigarettes, being Plaintiff's Exhibit No. 1, Beech-Nut Cigarettes. Have you seen these cigarettes before?

A. Yes, sir.

Q. 14. When, and how was your attention first directed to these cigarettes, do you remember?

A. Why, yes, I was out at Jones' pharmacy, 63rd street, and standing at the counter there, and I says, "Beech-Nut cigarettes," and he says, "Yes, I got some Beech-Nut cigarettes here, put out by the Beech-Nut Company." I says, "It isn't the same one that makes bacon?" He says, "Yes."

Q. 15. And did he mention any other product that was made by these same people?

A. Why, chewing tobacco; that was what I was after when I was in there.

Q. 16. Do I understand he told you the chewing tobacco was made by the same people?

A. By the Beech-Nut Packing Company.

Q. 17. What made you think that this scrap tobacco was a product of the Beech-Nut Packing Company?

A. It had the two beech-nuts on there, the same as the bacon, and it was in an oval shape, the same as the bacon does, and red letters and blue letters, just exactly the same as it is on the bacon. I never thought of looking at what was on the package.

Q. 18. When did you first see the name of the manufacturer on this package, do you remember?

A. About three months ago, when I had a package and looked at it, and it said "Lorillard's" across the top.

Q. 19. On the back of the scrap?

A. Yes.

Q. 20. This was after you were advised?

A. After I was told it was not a Beech-Nut product. That is the reason I have been chewing it all the time, because I know the Beech-Nut bacon is good, and that the tobacco ought to be the same, and I liked the taste of it very much, being in the business I am in.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 21. Are you still buying and chewing this Beech-Nut scrap tobacco of Lorillard's?

A. Yes, I bought a package yesterday.

X-Q. 22. So you have been buying it steadily since you found out it was Lorillard's?

A. Yes, I have been using it all the time.

X-Q. 23. You have heard of the P. Lorillard Company, have you not?

A. Yes, I have heard of them; yes.

X-Q. 24. You know they are large tobacco manufacturers?

A. I know they are tobacco manufacturers. That is all I know about them

X-Q. 25. And this is a good tobacco, is it not?

A. Yes.

X-Q. 26. And it does not make any difference to you whether it is made by the Lorillard Company or the Beech-Nut Packing Company, so far as your use of it is concerned?

A. Yes; I like the taste of it.

X-Q. 27. That is the reason you continue to use it?

A. That is the reason I use it.

X-Q. 28. Do you ever use their cigarettes?

A. Never smoke cigarettes.

X-Q. 29. I understand you have been chewing this tobacco for five years?

A. About four years; I would not say five.

X-Q. 30. About four years?

A. About four years.

X-Q. 31. And you had never taken the trouble to look to see whose name was on there?

A. Never looked at the name; just stuck it in my pocket and when I wanted a chew just took a handful out.

X-Q. 32. You spoke of this label being something like the bacon label.

A. Like they have on the bacon; yes.

X-Q. 33. Have you got one of those bacon labels?

A. Yes.

X-Q. 34. Could you get one a minute, please?

A. Sure.

(Witness produces label.)

Mr. Cavanagh: Mark this for identification as "Defendant's Cross-Exhibit No. 8."

(The paper was so marked.)

X-Q. 35. Now, this oval on the bacon label which you have produced is in the nature of a wide red band, is it not?

A. Yes.

X-Q. 36. That is a blue band around the Beech-Nut scrap tobacco?

A. Yes.

X-Q. 37. And that red label has printing on it, "Beech-Nut Brand," and the word "Bacon," has it not?

A. Yes.

X-Q. 38. And there is no printing on that blue band of the oval of the Beech-Nut tobacco, is there?

A. No.

X-Q. 39. And the Beech-Nut has a single beech-nut on green leaves, has it not?

A. Yes.

X-Q. 40. And you have two red beech-nuts on the scrap tobacco?

A. Yes.

X-Q. 41. And this scrap tobacco has large, prominent red radiating lines running from the oval, has it not, on the face of it?

A. Yes.

X-Q. 42. So the two labels are not alike, are they?

A. Well, they are shaped alike.

X-Q. 43. That is, their ovals?

A. Their ovals, yes.

X-Q. 44. Now, if you went into a store and you wanted some scrap tobacco, being as you chew, and a man handed you a package of chewing gum for scrap tobacco, could you be fooled into taking that chewing gum in the place of scrap tobacco?

A. No, sir.

X-Q. 45. You would think a man was crazy that would, wouldn't you?

A. I would think so.

X-Q. 46. That is because they are an entirely different class of goods, is it not?

A. Absolutely.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

JAMES F. BALLARD, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Mr. Ballard, please state your name, age, residence and occupation.

A. James F. Ballard; 5213 Harper avenue; retail meat business.

Q. 2. Age?

A. Twenty-eight.

Q. 3. Where is your place of business?

A. 1516 East 53rd.

Q. 4. I show you a package of cigarettes, being a package of Beech-Nut cigarettes in evidence in this case, as Plaintiff's Exhibit No. 1. Have you ever seen those cigarettes before?

A. No, I never have.

Q. 5. I am not referring to this particular package, but to another package like that.

A. Oh, yes, another package like that; certainly.

Q. 6. When did you first hear about these cigarettes?

A. From A. L. Christensen.

Q. 7. What did he say?

A. Told me the Beech-Nut Company was putting out a product in tobacco and cigarettes.

Q. 8. Who is Mr. Christensen?

A. He is a man in my employ.

Q. 9. Did you subsequently obtain and smoke any of these cigarettes?

A. I did.

Q. 10. What made you want to get some of those cigarettes?

A. Just because I handled some of the Beech-Nut goods, more than anything.

Q. 11. What did you expect the cigarettes would be?

A. I thought they would be an extra fine quality.

Q. 12. Was your expectation satisfied when you obtained and smoked those cigarettes?

A. I did not think they were. Of course, I am not a cigarette smoker. See?

Q. 13. From the time that Mr. Christensen spoke to you about the cigarettes, how long did you believe that they were a Beech-Nut product?

A. All the time.

Q. 14. Until when?

A. Until I was convinced they was not.

Q. 15. Who convinced you?

A. A representative of the Beech-Nut Packing Company. I would have still firmly believed so.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. Do you chew, Mr. Ballard?

A. No, I do not, sir.

X-Q. 17. Do you smoke?

A. Not cigarettes.

X-Q. 18. You do not smoke cigarettes?

A. Nothing but cigars.

X-Q. 19. So it is very seldom you smoke cigarettes?

A. Very seldom. I think that was my first cigarettes.

X-Q. 20. Did you ever hear of the P. Lorillard Company?

A. Yes, I have heard of it.

X-Q. 21. They are a large tobacco company, are they not?

A. Yes, sir.

X-Q. 22. If you had seen that name, P. Lorillard Company, on that package of cigarettes, you would have thought it was one of their products?

A. Not necessarily.

X-Q. 23. Wouldn't that connect them in your mind?

A. Not necessarily.

X-Q. 24. Who would you have thought made it?

A. Beech-Nut Packing Company.

X-Q. 25. Is Beech-Nut Packing Company anywhere on that package?

A. No.

X-Q. 26. You do find it on all of their other products?

A. This packing company? There is no name on the Beech-Nut Packing Company products; no.

X-Q. 27. I mean there is a name—for instance, to be specific, I show you a label in this case, known as Defendant's Cross-Exhibit No. 8, of the Beech-Nut brand of bacon; do you not find the name "Beech-Nut Packing Company, Canajoharie, New York," on it?

A. Yes, sir, exactly.

X-Q. 28. That label is on all their goods?

A. Yes.

X-Q. 29. With that name Beech-Nut Packing Company on there?

A. Exactly.

X-Q. 30. You do not find the name "Beech-Nut Packing Company" on this package of cigarettes?

A. No.

X-Q. 31. But you do find the name "P. Lorillard Company"?

A. Exactly.

X-Q. 32. And you know the P. Lorillard Company are tobacco people?

A. Yes, I know of them.

X-Q. 33. You have heard of them?

A. I have heard of them.

X-Q. 34. If you went into a store and you wanted a food product or chewing gum, could you be fooled into taking a package of cigarettes for chewing gum?

A. Could I be fooled into taking the package?

X-Q. 35. Yes.

A. No. But I could if I wanted cigarettes, not if I wanted chewing gum.

X-Q. 36. Perhaps you do not understand. Supposing you wanted cigarettes.

A. That is the idea.

X-Q. 37. Could you be fooled into taking gum for the cigarettes?

A. Could I be fooled into taking gum for cigarettes? No.

X-Q. 38. That is because they are an entirely different class of goods?

A. Yes; sure; exactly.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

ALEX B. CHRISTENSEN, called as a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Please state your name, age, residence and occupation.

A. My name is Alex B. Christensen; butcher; 1623 East 55th Street, that is my residence. I am fifty-four years old.

Q. 2. Where is your place of business, Mr. Christensen?

A. Well, right here, 1516 East 53rd.

Q. 3. By whom are you employed.

A. James Ballard.

Q. 4. I show you a package of cigarettes in evidence in this case as Plaintiff's Exhibit No. 1. Have you ever seen similar packages of cigarettes before?

A. Similar packages?

Q. 5. Yes.

A. Yes, sir.

Q. 6. When did you first see these cigarettes?

A. When did I first see the cigarettes, close, do you mean—had it in my hand?

Q. 7. Well, no; I mean, when did you first see them?

A. First time I seen them, in the United Cigars Company.

Q. 8. When was the first time you bought them?

A. In the store here.

Q. 9. Now, when you saw them in the United Cigars Stores, did you have any conversation with the clerk about them?

A. I did, sir.

Q. 10. Do you remember what he told you?

A. Well, I asked him, I says, "Beech-Nut put out cigarettes?" He says, "Yes." He says, "They are also putting out scrap tobacco," and he says, "When the people ask me for a package of Beech-Nut, I don't know whether to give them gum, cigarettes or tobacco."

Q. 11. Did you believe that this was a product of the Beech-Nut Packing Company?

A. I certainly did.

Q. 12. How long did you continue to believe that?

A. Why, until a representative of the Beech-Nut Packing Company come in here and told us different.

Q. 13. Did you say anything to Mr. Ballard about this cigarette?

A. I did. I come in and says, "Beech-Nut is putting out cigarettes as well as tobacco, Beech-Nut Packing Company."

Q. 14. Did you ever see Mr. Ballard with a package of these Beech-Nut cigarettes?

A. I did, yes, sir, previous—after we spoke about the Beech-Nut Packing Company.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. Do you chew?

A. No.

X-Q. 16. Do you smoke?

A. Yes.

X-Q. 17. Do you smoke cigarettes?

A. Yes.

X-Q. 18. Did you ever buy a package of this scrap tobacco?

A. No, sir.

X-Q. 19. Did you ever buy a package of these cigarettes?

A. No, sir.

X-Q. 20. Did you ever take them in your hand and examine them?

A. Yes, sir.

X-Q. 21. Did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. Yes, sir.

X-Q. 22. P. Lorillard Company's name is on that package, isn't it?

A. Yes, sir.

X-Q. 23. You do not find Beech-Nut Packing Company on there, do you?

A. No, sir.

X-Q. 24. Who was this man who told you that the Beech-Nut people were putting out this cigarette?

A. I don't know what his name is, clerk over here in the United Cigar Company.

X-Q. 25. You don't know what his name is?

A. No, sir.

X-Q. 26. Where is this United Cigar Company?

A. Right here in the Holland Hotel.

X-Q. 27. Holland Hotel, Chicago?

A. Yes, sir.

X-Q. 28. What corner, what street?

A. Fifty-third and Lake Park Avenue.

X-Q. 29. Is that clerk still working there?

A. Yes, sir.

X-Q. 30. If you went into a store and wanted a package of cigarettes, could you be fooled into taking chewing gum in place of cigarettes?

A. Certainly not. Chewing gum and cigarettes are two different articles.

X-Q. 31. Entirely different class of goods, are they not?

A. Yes, certainly. One you chew and the other you smoke.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

DANIEL HUTTNER, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Please state your name, age, residence and occupation.

A. Daniel Huttner; 5427 Kimbark Avenue, Chicago, Illinois; occupation, butcher.

Q. 2. Your age?

A. Thirty-six.

Q. 3. Where is your place of business, Mr. Huttner?

A. 1419 Fifty-fifth.

Q. 4. I show you a package of cigarettes in this case as Plaintiff's Exhibit No. 1, being a package of Beech-Nut cigarettes. Have you ever before seen a package of cigarettes like that?

A. I have.

Q. 5. When and where did you see them, do you remember?

A. Displayed in a United Cigar Store, 55th and Lake Park Avenue.

Q. 6. And whose product did you take them to be when you saw them?

A. The Beech-Nut Packing Company.

Q. 7. Did you purchase a package?

A. I did.

Q. 8. Why did you buy the package of cigarettes?

A. I am familiar with the goods of the Beech-Nut Packing Company and I purchased a package to try them out.

Q. 9. Were you satisfied with the cigarettes?

A. Well, I haven't bought any since.

Q. 10. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3 in this case, Beech-Nut Scrap Tobacco. When you first saw that package, whose product did you take it to be?

A. Beech-Nut Packing Company.

Q. 11. What made you take it to be the product of the Beech-Nut Packing Company?

A. It says "Beech-Nut" right on the package.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Do you sell tobacco?

A. I do not.

X-Q. 13. Don't handle any tobacco product at all?

A. No.

X-Q. 14. Do you chew?

A. Do not chew; no.

X-Q. 15. Do you smoke cigarettes?

A. I do.

X-Q. 16. You know that different people have different tastes, as far as brands of cigarettes go?

A. I do.

X-Q. 17. What some might like in one some other people would not want?

A. Exactly.

X-Q. 18. And that is the same in most products, isn't it?

A. Well, yes, just a matter of taste.

X-Q. 19. Matter of taste. Did you ever hear of the P. Lorillard tobacco people?

A. No, I have not; no.

X-Q. 20. When you bought that package of cigarettes, you did not take the trouble to notice that name, P. Lorillard Company, on it, did you?

A. No, I did not.

X-Q. 21. If you went into a store and you wanted to buy a package of chewing gum, could you be fooled into taking cigarettes for chewing gum?

A. If I was buying an article that was worth any money at all I maybe would look into it further, more than twenty cents.

X-Q. 22. But what I am asking you is this: Supposing you wanted some cigarettes and a man passed you over chewing gum over the counter when you asked for cigarettes, could you be fooled into taking that chewing gum?

A. Not at all.

X-Q. 23. Entirely different class of goods?

A. Exactly. I suppose if I wanted cigarettes I would ask for cigarettes and not chewing gum.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

Whereupon an adjournment was taken until Tuesday, November 1, 1921, at 2:30 P. M.

CHICAGO, November 1, 1921.

Parties met pursuant to adjournment. Present: counsel as before.

WILLIAM OLIVER PARK, called as a witness on behalf of of the plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Please state your name, age, residence and occupation.

A. My name is William Oliver Park; my residence is 2821 Warren avenue; I am 48 years old; my occupation is delicatessen or grocery.

Q. 2. Where is your place of business?

A. 3447 West Madison.

Q. 3. How long have you had this place of business?

A. Since last February.

Q. 4. What were you doing before that?

A. With Sprague-Warner. Well, prior— you mean immediately prior to that? I was with the Hecker people, of Cleveland.

Q. 5. And what line was that?

A. That was in the railroad business.

Q. 6. And before you were with the Hecker people?

A. Sprague-Warner.

Q. 7. What is Sprague-Warner's business?

A. Wholesale grocery.

Q. 8. Were you salesman for Sprague-Warner?

A. No, I had the tea room.

Q. 9. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3, being a package of Beech-Nut scrap. Do you sell this product in this store?

A. Yes, sir.

Q. 10. How long have you sold it here?

A. Ever since I have been in.

Q. 11. Do you know who makes this product?

A. No, I do not; I have never paid any attention to it.

Q. 12. Who did you think put out this product prior to August, 1921?

A. I thought Lorillard put it out, I guess. At least the salesman told me Lorillard put it out.

Q. 13. Did the salesman tell you that?

A. I don't know that. I thought the Beech-Nut people, naturally. It was called Beech-Nut scrap. We don't notice nothing except the mark. I never delved into it.

Q. 14. And when did this salesman tell you Lorillard put it out, do you remember when that was?

A. No, I don't remember exactly; must have been along in the spring sometime.

Q. 15. Have you ever seen Beech-Nut cigarettes?

A. Only the package you showed me; that is all.

Q. 16. You never handled them, Beech-Nut cigarettes?

A. No, we don't handle any cigarettes.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. I notice the name "Lorillard's" on that package.

A. Yes.

X-Q. 18. You know the Lorillard Company?

A. I know of them, yes.

X-Q. 19. Tobacco manufacturers?

A. They are.

X-Q. 20. That would indicate to you that was a Lorillard product, would it not?

A. Yes, that is naturally what that would indicate. But we sell so little, I don't pay any attention. Some people come in for Beech-Nut, I never look at it, just give it to them. We don't handle tobacco, you know.

X-Q. 21. Do you handle any of the Beech-Nut Packing Company's products here?

A. Yes, we handle Beech-Nut gum. We have handled Beech-Nut peanut butter.

X-Q. 22. You never bought any tobacco from the Beech-Nut Company, did you?

A. No, never.

X-Q. 23. Do you buy that product from Lorillard or from the jobber?

A. No; tobacco jobber out here.

X-Q. 24. If you went into a store and you wanted some Beech-Nut chewing gum, you couldn't be fooled into taking scrap tobacco when you wanted gum, could you?

A. Oh, no, not if I wanted gum.

X-Q. 25. They are an entirely different class of goods?

A. I imagine so.

X-Q. 26. You could never be fooled on that?

A. No, sir.

X-Q. 27. You wouldn't sell a person tobacco for gum?

A. No.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 28. About how much of that tobacco do you sell here, Mr. Park, could you tell me?

A. Oh, I suppose, maybe a dozen a week would be a fair estimate of the Beech-Nut scrap.

Mr. Hinton: That is all.

Recross-Examination by Mr. Cavanagh.

R-X Q. 29. That is a mighty good selling tobacco?

A. For a place like this, don't amount to anything; a dozen a week don't amount to anything.

R-X Q. 30. How many people work in this store?

A. Only myself.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

F. J. LATZEL, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Will you please state your name, age, residence and occupation, Mr. Latzel?

A. My name is F. J. Latzel; I run a delicatessen store at 1122½ Lake street, Oak Park; and I live in the same premises.

Q. 2. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco. Do you sell this scrap tobacco in your store, Mr. Latzel?

A. Sure.

Q. 3. How long have you sold it, do you remember?

A. About a month now.

Q. 4. When you first stocked and sold this scrap tobacco, by whom did you think that it was put out?

A. By the Beech-Nut Company.

Q. 5. How long did you continue to believe that this scrap tobacco was the product of the Beech-Nut Company?

A. Well, I don't know how long I believed it. Just when you told me, you know.

Q. 6. And how long ago was it when I told you?

A. About a couple of weeks ago; maybe a week ago; I don't know.

Q. 7. Have you personally handed out this product to

customers over the counter since it has been in this store here?

A. No. People want it, you know, and I give it to them, you know; that is all. I got the same thing here. I got a customer for it. You know how it is in a business.

Q. 8. Have you spoken to any jobber salesman of tobacco about this thing recently?

A. Well, except today.

Q. 9. And what happened today?

A. Well, he told me, I asked a fellow, another jobber what sells me cigars, and I asked him, "You got that tobacco?" He says, "Yes, I sell him." And I say, "You know that is maybe all kinds of trouble?" Why, he says, this is the case, you know, he says, "I don't know," just this way, and he says that for years now.

Q. 10. What did he say about who made the product?

A. He say nothing about this; nothing. I told him after who make it, you know. He says the name on it, he says, "I was sure that they sell that, that the Beech-Nut Company make that."

Q. 11. Beech-Nut Company made that?

A. Yes. Like I.

Q. 12. In other words, he was under the same belief that you were?

Mr. Cavanagh: Objected to as leading, and objected to as a conclusion that there is no foundation for, mere hearsay. That is a ridiculous question.

Mr. Hinton: This testimony is offered to show that tobacco jobbers will tell tobacco retailers in certain instances, at least, that the scrap is a Beech-Nut product.

A. How it looks, that people who know, they think it is from you, them dealers, you know, or them fellows.

Q. 13. Now, who was this jobber man, do you know his name?

A. What sold me the stuff?

Q. 14. No, the man with whom you had the conversation today.

A. Reimschreiber.

Q. 15. Mr. Latzel, was it Mr. Reimschreiber himself or one of his men?

A. I don't know; I can't tell you. Maybe. Maybe not. I can't tell you that.

Q. 16. Mr. Latzel, I wish you would try and tell me, if you know, slowly, what the conversation was between you and the jobber salesman who came in today, about this Beech-Nut scrap tobacco.

A. I told you already. I told you already again. I asked him about the tobacco. I asked him, "You sell that tobacco?" He says yes, and I told him maybe there is all kinds of trouble about this, the Beech-Nut. "Well," he says, "that is the first thing I hear." He was just the same mind as I, that you people make that. See? That is all. After this we look on that name, you know. I had a package out the other day.

Mr. Cavanagh: That part of the examination as to what the jobber or salesman might have thought is objected to on the ground this witness cannot testify as to that.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. Do you know of the P. Lorillard Company, the tobacco people?

A. I do not know him at all.

X-Q. 18. Did you ever hear of them?

A. This is the first thing I hear, a week ago, when we look on that package.

X-Q. 19. You see the Lorillard Company name on it?

A. I see it now. I see it last week; never before.

X-Q. 20. Never took the trouble to look for it?

A. Never looked at it.

X-Q. 21. It doesn't make any difference to you, as long as you sell the tobacco, whose name is on it, does it?

A. If they want tobacco and Beech-Nut stuff is good, maybe I sell it.

X-Q. 22. You still sell it?

A. I pay for it. I can't throw it away.

X-Q. 23. It is a good seller, then?

A. Yes, it is a good seller.

X-Q. 24. And you did not know that the Lorillard Company were large tobacco manufacturers?

A. I did not know. I never heard that name before, except when we looked for it when the gentleman was here about a week ago, my dear man.

X-Q. 25. Do you sell Beech-Nut chewing gum?

A. Oh, yes.

X-Q. 26. If a man came in and wanted some chewing gum, you wouldn't sell him Beech-Nut scrap tobacco when he asked you for chewing gum, would you?

A. Do you think I am crazy? Such a question.

X-Q. 27. Then they are two entirely different classes of goods, are they not?

A. Tobacco is tobacco and chewing gum is chewing gum. Don't you think so?

X-Q. 28. You wouldn't mix up one with the other?

A. No.

X-Q. 29. Now, this salesman, this cigar salesman you were talking to, did you buy your Beech-Nut scrap tobacco, like this package of Lorillard tobacco scrap, did you buy it from that salesman?

A. I bought it from Neimann.

X-Q. 30. But not from the man you were talking to?

A. He is a different man. I have two men that bring me cigars.

X-Q. 31. You say you never had anyone come in to sell you this tobacco and claim it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 32. They never misled you on that?

A. When I had the talk about a week ago, I have had cigars before and tobacco before, when my tobacco man came he says, "You need some tobacco," he says, "Beech-Nut?" "Sure; all right; that is a good thing; give me a dozen packages." That is all.

X-Q. 33. You did not buy that package from the Beech-Nut Packing Company man, did you; it was from a cigar jobber, was it not?

A. From a fellow named Neimann; same jobber for years.

X-Q. 34. And he didn't say to you it was made by the Beech-Nut Packing Company, did he?

A. No; we don't have no conversation about it. I don't know anything about it except when Beech-Nut come and he tell me, about three weeks ago and last week.

X-Q. 35. Was this man that you did talk to today about it around again, the man who sold you the tobacco?

A. No.

X-Q. 36. Had no connection with that man?

A. No; absolutely not.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

FRED KNOOP, called as a witness on behalf of plaintiff, having been first duly sworn, testified as follows:

Direct Examination by Mr. Hinton.

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is Fred Knoop; I am 60 years old; grocery and market; I live at 1148 Holly court, Oak Park, Illinois.

Q. 2. And where is your place of business, Mr. Knoop?

A. 1108 Lake street.

Q. 3. How long have you been in the grocery business?

A. Twenty-nine years.

Q. 4. I show you a package of scrap tobacco, being Plaintiff's Exhibit No. 3, Beech-Nut Scrap Tobacco. When you first saw that package, whose product did you take it to be?

A. Beech-Nut.

Q. 5. What label is that that appears on the package in the form of an oval on the front?

A. The same thing as we have on peanut butter and jellies, and of different things, all different articles that we sell in the store that is made by the Beech-Nut Packing Company.

Q. 6. How long, to your knowledge, has the Beech-Nut Packing Company used that label?

A. Well, ever since I have been in business.

Q. 7. Can you, Mr. Knoop, recite a full list of all the products the Beech-Nut Packing Company makes?

A. No, I could not, because I have handled some years more and some years less, but we have handled all their jams and jellies and the peanut butters, and we handle their bacon, and, oh, different things; handle their macaroni and all that. On every one of them you see that same label.

Q. 8. How many clerks do you employ in your place of business, Mr. Knoop?

A. Well, I only have four now, two of my boys and two outsiders.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 9. Did you ever hear of the P. Lorillard Company, Mr. Knoop?

A. No, sir; I do not know who they are, because——

X-Q. 10. Do you handle tobacco?

A. No, sir.

X-Q. 11. Don't sell tobacco at all?

A. No; no, don't use it myself.

X-Q. 12. Don't chew or smoke?

A. No, nor drink; none of the three.

X-Q. 13. You never bought a package of this tobacco?

A. Thirty-five years ago I bought tobacco; couldn't tell you what it was.

X-Q. 14. You never bought a package of this that you know of?

A. No, sir.

X-Q. 15. Do you handle Beech-Nut chewing gum?

A. Yes.

X-Q. 16. And you handle Beech-Nut bacon?

A. Yes.

X-Q. 17. I show you a label, which is in this case Defendant's Cross-Exhibit No. 8, of the Beech-Nut brand of bacon. Is that the label you say is the Beech-Nut Packing Company?

A. Yes.

X-Q. 18. That label is on all their goods?

A. Yes, that I handle.

X-Q. 19. That label has a wide red band on it, with some printing of words in it, has it not?

A. Yes.

X-Q. 20. And it has a single beech-nut in the center, on three green leaves?

A. Yes.

X-Q. 21. Now, on this label here there is not, on Beech-Nut chewing tobacco, there is no wide red band on it, is there?

A. No.

X-Q. 22. There is no printing on the band itself, is there?

A. It has an oval around there, about the same, and says "Beech-Nut."

X-Q. 23. But you know ovals are quite common on lots of goods you sell, that is, they use an oval on the labels like Veri-Best?

A. Yes, that is about the one thing, I think.

X-Q. 24. How about Armour's stuff?

A. Only one is Armour's.

X-Q. 25. So these two labels are not alike, are they?

A. No, they are not printed alike.

X-Q. 26. And you never knew of any other Beech-Nut product with a label having the wide radiating bands, did you?

A. No.

X-Q. 27. You would not confuse tobacco with chewing gums or food products so that you would take chewing gum when you wanted a chewing tobacco, would you?

A. No, not me.

X-Q. 28. They are an entirely different class of goods, are they not?

A. Yes.

X-Q. 29. You never saw Beech-Nut Packing Company's product with this Beech-Nut label on it that was put up like a package of tobacco, did you?

A. No.

X-Q. 30. Like this?

A. No. The only thing, if I had seen that, I would have thought it was put up by the Beech-Nut people, because I don't know anybody else that put up Beech-Nut stuff; that would be the only thing.

X-Q. 31. On this package you do not find any of the Beech-Nut Packing Company's name on it anywhere, do you?

A. No. No.

X-Q. 32. But you find Lorillard's name, do you not?

A. Yes; on top there.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

State of Illinois, County of Cook, ss.

I, Alice M. Rankin, a Notary Public within and for the County of Cook and State of Illinois, duly commissioned and qualified and authorized to administer oaths, and to take and certify depositions, do hereby certify that in the equity cause depending in the District Court of the United States, for the District of New Jersey, wherein Beech-Nut Packing Company is plaintiff and P. Lorillard Company is defendant, I was attended at Chicago, Illinois, beginning on the 30th day of October, 1921, by counsel for the respective parties, as appears above, and by William I. Thomas, A. V. Bobb, James F. Ballard, Alex B. Christensen, Daniel Huttner, William Oliver Park, F. J. Latzel and Fred Knoop, the witnesses named in the foregoing depositions; that said witnesses, being of sound mind and lawful age, were by me duly cautioned and sworn to testify to the truth, the whole truth, and

nothing but the truth in said cause, and thereupon they testified as appears in the foregoing depositions, and that counsel for the respective parties in each case waived the signature of the witness to his deposition; that said depositions were taken down stenographically by me in the presence of witnesses, and from the statements of said witnesses, and at the time set forth, and that all was done in the presence of counsel for both parties.

I further certify that I am neither of counsel nor attorney to either of the parties to said suit, nor interested in the event of said cause, and that it being impractical for me to deliver said depositions with my own hand, I have retained the same for the purpose of being sealed up and directed and speedily and safely transmitted to the said court for which they were taken.

Witness my hand and seal as such Notary Public at Chicago, Illinois, on this 8th day of November, 1921.

ALICE M. RANKIN,
Notary Public.

[SEAL.]

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken in behalf of plaintiff, before Henry F. Weller, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at Room 312 Wisconsin Hotel, Milwaukee, Wisconsin, beginning Friday, November 4, 1921, at 11 o'clock A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

MRS. AMELIA PETERSEN, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name?

A. Mrs. Amelia Petersen.

Q. 2. Residence and occupation?

A. I live at 421 North Eighth, Manitowoc, Wisconsin; we have a grocery store.

Q. 3. Of course you are of legal age?

A. Yes.

Q. 4. Do you sell tobacco products in that store of yours, Mrs. Petersen?

A. We do, yes.

Q. 5. Who is the proprietor of the store?

A. Petersen Brothers.

Q. 6. And are you the wife of one of those brothers?

A. I am.

Q. 7. Do you yourself work in the store?

A. I do at times, yes.

Q. 8. I show you a package of Beech-Nut scrap tobacco, which is in this case as "Plaintiff's Exhibit No. 3." Have you sold this scrap tobacco in your store?

A. Yes, we have.

Q. 9. How long have you had it there, Mrs. Petersen?

A. Oh, I should think about a year or more, about a year.

Q. 10. Up to within very recently whose product did you think that was?

A. The Beech-Nut Packing concern.

Q. 11. Now, I show you some Beech-Nut cigarettes. Have you seen these cigarettes?

A. I have never seen them, no.

Q. 12. You never examined a package of these cigarettes?

A. No, I have not.

Q. 13. Have you ever heard about these cigarettes?

A. I have heard about them, yes.

Q. 14. When and where did you first hear about them?

A. Well, that morning when that man was in our store trying to sell them.

Q. 15. Now, how long ago was that?

A. I think about three weeks ago.

Q. 16. Do you remember what this man said when he tried to sell these cigarettes?

A. Well, he said they were branching, that the Beech-Nut Packing Company were branching off into tobacco and cigarettes, that is what he told us.

Q. 17. To whom did he make that statement?

A. To my brother.

By Mr. Cavanagh: All that testimony is objected to as merely hearsay.

By Mr. Hinton: Q. 18. Were you present at the time?

A. I was.

Q. 19. Did you hear it?

A. I heard it.

Q. 20. Did you talk with this man about any Beech-Nut product besides cigarettes?

A. We spoke about the peanut butter, and he said they were branching off into tobacco and cigarettes.

Q. 21. Did this man say anything about what territory he had been traveling in, that you heard?

A. No, I didn't pay any attention to that; there was more said, but I couldn't remember.

Q. 22. Did you just talk about the peanut butter to him?

A. Yes, spoke about the peanut butter, and he said it was the same.

Q. 23. When he left the store, who did you believe was putting out the Beech-Nut cigarettes?

A. We always thought it was the Packing Company putting out the tobacco and the cigarettes. In fact, we knew of no other company.

Q. 24. How long was this conversation, Mrs. Petersen? Do you remember approximately about how many minutes?

A. Oh, about fifteen minutes, I should think, or longer.

Q. 25. You were talking to that man about fifteen minutes?

A. Yes.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 26. Do you sell any products of the Beech-Nut Packing Company in that store?

A. Yes.

Q. 27. What do you sell?

A. Oh, we got gum and baked beans and peanut butter and macaroni.

X-Q. 28. Then you have a general line of the products of the Beech-Nut Packing Company?

A. We have a general line, yes.

X-Q. 29. From whom do you buy goods?

A. That man over there, I think, was there last (indicating).

X-Q. 30. What is his name?

A. I don't know that, I never inquired.

Mr. Cavanagh: I will ask the gentleman his name on the record.

Mr. Wesling: O. M. Wesling.

Mr. Cavanagh: X-Q. 31. You refer to the gentleman who said his name was Mr. Wesling?

A. Yes, sir, the regular Beech-Nut man.

X-Q. 32. How long have you been buying products from Mr. Wesling for your store?

A. That I don't know either.

X-Q. 33. Well, approximately. You need not be exact, one month or a year, or what?

A. Oh, we have had it at least a year, if not more.

X-Q. 34. That Mr. Wesling has been coming to the store?

A. I don't even know if that is the same man always comes, but I noticed the one comes lately.

X-Q. 35. But you have bought stuff from Mr. Wesling?

A. Yes, I have bought stuff from Mr. Wesling.

X-Q. 36. And you know the other Beech-Nut man by appearance, don't you?

A. The one sells this tobacco?

X-Q. 37. No, the one you bought your food products from.

A. Yes.

X-Q. 38. Now, this man you had the conversation with about tobacco, that I understood you to say said that the cigarettes were made by the Beech-Nut Packing Company, had you ever seen him in the store before?

A. I had never seen him before, no.

X-Q. 39. And he wasn't the regular Beech-Nut man, was he?

A. No, he wasn't the regular Beech-Nut man.

X-Q. 40. And you had never bought goods—any Beech-Nut goods from anybody else except the regular Beech-Nut man, had you?

A. No.

X-Q. 41. How often would that Beech-Nut man come around to your place?

A. Well, I don't know how often he comes around.

X-Q. 42. Well, approximately?

A. Every five or six weeks.

X-Q. 43. Now, who was this man that came in and represented himself, and had this conversation about the Beech-Nut cigarettes?

A. I don't know his name at all.

X-Q. 44. Do you know who he represented?

A. He said he was selling Beech-Nut tobacco and cigarettes.

X-Q. 45. Do you know what concern he was from?

A. No, I don't know that either, but he let us believe he was with the Beech-Nut concern.

X-Q. 46. And didn't you ask him his name, for his card?

A. No, I didn't.

X-Q. 47. You knew he wasn't the regular Beech-Nut man, didn't you?

A. No—well, he wasn't selling the other stuff, but we thought he was maybe a specialty man.

X-Q. 48. But you knew he wasn't the regular agent for the Beech-Nut Company that you had been in the habit of buying from?

A. No, he wasn't the regular agent, no.

X-Q. 49. You didn't buy any of these cigarettes, did you?

A. No, we didn't, didn't buy no cigarettes.

X-Q. 50. I understood you to say that you had been selling this Beech-Nut scrap tobacco like this (indicating).

A. Yes, we got it in the store.

X-Q. 51. Where have you been buying it?

A. That I don't know. I don't know where the buyer bought it, but I know we have got it in the store.

X-Q. 52. You don't know who he bought this tobacco from?

A. I don't know where he bought it.

X-Q. 53. You don't ever remember buying any of that tobacco from the man who represented himself to be the Beech-Nut Packing Company representative?

A. No.

X-Q. 54. From the man who tried to sell you the Beech-Nut cigarettes, do you?

A. No, I do not.

X-Q. 55. Was that the first time you ever saw that man?

A. That is the first time I saw that man.

X-Q. 56. You haven't seen him since?

A. No, I haven't seen him since.

X-Q. 57. So far as you know, he might have been some

faker coming in just to mix you up on the cigarettes, might not he have been?

A. So far as I know, yes.

X-Q. 58. He didn't show you any credentials?

A. No.

X-Q. 59. He didn't give you any card?

A. No, he didn't give me no card.

X-Q. 60. He didn't say he was from the P. Lorillard Company, did he?

A. No, he didn't.

X-Q. 61. He didn't say he was from the Beech-Nut Packing Company?

A. He said he was selling the Beech-Nut cigarettes and tobacco.

X-Q. 62. But he did say he was from the Beech-Nut Packing Company?

A. I don't think he said that.

X-Q. 63. He didn't say who he was from, did he?

A. No, I don't think he said that.

X-Q. 64. Did you ever take the trouble to look at a package of that tobacco?

A. Yes, I have looked at it.

X-Q. 65. You have seen the name "Lorillard's" on it, haven't you?

A. No.

X-Q. 66. You didn't look at a package very closely, did you, and read it?

A. No, I never read it either.

X-Q. 67. I show you a package, Mrs. Petersen. You notice the name "Lorillard's" on it now?

A. Yes, I see it now.

X-Q. 68. Did you ever buy of P. Lorillard Company?

A. No, I did not.

X-Q. 69. If I understand the truth, then, you never took the trouble to read any of the printing, or anything, on the cigarettes?

A. Only the "Beech-Nut" is all I saw on there.

X-Q. 70. Just "Beech-Nut"?

A. Just that—"Beech-Nut Tobacco."

X-Q. 71. You didn't notice, then, the name "P. Lorillard"?

A. I never saw the cigarettes at all.

X-Q. 72. So, when this man was in the store—and I refer to the party who said the Beech-Nut Packing Company was putting out those cigarettes—you never took the trouble to look at the cigarettes, did you?

A. I never seen them. I don't know as he showed them there.

X-Q. 73. You didn't even see him showing them?

A. No, I didn't see him showing them.

X-Q. 74. And you don't know whether he was the man you buy your tobacco from, either?

A. No, I don't know that either; I don't know where we bought the tobacco.

X-Q. 75. So this was practically some stranger dropped in the place and told you that?

A. It is a man I never saw before and never saw him since.

X-Q. 76. And you don't know anything about him at all?

A. Don't know anything about him.

X-Q. 77. He simply dropped in and said—

A. (Interrupting) That is what he said.

X-Q. 78. (Continuing) —told you that the same concern made both food products and the cigarettes and tobacco?

A. Yes, talking about the peanut butter and all the rest and he said he was branching out from that to tobacco and cigarettes.

X-Q. 79. He just mentioned that in the course of conversation?

A. Yes, that is what he said.

X-Q. 80. He didn't leave you any samples of any cigarettes?

A. No, we didn't get any cigarettes. We have no cigarettes in our store, Beech-Nut.

X-Q. 81. And he didn't give you any prices on any of the cigarettes, that you know?

A. I believe he did give prices, but I didn't pay no attention to that.

X-Q. 82. Did he leave you any advertisement, or anything of the kind?

A. No.

X-Q. 83. Just walked in and talked about cigarettes and walked out again?

A. That is what he did.

X-Q. 84. You haven't the slightest idea where the man came from, have you?

A. No, I haven't. I don't know where he came from.

X-Q. 85. Now, I understood you to say that you were selling other Beech-Nut products like food products and chewing gum. If a man wanted some chewing gum or some Beech-Nut bacon, would you sell him a package of Beech-Nut tobacco for bacon or chewing gum?

A. No.

X-Q. 86. You would think he was crazy if he took it?

A. Yes.

X-Q. 87. In other words, they are entirely different goods, aren't they?

A. I should think so.

X-Q. 88. Then, Mrs. Petersen, so far as you know, of your own knowledge, this man that tried to sell you the Beech-Nut cigarettes might have been sent in there by the Beech-Nut Packing Company, might he not?

A. Yes, he might have been.

X-Q. 89. You don't know anything about it at all?

A. I don't know anything about it.

Mr. Cavanagh: That is all.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 90. Mrs. Petersen, I simply want to clear up one or two points. Was this man trying to sell these cigarettes to you personally or were you present when [illegible]

A. No, he wasn't trying to sell them to me. I simply overheard the conversation.

R-D. Q. 91. Now, Mrs. Petersen, if, as a result of the various questions you have been asked during this examination, there is any doubt whatever in your mind that that man tried to make you believe the Beech-Nut Packing Company were putting out these cigarettes, I wish you would say so.

A. I have no doubt but what he knew that we believed that he was selling those for the Packing Company, those cigarettes.

Deposition closed.

Signature waived.

H. N. PETERSEN, a witness produced in behalf of plaintiff pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposed as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. H. N. Petersen; I am forty-eight at present, will be forty-nine in January; live at Manitowoc, Wisconsin, 421 North Eighth street.

Q. 2. And what is your occupation?

A. Grocery business.

Q. 3. What is the name of the grocery store?

A. Petersen Brothers.

Q. 4. And are you one of the Petersen Brothers?

A. Yes, sir.

Q. 5. I show you a package of cigarettes in this case that is "Plaintiff's Exhibit No. 1." Have you ever seen these cigarettes before?

A. Yes, sir.

Q. 6. When was the first time you heard about these Beech-Nut cigarettes?

A. When that salesman was in the store that was trying to sell them.

Q. 7. Who was he trying to sell them to?

A. Well, he was asking about the buyer, and I told him the buyer wasn't in, exactly, but I asked him what he was selling, maybe I could give him a definite answer whether we would be in the market or not, so he told me then he was selling Beech-Nut cigarettes.

Q. 8. Can you state the conversation that you had with this man?

A. Well, pretty well, I guess.

Q. 9. I wish you would, please.

A. Well, then I says to him when he showed them cigarettes, I says: "Well, if those cigarettes are as good as the Beech-Nut peanut butter, it is a good line, but," I said, "we have never had them before." And I said to him then: "Well, that is a kind of peculiar line to go into, from the peanut butter into cigarettes," and he said then: "Well," he says, "they are branching out," so I never paid no attention to the tobacco, really, whose that was, and never thought any more of it at the time.

Q. 10. Well, do you remember whether this man said anything about where he had been immediately prior to coming into your store?

A. Yes, he said he had been up north and sold lots of them, they were fine cigarettes.

Q. 11. Did he mention any particular town he had been in in the north?

A. Well, he did, but I don't recollect that now, because I didn't think anything would turn up or I would have taken notice of that.

Q. 12. Who, if anybody else, was present at this conversation?

A. Who else was present?

Q. 13. Yes.

A. My brother's wife; she was in the room, I believe, at the time. There was another gentleman in with him, too, I believe, some other man, whether he was a salesman or not, I don't know.

Q. 14. You brother's wife—is it your brother's wife who has just testified in this case?

A. Yes.

Q. 15. Now, are you acquainted with Mr. Wesling?

Mr. Hinton: Mr. Wesling, will you please stand up? (Mr. Wesling stands up.)

The Witness: Yes, sir.

Q. 16. Who is Mr. Wesling?

A. He is with the Beech-Nut Packing Company.

Q. 17. Did Mr. Wesling make a subsequent visit to your store after this conversation you have just talked about?

A. I don't know if Mr. Wesling, but I think there was some other gentleman came in there.

Q. 18. You mean another Beech-Nut Packing Company man?

A. Yes, that is what I took him for. Of course, I had never seen that gentleman before.

Q. 19. But do you remember what, if anything, you said to this other Beech-Nut Packing Company man when he came in?

A. Yes, I think I mentioned to him, I said: "How many men have you people got on the road making this

territory?'' I didn't think any more of it, and just asked him that question.

Q. 20. How long after this conversation you had with the man who tried to sell you Beech-Nut cigarettes was it that the Beech-Nut Packing Company man came in?

A. I think it was the week after.

Q. 21. How long is it usually, Mr. Petersen, between the visits of Beech-Nut Packing Company men to your town or store?

A. Well, really I never paid so much attention to it, but something around six weeks, I should judge.

Q. 22. How long was this conversation you had with this person who tried to sell cigarettes, do you suppose?

A. Oh, it wasn't very long, somewhere around fifteen minutes, somewheres around there.

Q. 23. Were you discussing Beech-Nut cigarettes and Beech-Nut Packing Company products in this conversation?

A. No, there was no more said about it, only I said that we had some tobacco over there that didn't sell at all, I says, but I never stopped to think that it was the same as—I figured on that as the Beech-Nut Packing Company line. I never paid no attention to the name on there.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 24. I understand, Mr. Petersen, that you buy products of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 25. Various food products and chewing gum?

A. Yes, sir.

X-Q. 26. And you buy those from the regular Beech-Nut agent, do you not?

A. Yes, sir.

X-Q. 27. And that agent is this gentleman in the room, Mr. Wesling?

A. Yes, that is the name.

X-Q. 28. He is the one that you have been accustomed to buying from all the time?

A. Yes.

X-Q. 29. He is not the man that wanted to sell you the tobacco, is he?

A. No, sir.

X-Q. 30. Or the cigarettes, rather?

A. No, sir.

X-Q. 31. He is not the man that wanted to sell you the Beech-Nut cigarettes?

A. No, sir.

X-Q. 32. From whom did you buy this Beech-Nut tobacco?

A. Well, now, I will leave that unsaid, because it is so long since we bought that tobacco. My brother did the buying.

X-Q. 33. But you were accustomed to buying your regular Beech-Nut Packing Company products, such as food and chewing gum, from this Beech-Nut man here (indicating Mr. Wesling)?

A. Yes, sir.

X-Q. 34. And a stranger came in and wanted to sell you the Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 35. Now, I want you to think this over very carefully. Did this man, when he came in, say that he represented the Beech-Nut Packing Company?

A. He meant it this way, that I said to him: "Well, if it is the same people—"

Mr. Cavanagh: Would you just answer the question?

Mr. Hinton: Let him answer. He is entitled to finish his answer.

A. (Continuing) I asked him, "If it is the same people that turn out the cigarettes as the peanut butter, it is a good article, no question about it," and he said: "Yes." I said: "But that is a funny thing to branch out in that line from peanut butter," and he said: "Well, they are branching out." That is all he said.

Mr. Cavanagh: X-Q. 36. Then, he didn't say these cigarettes were made by the Beech-Nut Packing Company, did he?

A. No, he didn't say that that I understood, but I thought when I mentioned the peanut butter that would be sufficient.

X-Q. 37. As a matter fact, he didn't say those cigarettes were made by the Beech-Nut Packing Company?

A. No, he didn't say that, that I heard.

X-Q. 38. Do you know of the P. Lorillard Company?

A. No, sir.

X-Q. 39. Do you use tobacco?

A. Yes, I use some.

X-Q. 40. Do you smoke and chew?

A. Well, a little, chew a little, but not very much.

X-Q. 41. Did this party you had this conversation with, when he tried to sell you the Beech-Nut cigarettes, leave you any samples of these cigarettes?

A. No, sir.

X-Q. 42. Did he leave any advertising matter?

A. No, sir.

X-Q. 43. Did he leave his card?

A. No.

X-Q. 44. Did he tell his name?

A. Well, I don't know but he might have done that, but I didn't take notice.

X-Q. 45. But you don't know his name or the name he told you?

A. No.

X-Q. 46. Did he leave you any advertising matter?

A. No, sir.

X-Q. 47. He didn't tell you who made the cigarettes?

A. Well, showed this cigarette, and as I said before.

X-Q. 48. Oh, he showed you the cigarette?

A. Oh, yes, he had one of them cartons, twenty in there or whatever it was, yes, he showed it to me.

X-Q. 49. He just had a small carton of the cigarettes?

A. Yes, he had one of them small cartons, he held it up and showed me so I could see the label and see the "Beech-Nut," that is all I could see.

X-Q. 50. So he showed you the carton of cigarettes?

A. Yes, sir.

X-Q. 51. He also showed you the individual package?

A. Yes, sir.

X-Q. 52. Now, on this scrap tobacco you see the name "Lorillard's" on there, don't you (indicating)?

A. Yes, sir.

X-Q. 53. You don't find the name "Beech-Nut Packing Company" any place on that package, do you?

A. No.

X-Q. 54. And the goods of the Beech-Nut Packing Company, for example, as shown on this label, "Defendant's Cross Exhibit 8," which is a bacon label, that has the words "Beech-Nut Packing Company, Canajoharie, N. Y., U. S. A."?

A. Yes.

X-Q. 55. That is the regular Beech-Nut label, is it not?

A. Yes, sir.

X-Q. 56. You notice on this package of Beech-Nut cigarettes the name "P. Lorillard Co." on it, don't you (indicating)?

A. Down at the bottom, yes, sir.

X-Q. 57. You don't find the Beech-Nut Packing Company's name on this label, do you (indicating)?

A. No, I don't see it.

X-Q. 58. You never saw this man again?

A. No, sir, I did not.

X-Q. 59. You didn't buy anything from him?

A. No.

X-Q. 60. You yourself thought it would be peculiar that the Beech-Nut Packing Company should take up such a widely different line of goods as tobacco?

A. Yes.

X-Q. 61. It had nothing to do with food products?

A. No.

X-Q. 62. You considered them an entirely different class of goods, didn't you?

A. I would, yes, sir.

X-Q. 63. And if a man came into your store and wanted some Beech-Nut bacon or wanted some Beech-Nut chewing gum, you would think he was a fool or crazy if he took tobacco in place of the article he asked for?

A. It would seem that way to me, it would be funny.

X-Q. 64. And as a common-sense man you wouldn't give him tobacco or cigarettes when he asked you for Beech-Nut food products or gum?

A. No, sir.

X-Q. 65. And that is because they are an entirely different class of goods?

A. Yes, sir, sure.

X-Q. 66. That man that you had the conversation with about cigarettes, so far as you know, he might have been from the Beech-Nut Packing Company, might he not?

A. Yes, sir.

X-Q. 67. He might have been sent in there on a framed up proposition, so far as you know?

A. I thought he was a specialty man, or either the other man, something had happened to him, or he was put in to cover his territory, or something like that.

X-Q. 68. But he might have come from those people?

A. Sure, he might.

X-Q. 69. Might just have been a party sent in there to tell you that, so far as you know, mightn't he?

A. Yes, couldn't tell.

X-Q. 70. You couldn't say anything about it?

A. No, sir.

X-Q. 71. Mr. Petersen, I show you a carton of Beech-Nut cigarettes, which have been heretofore introduced in this case as "Defendant's Cross Exhibit 9." Does that look like the carton of cigarettes he showed you?

A. As near as I recollect, this tobacco cover was off (indicating), and there was a slit underneath, and he exhibited them up like that in front of me.

X-Q. 72. Oh, the cover was off?

A. The cover was off. I could see the "Beech-Nut" and then he held up one package like that (indicating), took it out of the box and held it up.

X-Q. 73. You were not looking at the package?

A. No, because I was standing as far away as from here to my brother's wife (indicating).

X-Q. 74. Didn't take time to look at the package?

A. No, sir.

X-Q. 75. On the outside of this carton you see the name "Lorillard's," don't you (indicating)?

A. Yes, sir.

X-Q. 76. And there is a slip in this carton marked "P. Lorillard & Co., Manufacturers"?

A. Yes, sir.

X-Q. 77. Referring to those Beech-Nut cigarettes, and says: "Please Read," headed "Please Read."

A. Yes, sir.

X-Q. 78. There is also a small red card marked "Lorillard's Beech-Nut Perfect Cigarettes," isn't there?

A. Yes.

X-Q. 79. Do you remember seeing that little card?

A. No, sir, I do not.

X-Q. 80. Or the slip?

A. No.

X-Q. 81. Just opened the carton——

A. I didn't see this on it at all (indicating), only this front part as he held it up. I didn't see this top cover on it at all.

X-Q. 82. Just had the box open, showing the cigarettes?

A. Showing the cigarettes, yes.

X-Q. 83. Packed in?

A. Yes.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 84. Mr. Petersen, do you now remember whether the Beech-Nut Packing Company man who came into your store approximately a week after the man who tried to sell cigarettes was Mr. Wesling; is it any clearer to you now than it was a few minutes ago?

A. Well, now, I don't think it was Mr. Wesling, it was a special man that come in to pick up points about this cigarette, it seems to me, because when he came in and spoke about that—that wasn't you, was it, Mr. Wesling?

Mr. Wesling: No.

The Witness: (Continuing.) I am pretty sure it was some other man. I am pretty sure of that, and when he came in he started to talk about the Beech-Nut line, and I spoke then to him: "How many is there representing the Beech-Nut Packing Company?" I didn't think any more of it.

Mr. Hinton: R-D. Q. 85. Was he trying to sell you products?

A. He was representing the Beech-Nut products.

R-D. Q. 86. He was selling?

A. Yes, and he took down the notes then what this other tobacco man had.

R-D. Q. 87. Do you know Mr. Lewis, of the Beech-Nut Packing Company, the division manager here?

A. No, this is the only gentleman I really know that has been coming in there (indicating Mr. Wesling).

R-D. Q. 88. Do you know whether Beech-Nut cigarettes are now being sold in Manitowoc in other stores?

A. If I know they are sold?

R-D. Q. 89. Why, yes.

A. Yes, sir; I seen them in the barber shop.

R-D. Q. 90. And do you know whether they appeared there before or after the visit of this first man who tried to sell you cigarettes?

A. No, the only time after that, after this man had been trying to sell cigarettes, and I was in there last Wednesday, I think it was yesterday, and as I was going out they had a tobacco exhibit in the window and I noticed one of them packages there, and I then asked if they handled the Beech-Nut cigarettes.

R-D. Q. 91. Those are the first Beech-Nut cigarettes you saw on sale in Manitowoc?

A. Yes, sir.

R-D. Q. 92. How long ago was this case where the man came into your store and tried to sell you Beech-Nut cigarettes?

A. I should judge maybe about three weeks ago.

Mr. Hinton: That is all.

Recross-Examination by Mr. Cavanagh.

R-X Q. 93. When this second Beech-Nut man came in, after the man tried to sell you the cigarettes, you state that he was not Mr. Wesling, was he?

A. No, I don't recollect it was this man (indicating Mr. Wesling).

R-X Q. 94. But Mr. Wesling is the man that usually comes in?

A. Yes, sir.

R-X Q. 95. And you didn't know this other Beech-Nut man, did you?

A. Not until he introduced himself.

R-X Q. 96. Did he ask you for an order?

A. No.

R-X Q. 97. He wasn't selling you anything, was he?

A. No.

R-X Q. 98. He was asking about those cigarettes?

A. Yes, sir.

R-X Q. 99. He was digging up information, wasn't he?

A. It seems that way, yes, sir.

R-X Q. 100. And after this first mysterious cigarette man was in, this other man came around to dig up the information?

A. Yes, sir.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 101. Now, you have testified that a man came in and you said: "How many Beech-Nut salesmen have you got," or something of that character.

A. Yes, sir.

R-D. Q. 102. Now, can you state what you said then, what you told him?

A. Yes, I said then: "It is a peculiar thing for them

to branch into cigarettes from other lines of peanut butter and that other product."

R-D. Q. 103. Evidently you didn't understand my question. I am talking about the Beech-Nut salesman who came in about a week after the man who tried to sell you the cigarettes.

A. Oh, the real Beech-Nut man?

R-D. Q. 104. Yes, the real Beech-Nut man. What I want to get at is, what you said to him when he came in.

A. Well, he introduced himself, he came in in a joking way, I greeted him, greeted the time of day, and I said he was with the Beech-Nut Packing Company? And then I says to him, "How many men have they got out?" Then he came out with it, and I told him, as I said before, about this here tobacco, and he took down the notes of it; then I told him: "Now, don't write anything down, because I don't want to have any trouble about it," and he said: "Oh, no, there won't be anything about it."

R-D. Q. 105. That is, you made this remark to him first, that you have just said?

A. Yes.

Recross-Examination by Mr. Cavanagh.

R-X Q. 106. Just a few questions. Is there a gentleman in the room by the name of Atkinson?

(Mr. Atkinson rises.)

R-X Q. 107. Does he resemble the man that was in to see you, the man that took down the notes about the Beech-Nut tobacco and Beech-Nut Packing Company?

A. No, I didn't pay such strict attention.

R-X Q. 108. But he didn't ask you for an order for goods, did he?

A. No, sir.

R-X Q. 109. Spent all his time talking about this cigarette case, as a matter of fact, didn't he?

A. Who is that?

R-X Q. 110. That other Beech-Nut man, the last man that was in?

A. This man here (indicating Mr. Wesling)?

R-X Q. 111. Is that the man?

A. That is the last man that I saw in the store.

R-X Q. 112. Is that the man who spoke about the Beech-Nut cigarettes?

A. No.

R-X Q. 113. But he is the one took down the notes for the Beech-Nut Packing Company?

A. No, there was one before him, I think, took it. I don't know who that was.

R-X Q. 114. There are three Beech-Nut Packing Company men in the room, Mr. Wesling, Mr. Atkinson and Mr. Lewis.

A. I never paid enough attention.

R-X Q. 115. Is it either one of those men? Was it either one of those three men?

A. That came in the second time, you mean?

R-X Q. 116. That came in to investigate this cigarette.

A. That I wouldn't swear to now, it is so long ago now. I didn't take enough notice which one of them it was.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 117. Quite aside from this situation we are talking about, the man who has just come into the room, standing over there, have you seen him before that you recognize him (counsel indicates Mr. Lewis)?

A. Yes, sir.

R-D. Q. 118. Do you know his name?

A. He did say his name, but I don't remember just what it was.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

MRS. AMELIA PETERSEN, a witness produced in behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Examined by Mr. Hinton.

Q. 1. Mrs. Petersen, you have testified this morning that a man came into your store and tried to sell Beech-Nut cigarettes. Now, when did the regular Beech-Nut man come around after that, do you remember?

A. About a week after.

Q. 2. And who was he?

A. That is the man over there (indicating Mr. Wesling).

Q. 3. This man right here (indicating)?

A. That is the man.

Q. 4. Mr. Wesling?

A. Yes.

Q. 5. He is the regular Beech-Nut salesman?

A. He is the regular Beech-Nut salesman.

Q. 6. Do you remember whether your brother made any remark to Mr, Wesling when he came in a week after the cigarette salesman?

Mr. Cavanagh: That is all objected to.

A. Yes.

Q. 7. What did he say?

A. He said: "Was there somebody here before?" and then he told him a week before about that tobacco man.

Q. 8. I want to get what, if anything, you heard your brother say to Mr. Wesling when he came into your store about a week after the man tried to sell you Beech-Nut cigarettes. Do you understand that question?

Mr. Cavanagh: That question is objected to as merely calling for hearsay; furthermore, as incompetent, as the witness has not been shown qualified to answer.

A. He asked him how many Beech-Nut men there were.

Mr. Hinton: Q. 9. And what did Mr. Wesling say?

Mr. Cavanagh: Same objection.

A. He said: "Why, has there been some before?"

Mr. Hinton: Q. 10. Then what did your brother say?

Mr. Cavanagh: Same objection.

A. Then he told him about the tobacco man that had been there the week before trying to sell cigarettes.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all. No cross-examination.

Deposition closed.

Signature waived.

O. M. WESLING, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. O. M. Wesling; 48 years old on September 16th; live at 1182 26th avenue; occupation, salesman for the Beech-Nut Packing Company.

Q. 2. How long have you been an employee of the Beech-Nut Packing Company, and in what territory?

A. State of Wisconsin, about nine months.

Q. 3. Mr. Wesling, were you present in the room this morning when Mr. and Mrs. Petersen testified?

A. I was.

Q. 4. Are you the Mr. Wesling that stood up once or twice to be identified by Mr. and Mrs. Petersen?

A. I was.

Q. 5. Do you make the town of Manitowoc, Wisconsin?

A. I do.

Q. 6. About how often do you go through there?

A. About every two months.

Q. 7. When was the last time you were there?

A. Last week.

Q. 8. Are you acquainted with Mr. and Mrs. Petersen, who testified this morning?

A. I am.

Q. 9. Do they run a grocery store in Manitowoc?

A. Yes, sir.

Q. 10. Did you go into that store the last time you were there?

A. I did.

Q. 11. For what purpose?

A. To sell Beech-Nut products.

Q. 12. Had you been directly or indirectly instructed by anybody, prior to going into that store——

A. (Interrupting.) I was not, outside of to go in and sell Beech-Nut Packing goods.

Q. 13. You did not permit me to finish my question, I will therefore repeat it. Had you been directly or indirectly instructed by anybody, prior to going into that store, to go there for the purpose of getting evidence in this case?

A. I was not.

Q. 14. Did you, as a matter of fact, go there for the purpose of getting evidence in this case?

A. No, sir.

Q. 15. Now, when you went into that store, who was there?

A. Mrs. Petersen and her brother-in-law, Mr. Petersen. He is not the buyer.

Q. 16. That Mr. and Mrs. Petersen who were here? The same two who testified this morning?

A. They were.

Q. 17. Now, what was said?

A. When I went in there I told them who I was and introduced myself; in fact, they knew who I was, they said: "How many Beech-Nut men have they got on this territory?" and I said: "Why?" He said: "There has been a man here last week," and I said: "No, I am the only man on this territory for the Beech-Nut Packing Company." Then he went on and told me it was some specialty man had been in selling Beech-Nut cigarettes and tobacco, and I said: "What did you do about it?" He said, well, they didn't buy any because "I didn't do the buying in there." The brother does the buying, see, and this man told them the Beech-Nut Packing Company was branching out into the tobacco business, and that they were made by the Beech-Nut Packing Company that makes the Beech-Nut catsup and butter.

Mr. Cavanagh: All that portion of the answer with reference to the alleged conversation between the alleged tobacco salesman and the Petersens is objected to as merely hearsay.

Q. 18. Did you make a note of what this man said?

A. I did.

Q. 19. And who was the first person to whom you disclosed what had been said to you by this Mr. Petersen?

A. To you and Mr. Lewis, the district manager.

Q. 20. And when was that?

A. Last week Friday.

Q. 21. A week ago today?

A. A week ago today.

Q. 22. And where was it?

A. Down in the Hotel Wisconsin lobby.

Q. 23. Did you make other calls in Manitowoc?

A. I did.

Q. 24. At the same time?

A. I did.

Q. 25. Did you call on your regular trade?

A. On all of the groceries.

Q. 26. Was this trip that you made to Manitowoc in any way made for the purpose of obtaining evidence in this case?

A. It was not.

Q. 27. I show you a package of Beech-Nut cigarettes, in this case "Plaintiff's Exhibit No. 1." Have you seen these cigarettes before?

A. I have.

Q. 28. Have they been offered for sale and displayed by posters in Milwaukee?

A. They have.

Q. 29. Have you heard any comment, remarks and inquiries about these cigarettes since they came out in this territory?

A. Lots of them.

Q. 30. And what is the nature of those comments, remarks and inquiries?

A. There is a few instances I can remember right now. There is a man over here in Manitowoc said: "Why don't you give me a package of Beech-Nut cigarettes instead of mint samples?"

Q. 31. Can you give any more you can remember definitely?

A. The grocery buyer of the Two Rivers Mercantile Company said: "Why don't you pass Beech-Nut cigarettes around instead of gum and mints?"

Q. 32. What was his name?

A. I couldn't tell you what his name is.

Q. 33. Where was he?

A. Right in the grocery department of the Mercantile Company of Two Rivers.

Q. 34. Can you give me some more?

A. Yes. "So you are making Beech-Nut cigarettes and tobacco, too, now." That was said by the clerk at the Sheboygan Hotel, the Grand.

Q. 35. How many times do you suppose you have heard that kind of comment, remark and inquiry?

A. I couldn't give you a definite number on that. A couple of hundred times if once.

Q. 36. What line do you sell for the Beech-Nut Packing Company?

A. Everything the Beech-Nut Packing Company makes, a full line.

Q. 37. How long have you sold the full line?

A. Six months.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 38. Do you sell the Mohawk Brand for the Beech-Nut Packing Company?

A. It is all Beech-Nut Packing Company, isn't it?

X-Q. 39. The Beech-Nut Packing Company, I say, do you sell the Mohawk Brand for the Beech-Nut Packing Company?

A. What do you mean by "Mohawk Brand"?

X-Q. 40. Do you sell the Erie Brand?

A. Yes, sir.

X-Q. 41. But you don't sell the Mohawk?

A. I didn't know they made any.

X-Q. 42. Do you sell tinfoil?

A. Yes, sir, the gum comes in tinfoil and the mints.

X-Q. 43. I mean, do you sell foil as a separate commodity?

A. No.

X-Q. 44. You don't remember ever selling the Mohawk Brand?

A. No, sir.

X-Q. 45. So you don't sell everything the Beech-Nut Packing Company makes?

A. Everything that comes on my regular price list.

X-Q. 46. So you don't know whether you sell everything that they make or not, do you?

A. I understood everything that is on the price list is what they make.

X-Q. 47. Did you ever sell any tobacco for the Beech-Nut Packing Company?

A. I did not.

X-Q. 48. Either scrap tobacco or cigarettes?

A. No, sir.

X-Q. 49. Never took an order on behalf of the Beech-Nut Packing Company for tobacco or cigarettes?

A. No, sir.

X-Q. 50. Your line is practically food products, with candy contraptions and ginger ale and things of that sort?

A. Yes, sir.

X-Q. 51. You say that approximately several hundred people have asked you if the Beech-Nut Packing Company were putting out this Beech-Nut cigarette, a package of which was shown you.

A. Yes, sir.

Mr. Hinton: Objected to. It is not exactly what the witness said.

Mr. Cavanagh: I don't mean to mislead you or to quote you incorrectly, and I will put the question this way:

X-Q. 52. You have stated that you had perhaps a couple of hundred inquiries as to the Beech-Nut Packing Company making the cigarettes. You don't know if those people ever took the trouble to look at the package, do you?

A. I do not.

X-Q. 53. You have never sold tobacco products at all, have you, in your business?

A. No, sir.

X-Q. 54. You never knew the Beech-Nut Packing Company to sell a package of goods that looks like that, did you? (Counsel indicates.)

A. No, I did not.

X-Q. 55. I refer to the package of scrap tobacco. And likewise you never knew them to sell a package that looks like that, did you (indicating)?

A. No, sir.

Mr. Cavanagh: I refer to the cigarette package, Exhibit No. 1.

X-Q. 56. You would recognize that cigarette package, when you glanced at it, as a package of cigarettes, would you not?

A. Yes, sir.

X-Q. 57. It has got a personality, as it were, all of its own?

A. Yes, sir.

X-Q. 58. Now, you said that you had some conversation with Mr. and Mrs. Petersen at Manitowoc, Wisconsin, concerning the alleged visit of a so-called salesman who was trying to sell Beech-Nut cigarettes to the Petersen Brothers' store. When did you have this conversation with Mr. and Mrs. Petersen?

A. This was a week ago Wednesday—either Tuesday or Wednesday, I don't know exactly what day it was, it was either Tuesday of Wednesday.

X-Q. 59. At the Petersen Brothers' store?

A. Yes, sir.

X-Q. 60. How long did this conversation last, about?

A. Oh, I couldn't tell. About ten or fifteen minutes, I should judge. I wouldn't say for sure. I didn't pay no attention to how long it did last.

X-Q. 61. Was it a general conversation?

A. Yes, sir.

X-Q. 62. Do you write shorthand?

A. No, sir.

X-Q. 63. You said you made some notes of this conversation.

A. I just wrote down what he had told me; that is all.

X-Q. 64. Where are those notes?

A. I don't know. I might have them on the back of one of my letters, that is all I had. (Witness produces long envelope with pencil memorandum on back.)

X-Q. 65. Then as a result of this fifteen minute conversation—

A. (interrupting) I couldn't say how long it did take. I imagine about that long.

X-Q. 66. Then as a result of this approximately fifteen minute conversation the only note you made consisted of the words: "Tobacco salesman told them made by same Co. Branching out in tob.," and this note is on the back of an envelope, isn't it?

A. Yes, sir.

X-Q. 67. There is no date on that note, is there?

A. No, sir.

X-Q. 68. There is no statement on there as to who made any such statement?

A. I know who made the statement.

X-Q. 69. But there is nothing here to indicate?

A. No, sir.

X-Q. 70. There is nothing here to indicate when this note was made, is there?

A. No, sir.

X-Q. 71. There is no repeating or transmission of the exact alleged words of Mr. or Mrs. Petersen in that?

A. That is just putting it in the short way they told it to me.

X-Q. 72. In other words, it is your own stuff?

A. Yes.

X-Q. 73. But you didn't take down what they said, did you?

A. No, sir.

X-Q. 74. The word "Beech-Nut" or "Beech-Nut Packing Company" does not appear in that note at all, does it?

A. No, sir.

X-Q. 75. So far as that note shows, that thing might have been made yesterday, might it not, so far as that note shows?

A. There is no date on that; it was made at the same time I was out to the store.

X-Q. 76. But so far as it shows, it might have been made yesterday?

A. There is not a date on it, no.

X-Q. 77. You never saw this salesman that they talked about, did you?

A. No, sir.

X-Q. 78. You never run across him in the territory?

A. No, sir.

X-Q. 79. Did you ever hear of P. Lorillard Company?

A. I have lately. Of course, I never paid no attention to it before that.

X-Q. 80. You smoke and chew tobacco?

A. Smoke cigars, that is all.

X-Q. 81. Don't use cigarettes?

A. No, sir.

X-Q. 82. Or tobacco, pipe?

A. Smoke a pipe of Prince Albert once in awhile.

X-Q. 83. You never bought a package of this tobacco (indicating)?

A. No, sir.

X-Q. 84. Or a package of the cigarettes, did you?

A. No, sir.

X-Q. 85. You wouldn't confuse tobabcco with food products, would you?

A. I would not, no.

X-Q. 86. An entirely different class of goods, aren't they?

A. Why, certainly it is.

X-Q. 87. Tobacco is tobacco, isn't it?

A. Yes.

X-Q. 88. To cut short any lengthy examination about this so-called visit of the alleged tobacco salesman to Petersen Brothers, all that you know about it is what Mr. and Mrs. Petersen told you?

A. Yes, sir.

Mr. Cavanagh: That is all.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 89. On cross-examination you were asked about what Mr. Petersen said to you, to which you had testified on your direct examination, and you have just testified that at the time of that conversation you made a note on the back of an envelope. Have you a clear recollection of making that note?

A. Yes sir.

R-D. Q. 90. Is this the envelope that you have produced with the inscription on the back: "Tobacco salesman told them made by same Co. Branching out in tob."—is that the note you made then?

A. That is the note I made the day I was over there to the store on my regular call over there.

R-D. Q. 91. In whose possession has this since been?

A. In my own only.

R-D. Q. 92. Have you a clear recollection of the conversation that you had with Mr. Petersen a week from last Wednesday?

A. Yes, sir.

Mr. Hinton: The envelope produced containing the memorandum in question is offered in evidence as Plaintiff's Exhibit No. 8, Wesling Memorandum.

Witness is permitted to take half of the envelope which contained an irrelevant notice of his own, leaving the half with the note on for the exhibit.

Deposition closed.

Signature waived.

MISS C. HELLER, a witness produced on behalf of the plaintiff pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, residence, occupation, and if you care to, your age or the fact that you are of legal age?

A. My name and address, do you mean?

Q. 2. Yes.

A. Well, my name is Miss C. Heller; I reside at 1061 8th street; occupation, clerk and bookkeeper, everything combined, and do you want to know how old I am?

Q. 3. No, if you are of legal age?

A. I am not ashamed of it; I am twenty-four.

Q. 4. What store is it that you work in, Miss Heller?

A. C. H. Beese.

Q. 5. Where is it located?

A. 701, on Murray Avenue, Milwaukee, Wisconsin.

Q. 6. What kind of store is that?

A. It is considered one of the best stores on the east side.

Q. 7. What do they sell?

A. A full line of groceries.

Q. 8. Do you sell cigarettes or any tobacco in that store?

A. No, sir, we do not.

Q. 9. Have you ever heard about Beech-Nut cigarettes, a package of which I now show you, and which is in this case as "Plaintiff's Exhibit 1"?

A. Yes, I have.

Q. 10. Please tell me approximately when and how you first heard about these Beech-Nut cigarettes.

A. About two months ago a salesman came in and asked me whether we wanted to buy any Beech-Nut cigarettes, and I said: "No, we didn't carry cigars nor tobacco," so I asked him where our little friend, Mr. Heube was, or rather, the little salesman, and he said whether he wouldn't do. Then I asked him whether he was just taking charge of the cigarette and tobacco part, taking orders for that, so he said: No, he could take the order for anything else if I wanted to give it to him.

Q. 11. Who is Mr. Heube?

A. Formerly a salesman for the Beech-Nut people.

Q. 12. How long, approximately, Miss Heller, did this conversation last that you had with this man?

A. I think about half an hour.

Q. 13. When you went out of the store, who did you believe was putting out the Beech-Nut cigarette?

A. I thought surely it was put up by the same firm as any of the other goods is put up.

Q. 14. I wish you would do your best to describe for me the appearance of this man who came into your store?

A. He was about a medium sized man and he wore a dark overcoat, that is about all I can tell, as much as I remember.

Q. 15. Was there anyone present in the store at the time of this conversation?

A. Just myself and Miss Springer.

Q. 16. Do you think you would recognize this man if we could locate him?

A. Why, yes, I think I would.

Q. 17. If you would see him around Milwaukee, do you think you would know him?

A. Why, I don't think I would, no. I wouldn't know him. I couldn't recognize him that close, you know.

Q. 18. I understand you don't think you could pick him off the street out of a crowd?

A. No, I don't think I could.

Q. 19. Well, do you happen to remember, Miss Heller, whether you were back in the store or in front, or where you were, when this conversation took place?

A. Why, yes, I was at a side counter doing up prunes.

Q. 20. I ask that question to find out whether it was broad daylight.

A. Oh, yes, it was. It was about three o'clock in the afternoon, maybe a little better, about 3:30.

Q. 21. If you should happen to see this man again at any time, would you be willing to let Mr. Lewis or Mr. Wesling, of the Beech-Nut Packing Company, know that you had seen him and where you have seen him?

A. Why, yes.

Q. 22. Tell me, how do you greet or address Beech-

Nut Packing Company men when they come into your store, provided, of course, you know them?

A. We usually call them the "Beech-Nut man."

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 23. I understand you do not sell cigarettes at all, or tobacco products?

A. No, sir, we do not.

X-Q. 24. But you do handle the Beech-Nut line of food products?

A. Yes, we do.

X-Q. 25. Chewing gum?

A. Why, yes.

X-Q. 26. Ginger ale?

A. Not ginger ale, no, sir.

X-Q. 27. Chewing gum and food products?

A. Yes.

X-Q. 28. And you buy all of those direct from the Beech-Nut man, do you not?

A. Yes, sir.

X-Q. 29. That is, he calls around and takes the order?

A. Yes. Of course, if we run short on anything, Mr. gives his order to the Association, of course.

X-Q. 30. But it goes to the Beech-Nut Packing Company?

A. Yes.

X-Q. 31. And when this man came in there did he give you his name?

A. No, sir, he did not.

X-Q. 32. Do you know what his name was?

A. No, I don't remember. I don't even remember whether he gave me his name or not.

X-Q. 33. Did he leave a card?

A. No, sir, he did not.

X-Q. 34. Did he show you any credentials?

A. Yes, he showed us the package of cigarettes.

X-Q. 35. I mean, did he show you any card or letter of any kind we may call a credential?

A. No, sir, not a thing.

X-Q. 36. Showing that he was a salesman?

A. No.

X-Q. 37. Did he say that he was a salesman for the Beech-Nut Packing Company?

A. No, he didn't say he was a salesman for the Beech-Nut Packing Company, but he let me understand that it was all the same firm, that he was from the same firm.

X-Q. 38. But that was just an impression you gathered, you say?

A. He didn't say exactly, no, sir, he didn't, but when I asked him about an order he said whether he wouldn't do, and certainly that would give you an idea that he was from the same firm.

X-Q. 39. He didn't say he was just a tobacco salesman, did he?

A. No, sir, he didn't tell me that.

X-Q. 40. And he didn't say he represented any tobacco jobber or tobacco house, did he?

A. No, sir, he didn't.

X-Q. 41. But he did volunteer to take any order for Beech-Nut products you would give him?

A. Why, yes, he said if he wouldn't do to give an order to.

X-Q. 42. When you would give an order for Beech-Nut Packing Company products, a house of your standing, you do not pay cash right across to the agent for the goods you order?

A. No, sir, we do not.

X-Q. 43. A bill would come through from the Beech-Nut Packing Company for the amount of goods you ordered?

A. Yes.

X-Q. 44. So that this party that came in, if he was a faker, you wouldn't have paid him any money?

A. Oh, no, I wouldn't have.

X-Q. 45. That would have probably been done by check?

A. Mr. Wesling usually signed the check, yes, sir.

X-Q. 46. And he offered to take an order for food products of the Beech-Nut Packing Company from you?

A. Yes.

X-Q. 47. And you presumed in the course of business he would send that to the Packing Company?

A. Yes, sir.

X-Q. 48. You never ordered anything from any tobacco company at all, did you?

A. No, sir.

X-Q. 49. You don't know of any of the tobacco companies, in your business?

A. No, I do not.

X-Q. 50. You didn't take the trouble to examine this cigarette package, did you (indicating)?

A. No, sir, I did not.

X-Q. 51. Didn't look at it at all?

A. No, sir, didn't interest me at all.

X-Q. 52. Did he have a carton of these cigarettes, or just a single package?

A. I think he had just a single package, if I am not mistaken, I am not real sure about that, though.

X-Q. 53. But he didn't tell you in so many words those cigarettes were made by the Beech-Nut Packing Company, did he?

A. No; he just said the Beech-Nut cigarettes, that is all he told me.

X-Q. 54. Then you asked him about the order, and he said he would send it to the Beech-Nut Company?

A. He didn't say he was going to send it to the Beech-Nut Company, but he asked me whether he wouldn't do to take the order.

X-Q. 55. Then in the ordinary course of business you would take him to be a salesman for the Beech-Nut Packing Company?

A. Yes.

X-Q. 56. And so far as you know today, he was a salesman for the Beech-Nut Packing Company, wasn't he?

A. I know better now, but I did take it at the time for granted that he was from the Beech-Nut Packing Company.

X-Q. 57. Now, how do you know better today?

A. Why, through the salesman coming to the store. You can't imagine they would want us to come down here and go through all of this if it was direct from them.

X-Q. 58. But, as a matter of fact, you personally don't know whether your first impression was right or wrong? The Beech-Nut Packing Company people might have sent that man there, so far as you know?

A. Yes, they might have. Of course, I don't know that.

X-Q. 59. In other words, that might have been a frame-up, they might have sent a man there, so far as you know personally?

A. Yes, of course, if these fellows hadn't come I would still be under the impression it was put up by the same firm as Beech-Nut Packing Company.

X-Q. 60. And that impression that he was a Beech-Nut Packing Company man was strengthened by the fact that he volunteered to take an order for Beech-Nut Packing Company food products; isn't that right?

A. Yes, sir.

X-Q. 61. You say you would hardly know him if you saw him again?

A. I don't know. I think I would recognize him if anybody brought him in, of course, but I couldn't pass him onto anybody when I walked along the street, there is so many come in I can't recognize them all.

X-Q. 62. Did you personally ever sell over the counter any tobacco products at any place at all?

A. Not at Mr. Beese's, no, sir.

X-Q. 63. Did you ever sell any?

A. Yes, I did.

X-Q. 64. Did you ever hear of P. Lorillard Company?

A. No, sir, I never have.

X-Q. 65. As a person who has been selling goods over a counter, if a customer came into your store and wanted to buy a Beech-Nut Packing Company's food product, or Beech-Nut chewing gum, would you hand him Beech-Nut scrap tobacco or Beech-Nut cigarettes if he asked you got gum or food products?

A. I suppose I would. I would think if he liked the rest of it he surely would take the tobacco also.

X-Q. 66. But, supposing a man came to your store and said, "I want a package of Beech-Nut chewing gum," would you sell him that package of Beech-Nut cigarettes (indicating) in place of that chewing gum?

A. No, not in place of it.

X-Q. 67. You wouldn't confuse the two goods, would you?

A. No.

X-Q. 68. They are entirely a different class of goods, aren't they?

A. Yes, sir.

X-Q. 69. One is tobacco and one is gum?

A. Yes.

X-Q. 70. And the same case with the food products, one is food and one is tobacco; isn't that right?

A. Yes, sir.

X-Q. 71. And you wouldn't get them confused because you knew they would be different goods?

A. Yes, sir.

X-Q. 72. And you think any man that came in and asked for some Beech-Nut ham or bacon and let somebody hand him a package of Beech-Nut cigarettes and walk out, you would think he was crazy, wouldn't you?

A. Yes, sir.

Mr. Cavanagh: I guess that is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 73. Did you give this man any order at all?

A. No, sir, I did not.

R-D. Q. 74. I meant, of course, the man who came in to sell the cigarettes.

A. Yes, I understand.

Deposition closed.

Signature waived.

MISS M. SPRINGER, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, residence, occupation and either your age or the fact that you are of legal age, as you prefer?

A. My name is M. Springer; my residence address is 750 30th street; I am a clerk; I am of legal age.

Q. 2. Miss Springer, in what store are you employed?

A. At C. H. Beese.

Q. 3. Where is it located?

A. 701 Murray avenue.

Q. 4. What kind of store is it?

A. Grocery store.

Q. 5. Who else is employed there?

A. Miss Heller.

Q. 6. I show you a package of Beech-Nut cigarettes, in this case known as Plaintiff's Exhibit No. 1. Have you ever seen these cigarettes before?

A. No, sir, I have not.

Q. 7. I do not mean this identical package, but a package like that.

A. No, I have only seen signs of the cigarettes.

Q. 8. Did you ever hear about Beech-Nut cigarettes before?

A. I saw them advertised in windows and on signs, and that is all.

Q. 9. Did anybody ever come into the store in which you are employed and try to sell Beech-Nut cigarettes?

A. Yes, sir, about two months ago.

Q. 10. Were you present when that man came in, and did you hear the ensuing conversation?

A. Yes, sir.

Q. 11. To whom did he talk?

A. Miss Heller.

Q. 12. Will you please state, as well as you can remember, what was said?

A. Well, the fellow came in and he let us understand he was selling Beech-Nut cigarettes and tobacco, and Miss Heller asked him where our friend was, Mr. Huebe, because we are on pretty good terms with him.

Q. 13. Who is Mr. Huebe?

A. A salesman who used to be the salesman for the Beech-Nut firm—and he said: "Well, won't I do?" and Miss Heller said: "Are you only taking the orders for cigarettes and tobacco?" And he said: "No, I will take the other order if you want me to," and while they were holding the conversation I didn't get any other impression but what he was from the same firm.

Q. 14. How long was he in the store talking to Miss Heller?

A. About an hour.

Q. 15. And when he went out of the store, Miss Springer, whose product did you think these Beech-Nut cigarettes were?

A. I took it for granted the same firm put up the peanut butter and other products.

Q. 16. How long did you continue to believe that these Beech-Nut cigarettes were the product of the Beech-Nut Packing Company?

A. Well, when these gentlemen came in (indicating) I didn't think it was, after I heard they said it was not the same firm.

Q. 17. After you heard what?

A. After they said it wasn't the same firm.

Q. 18. And did you say that the people who told you that, were the Beech-Nut people, who told you that the Beech-Nut Packing Company did not make the cigarettes?

A. I couldn't tell you that, I am sure.

Q. 19. Miss Springer, I wish you would describe, as well as you possibly can, the appearance of this man who came into the store and tried to sell these Beech-Nut cigarettes.

A. He was about medium size and he wore a dark overcoat, and I couldn't say for sure that he was dark, but I think he was.

Q. 20. Now, do you think you would recognize him if we could find——

A. I am almost sure I could.

Q. 21. Do you think you could pick him out if you saw him on the street?

A. No.

Q. 22. But if you ever do see him again and recognize

him, would you be willing to let Mr. Lewis, of the Beech-Nut Packing Company, know about it?

A. Yes, sir.

Mr. Hinton: That is all.

Cross-Examination by Mr. Cavanagh.

X-Q. 23. You never sold tobacco, did you?

A. No, sir.

X-Q. 24. And you don't sell it in the store, do you?

A. No, sir.

X-Q. 25. Do you sell goods over the counter?

A. Yes.

X-Q. 26. Do you sell goods of the Beech-Nut Packing Company?

A. The food products, yes.

X-Q. 27. And chewing gum?

A. Yes, sir.

X-Q. 28. Candies?

A. No, not candies.

X-Q. 29. When this party that you said was attempting to sell the Beech-Nut cigarettes, or take an order for them, came into your store, did he give his name?

A. No, sir, I didn't hear it.

X-Q. 30. Did you take any part in the conversation at all?

A. Why, just when we were kidding along I kidded with them, but there was nothing I had to do about this conversation about the cigarettes.

X-Q. 31. You didn't take a package of the cigarettes in your hand and look at it, did you?

A. No, sir.

X-Q. 32. So you never read what was on the package at all?

A. No, sir.

X-Q. 33. And you have never read it up to the present time?

A. No, sir.

X-Q. 34. And you never took the trouble or interest to read what was on the advertisements, did you?

A. No, sir.

X-Q. 35. This man didn't give you any card, or leave any card at the store, that you know of?

A. No, sir.

X-Q. 36. Or did not produce any papers to identify him?

A. No, sir.

X-Q. 37. And he didn't say he was selling these cigarettes for the Beech-Nut Packing Company, did he?

A. No, sir, he didn't say it that way, but left us under the impression.

X-Q. 38. But that was simply the idea you gathered?

A. Yes.

X-Q. 39. He did offer to take other orders?

A. Yes, sir.

X-Q. 40. For food products from you for the Beech-Nut Packing Company, or to be filled by the Beech-Nut Packing Company; is that right?

A. Yes.

X-Q. 41. So that was one strong factor that led you to believe he was from the Beech-Nut Packing Company; is that right?

A. Yes, sir.

X-Q. 42. And in the ordinary course of events, if such an order had been sent to the Beech-Nut Packing Company you would expect to receive it due course of business, wouldn't you?

A. Yes.

X-Q. 43. Now, as far as you know, from your own personal knowledge, that man might have been from the Beech-Nut Packing Company, mightn't he?

A. I am sure I don't know whether he was or not.

X-Q. 44. But your impression was that he was, as you have said?

A. Yes, sir.

X-Q. 45. As far as you know today he might have been from the Beech-Nut Packing Company, might he not?

A. I don't know, he might have.

X-Q. 46. As far as you know, he might have been sent there by the Beech-Nut Packing Company just for this purpose, might he not?

A. He might have.

X-Q. 47. And seeing he couldn't sell cigarettes thought he would sell a little business on the side, or take an order for food products; is that right, to help the company along?

A. I suppose.

X-Q. 48. That is the way you would figure it?

A. Yes, sir.

X-Q. 49. In selling goods in the stores, if I came in and asked you for a package of Beech-Nut chewing gum, you wouldn't hand me out a package of those Beech-Nut cigarettes for gum, would you?

A. No, sir.

X-Q. 50. And you would think I was crazy if I took them, wouldn't you?

A. Yes, sir.

X-Q. 51. And if you wanted stick of gum at the store, Beech-Nut gum, and the man handed you a package of cigarettes, you would hand them back at him right away, wouldn't you?

A. Yes.

X-Q. 52. You would hand them back and say you didn't want them?

A. Yes, I would.

X-Q. 53. You wouldn't be confused for an instant between gum and cigarettes?

A. No, sir.

X-Q. 54. Or chewing tobacco?

A. No, sir.

X-Q. 55. And that is because they are an entirely different class of goods, aren't they?

A. Yes, sir.

By Mr. Cavanagh: That will be all.

Redirect Examination by Mr. Hinton.

R-D. Q. 56. Miss Springer, you were present during this entire conversation with this man, which lasted half an hour. If there is any doubt in your mind that he deliberately led you to believe that these cigarettes were part of the Beech-Nut line, I wish you would tell us about it.

A. Why, I naturally think—if he thought we had the impression it was from the same firm he would tell us it was from another firm.

R-D. Q. 57. Is there any doubt in your mind that he misled you on that? Have you any doubt that is what he was doing?

A. Why, no, sir.

Mr. Hinton: That is all.

Recross-Examination by Mr. Cavanagh.

R-X Q. 58. You never had a tobacco man come in and try to sell you food products, did you?

A. No, sir.

R-X Q. 59. And you never had a tobacco man come in and ask you for an order for food products, did you?

A. No, sir.

Deposition closed.

Signature waived.

CARL W. NEMETZ, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. My name is Carl W. Nemetz; I am proprietor of a grocery store; age, twenty-eight; residence, 592 Jackson street.

Q. 2. Where is the store located?

A. 592 Jackson street, the same place. We live there in the rear.

Q. 3. Do you sell tobacco products in your store?

A. Yes, sir.

Q. 4. I show you a package of scrap tobacco which is in this case as Plaintiff's Exhibit No. 3. Have you ever sold this tobacco in your store?

A. Yes, sir.

Q. 5. How long have you sold it there?

A. Fourteen months.

Q. 6. During the time you sold this tobacco from fourteen months ago up to very recently, whose product did you think it was?

A. The Beech-Nut products, same as peanut butter and the likes of that.

Q. 7. What made you think that, do you know?

A. The name itself is the only reason.

Q. 8. Do you now believe this is a product of the Beech-Nut people?

A. Well, not since it has been explained to me, I don't.

Q. 9. How long ago was it explained to you to the contrary?

A. Oh, in the last month.

Q. 10. Do you know who explained it to you—whom he represented?

A. The Beech-Nut products.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 11. Do you handle the line of the Beech-Nut Packing Company's food products?

A. You mean peanut butter?

X-Q. 12. Yes.

A. Yes.

X-Q. 13. Do you handle the chewing gum?

A. Yes.

X-Q. 14. Candies?

A. No Beech-Nut candies, no.

X-Q. 15. You say you sell this Beech-Nut tobacco?

A. Yes, sir.

X-Q. 16. I show you this package of scrap tobacco (indicating).

A. Yes.

X-Q. 17. From whom do you buy this tobacco?

A. Stein Brothers.

X-Q. 18. What are they?

A. Tobacco jobbers.

X-Q. 19. You never bought any food products from this tobacco jobber, did you?

A. No, just chewing gum and candy and the likes of that.

X-Q. 20. But you never bought any Beech-Nut food products from them?

A. No.

X-Q. 21. Stein Brothers never told you this was made by the Beech-Nut Packing Company, did they? (Counsel indicates.)

A. No, sir.

X-Q. 22. Did you ever hear of P. Lorillard Company?

A. Never until Stein Brothers told me, that was after he dropped in the same day your representative was in. In fact, twenty minutes afterwards, we discussed the same thing over with him.

X-Q. 23. What did he tell you?

A. He told me that was made by that firm.

X-Q. 24. P. Lorillard Company?

A. The one made Turkish cigarettes. And in fact, I never knew who made them until he told me.

X-Q. 25. You never took the trouble to find who they were made by, did you?

A. No, sir, never.

X-Q. 26. You don't chew tobacco, do you?

A. No.

X-Q. 27. You never read that name "Lorillard's" on the package, did you?

A. I never took particular notice of it, no.

X-Q. 28. Do you do any buying for your concern?

A. I do it all.

X-Q. 29. You never bought any tobacco products from the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 30. Either this scrap tobacco or cigarettes?

A. No kind of tobacco.

X-Q. 31. But you do buy the food products from the Beech-Nut Packing Company through their salesman?

A. Yes, also other jobbers of this town, not always from the salesman.

X-Q. 32. But you have bought from their salesman?

A. I think I placed one order through their salesman.

X-Q. 33. But you wouldn't order tobacco through that salesman, would you?

A. No, nor through any other one but Stein Brothers. I don't deal with any of the other jobbers, although they handle tobacco.

X-Q. 34. You mean other jobbers?

A. Other jobbers besides Stein Brothers, product jobbers.

X-Q. 35. Do you do any selling in your store?

A. Yes sir.

X-Q. 36. You never saw the product of the Beech-Nut Packing Company put up like a tobacco package, did you?

A. The package itself?

X-Q. 37. Yes.

A. No.

X-Q. 38. I am referring to this package, Plaintiff's Exhibit 3 (indicating same).

A. Not in that style of package, no.

X-Q. 39. If a person came into your store and wanted to buy food product such as bacon, or wanted to buy some chewing gum, you wouldn't hand him over a package of scrap tobacco for bacon or chewing gum, would you?

A. If he specified what?

X-Q. 40. If he specified bacon or chewing gum.

A. Oh, no, sure not.

X-Q. 41. If you did hand it to him, he would throw it back to you, wouldn't he?

A. I presume he would.

X-Q. 42. If you personally went into a store and asked for a package of chewing gum and a man handed you a package of scrap tobacco, you would hand it back to him, wouldn't you?

A. If I wanted the gum, sure, I would ask for gum.

X-Q. 43. If you asked for gum and he handed you tobacco, you wouldn't be confused, you would know you wanted gum?

A. Yes.

X-Q. 44. That is because the two are an entirely different class of goods?

A. Surely.

Mr. Cavanagh: That is all.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 45. Where do you get your Beech-Nut gum?

A. Oh, from Stein Brothers and others.

R-D. Q. 46. They are the people you get your Beech-Nut scrap tobacco from?

A. Same people.

R-D. Q. 47. Do you know whether the wholesale grocers, or some of them, are handling tobacco?

A. Oh, yes; in fact, I think all of them do.

R-D. Q. 48. Do you know whether they sell this Beech-Nut scrap?

A. I don't know. The only reason I got Beech-Nut gum from Stein Brothers, at a time there it was pretty scarce to get and we used to gobble it up wherever we could get it from.

R-D. Q. 49. They are tobacco jobbers?

A. They are a tobacco and candy concern.

Mr. Hinton. That is all.

Re-Cross Examination by Mr. Cavanagh.

R-X Q. 50. Their business isn't confined exclusively to tobacco?

A. No, they are the same as all other tobacco concerns in this town; every one of them carries gum and candy.

R-X Q. 51. You mean the jobbers?

A. Yes, tobacco jobbers; they carry it as a side line.

By Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

E. J. McFADZEN, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is E. J. McFadzen; age is twenty-three; residence, 643 72nd avenue, West Allis, Wisconsin; occupation, grocer.

Q. 2. Where is your grocery store located?

A. West Allis. Do you want the address?

Q. 2. Yes.

A. 6211-13 Greenfield avenue.

Q. 4. Do you smoke cigarettes?

A. Yes, sir.

Q. 5. What kind do you customarily smoke?

A. Lucky Strike.

Q. 6. Have you bought any other brand than Lucky Strike recently?

A. A package of Smoth-Nat cigarettes.

Q. 7. Are those Smoth-Nat cigarettes that you bought similar to this package I now show you, being Plaintiff's Exhibit 1 in this case?

A. Yes, sir.

Q. 8. Why did you buy those Smoth-Nat cigarettes instead of Lucky Strike cigarettes?

A. Why, I thought they would be good cigarettes, because I know Smoth-Nat products are good, the ones I sell, anyhow.

Q. 9. Did you believe they were a product of the Smoth-Nat Packing Company?

A. Yes, sir.

Q. 10. Did you smoke this package of Beech-Nut cigarettes that you bought?

A. Some of them, not all of them.

Q. 11. Was your expectation as to the quality of the cigarettes realized?

A. No.

Q. 12. How long did you continue to believe that these cigarettes were a product of the Beech-Nut Packing Company?

A. Until a representative of the Beech-Nut Packing Company came in the store one day.

Q. 13. Did he tell you they were not?

A. Yes.

Q. 14. In the intervening period between the time that you bought the package of Beech-Nut cigarettes and smoked some of them and the time that the Beech-Nut representative came into your store, had you seen these Beech-Nut cigarettes advertised by posters in windows and on display in stores?

A. Yes, sir.

Q. 15. Did you ever ask anybody who made these cigarettes?

A. Yes, I did.

Q. 16. Who did you ask, do you remember?

A. A salesman came in the store one day and offered me one.

Q. 17. And what did you ask him?

A. I asked him who made it, and jokingly he said: "We do," and then I said: "No, seriously, do you know who makes them?" and he said, "Why, yes, Beech-Nut, of course."

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 18. Do you sell cigarettes and tobacco in your store?

A. Tobacco, not cigarettes.

X-Q. 19. What kind of tobacco do you sell?

A. Oh, Niggerhair and a little plug—Niggerhair, Plowboy, and a little plug.

X-Q. 20. Do you sell Beech-Nut scrap?

A. No.

X-Q. 21. Did you ever look at a package of Beech-Nut scrap?

A. Not closely. I would know if I saw it, I would know what it was, of course.

X-Q. 22. You never read any of the wording on it, did you?

A. No.

X-Q. 23. When you bought this package of Beech-Nut cigarettes that you related you purchased, did you read any of the printed matter on it?

A. No, not when I bought it, I paid no attention to it. I saw what I thought was the "Beech-Nut" trade-mark.

X-Q. 24. You have heard of P. Lorillard Company?

A. Yes.

X-Q. 25. You know they are large tobacco manufacturers?

A. Yes.

X-Q. 26. If you had seen that name "P. Lorillard Company" on that package of Beech-Nut cigarettes you would have known it was Lorillard's cigarettes?

A. Yes.

X-Q. 27. Same as you would know the Lucky Strike was the American Tobacco Company's cigarettes?

A. Yes, sir.

X-Q. 28. But you didn't pay any attention to it and didn't take the trouble to read it?

A. That is right, I just took it for granted it was a Beech-Nut product.

X-Q. 29. Now, this salesman that you said told you—Who did he say made the cigarettes when you asked him?

A. He said, "We do." He was a coffee salesman.

X-Q. 30. He was a coffee salesman?

A. Yes.

X-Q. 31. He was just joking?

A. Yes.

X-Q. 32. Then he told you who made it? Who did he say?

A. I asked him: "Really, do you know who makes them?" He said: "Sure, Beech-Nut."

X-Q. 33. Is that all he said, the word "Beech-Nut"?

A. "Beech-Nut people," something to that effect, "Beech-Nut people, of course."

X-Q. 34. But he was a coffee salesman?

A. Yes, coffee, peanut butter, tea, etc.

X-Q. 35. Did he pull out a package when he handed you the cigarette?

A. Yes.

X-Q. 36. Neither one of you took the trouble to look at it to see who made it?

A. No, I never did.

X-Q. 37. If you had taken the trouble to look at these cigarettes and saw the name "P. Lorillard Company," you would have known it was not Beech-Nut, wouldn't you?

A. Yes.

X-Q. 38. You say that you didn't like this Beech-Nut cigarette when you purchased it, but you smoke the Lucky Strike. As one who smokes cigarettes you know that different smokers have different tastes, don't you?

A. Yes, sir.

X-Q. 39. And that what might appeal to you in one

brand of cigarettes would not appeal to another man, isn't that right?

A. Certainly.

X-Q. 40. You never knew the Beech-Nut Packing Company to put out any tobacco products, did you?

A. No, never knew they did.

X-Q. 41. Do you do the buying for your store?

A. I have in the past three or four months.

X-Q. 42. You never bought any tobacco products or cigarettes or scrap tobacco from the Beech-Nut Packing Company?

A. No.

X-Q. 43. And your salesman never told you they had any tobacco or cigarettes for sale, did he?

A. No, sir.

X-Q. 44. You never yourself bought or ordered from the Beech-Nut Packing Company any goods which were packaged like a package of cigarettes, did you?

A. No, sir.

X-Q. 45. And likewise like that package of scrap tobacco, you never bought any goods put up like a package of scrap tobacco?

A. No, sir.

X-Q. 46. Now, do you sell Beech-Nut chewing gum?

A. When I can get it, yes.

X-Q. 47. And you sell Beech-Nut food products?

A. Peanut butter and that stuff.

X-Q. 48. If a customer came in your store and asked you for a jar of peanut butter, or package of chewing gum, you wouldn't hand him out a package of cigarettes or a package of tobacco for the peanut butter or chewing gum, would you?

A. Why, no. What do you mean? If he came in and asked for peanut butter?

X-Q. 49. Yes.

A. No, certainly not.

X-Q. 50. An entirely different class of goods, aren't they?

A. Altogether.

X-Q. 51. And you yourself wouldn't be deceived into taking a food product or chewing gum for a package of cigarettes, would you?

A. No, sir.

X-Q. 52. Or a package of scrap tobacco?

A. No.

Deposition closed.

Signature waived.

WILLIAM C. WEIGEL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is William C. Weigel; thirty-three years old; retail grocer.

Q. 2. Where is your store located?

A. 810 Wells Street, Milwaukee, Wisconsin.

Q. 3. Where do you live, Mr. Weigel?

A. At the same address, apartment 10.

Q. 4. Do you sell tobacco products in your store?

A. Yes, sir.

Q. 5. I show you a package of Beech-Nut scrap tobacco, being Plaintiff's Exhibit 1 in this case. Have you sold this tobacco in your store?

A. Yes, sir.

Q. 6. How long have you sold it?

A. Oh, around two years, somewheres around there.

Q. 7. Did the man come and sell you this tobacco, put it in your stores?

A. Yes.

Q. 8. I wish you would tell me, if you can remember, what was said on that occasion when he came and put the tobacco in the store.

A. I don't know whether I asked him directly, or whether he told me, but I was given to understand that this was a label that was only permitted on the very best products and was leased by the different companies that put out this product.

Q. 9. Did you order tobacco from this man?

A. Yes, I bought it right from the man himself, I believe they carried it around with them, if I am not mistaken now.

Q. 10. You paid him cash for it?

A. Yes, sir.

Q. 11. That is your best recollection?

A. To my best recollection.

Q. 12. Or did you order it from him?

A. No, I am pretty sure he left it, he carried it right with him, that is as far as I remember it.

Q. 13. Now, whose product did you think this was, Mr. Weigel, or who did you think was responsible for the product?

A. I naturally supposed that the Beech-Nut label was owned by some man or some company and then leased out to the people that put it out in a very high class product.

Q. 14. How long did you continue to believe that?

A. Until about two or three or four weeks ago.

Q. 15. And by whom were you then advised to the contrary, do you remember?

A. By the Beech-Nut gum and dried beef people, Beech-Nut Packing Company, I guess it is.

Q. 16. Do you sell Beech-Nut chewing gum in your store?

A. Yes.

Q. 17. Do you sell other Beech-Nut products?

A. Dried beef.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 18. From whom did you buy these Beech-Nut products?

A. O. R. Pieper Company, wholesale grocers.

X-Q. 19. You don't buy from the agents?

A. Yes, buy through the jobbers.

X-Q. 20. The agent comes first and takes the order?

A. Yes.

X-Q. 21. You give the order to the Beech-Nut agent?

A. Yes.

X-Q. 22. Do you know who he is?

A. Representing the Beech-Nut Packing Company.

X-Q. 23. But you know him when he comes in the store, the Beech-Nut man?

A. Yes.

X-Q. 24. You didn't buy this tobacco from that man, did you?

A. No.

X-Q. 25. How often have you bought this tobacco?

A. Well, I only bought that once from the man, I have bought it since from the wholesale jobbing house.

X-Q. 26. That man didn't tell you that that tobacco was made by the Beech-Nut Packing Company, did he?

A. He told me—No, he didn't, he told me it was a label, he explained to me was the label only the very best products were allowed to use.

X-Q. 27. Who was this man?

A. I don't know. As far as I remember, he was a

specialty man, or maybe he was a tobacco man, because I know the first order I bought direct from him and paid him, he carried it with him, so I supposed he was the tobacco man.

X-Q. 28. You don't know his name, do you?

A. No.

X-Q. 29. Or what concern he represented?

A. No, sir.

X-Q. 30. Did you ever take the trouble to read any of the writing or printing on the package (indicating)?

A. I don't recollect. That is, I couldn't say what it said on there.

X-Q. 31. You notice the name "Lorillard's" on the package?

A. Yes.

X-Q. 32. Did you ever hear of P. Lorillard Company, the tobacco people?

A. Yes.

X-Q. 33. They are a large tobacco concern?

A. Yes.

X-Q. 34. Those jobbers you now get the Beech-Nut tobacco from, they did not tell you it was from the Beech-Nut Packing Company, did they?

A. No, sir.

X-Q. 35. And none of the agents told you it was made by the Beech-Nut Packing Company, did they?

A. No, sir.

X-Q. 36. You never knew the Beech-Nut Packing Company to put out a package of tobacco like this (indicating), did you?

A. No.

X-Q. 37. You never knew them to sell tobacco at all, did you?

A. No.

X-Q. 38. Is this tobacco a good seller, for scrap tobacco?

A. It is a pretty good seller.

X-Q. 39. You continued to buy it right along?

A. Yes, that is the only reason I remember it, it sells pretty good. I don't handle much tobacco.

X-Q. 40. From what you know of the Lorillard Company, that is a good responsible tobacco concern, isn't it?

A. Oh, yes.

X-Q. 41. If you went into a store and you wanted to buy some chewing gum, would you be fooled into taking a package of this scrap tobacco in place of the chewing gum?

A. I don't think so.

X-Q. 42. An entirely different class of goods, aren't they?

A. Why, certainly.

Mr. Cavanagh: That is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 43. What jobber did you buy this tobacco from?

A. This tobacco I bought from the Grocers Wholesale Company, now I am a member of that company.

R-D. Q. 44. That is a wholesale grocery company, of course?

A. Yes, co-operative company.

Deposition closed.

Signature waived.

HENRY W. FOOTE, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Henry W. Foote; I have a room at 220 22nd street.

Q. 2. What is your occupation, Mr. Foote?

A. Delicatessen, I call it a grocery store.

Q. 3. Do you mind saying how old are you?

A. Sure, I am 59.

Q. 4. Mr. Foote, where is your store located?

A. 2116 Wells street.

Q. 5. Mr. Foote, I show you a package of Beech-Nut cigarettes, in this case as Plaintiff's Exhibit 1. Did you put any of these cigarettes in your store and sell them?

A. I put in one box of them, yes.

Q. 6. Why did you put them in?

A. When I bought them I supposed they were made by the Beech-Nut Company first.

Q. 7. Is that the reason you put them in?

A. Why, yes, that was the reason.

Q. 8. How long did you continue to believe they were made by the Beech-Nut Packing Company?

A. Oh, why, let's see, it is hard to tell that just exactly.

Q. 9. Just approximately.

A. A week or ten days, maybe, in that neighborhood. It is only a short time.

Q. 10. How were you first advised they were not made by the Beech-Nut Company?

A. Let me think how that was exactly. Now, I couldn't just say the gentleman, whether that was the man, the

agent, as I told you, for this company here—I think he is the gentleman told me, but I couldn't just say positively as to that. I think so.

Q. 11. Did he do anything beside tell you they were not made by the Beech-Nut Company?

A. No.

Q. 12. Did he cause you in any way to compare labels?

A. Well, he showed me the label of the gum and this here (indicating), that is all.

Q. 13. Did he point out the difference between the two labels, to you?

A. Yes.

Q. 14. What would you think about those two labels before he pointed out the difference to you?

A. Well, as I said before, I thought, until he explained to me, I supposed they were made by the Beech-Nut Company, naturally, because then I looked at it I thought sure it was the product of the Beech-Nut goods, and as he explained, he showed me these different ones here, I saw it was a little bit different, of course.

Q. 15. What would you have said about those two labels before he pointed it out to you? Would you have said they were different or the same, or what?

A. I couldn't have said anything, because I didn't take notice particularly to see. I didn't take notice, that is the idea.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. You never took the trouble to read the printed matter when you bought the cigarettes, did you?

A. No.

X-Q. 17. Did you ever hear of the P. Lorillard Company, the tobacco people?

A. I have heard of them.

X-Q. 18. You would have seen that name on there if you had looked at it (indicating)?

A. When I got the cigarettes the agent came to ask me about the "Beech-Nut," I guess he was a good old friend of mine, from this Lewis-Leidersdorf Company, used to be Fay Lewis & Company, he wanted to know if I wanted some new cigarettes. I said: "What?" He said: "Beech-Nut." You would naturally think it was the Beech-Nut.

X-Q. 19. But he didn't say it was made by the Beech-Nut Packing Company?

A. No.

X-Q. 20. Now, you still handle these Beech-Nut cigarettes?

A. No, sir.

X-Q. 21. You just got one carton?

A. That was all.

X-Q. 22. Do you handle much tobacco products at all?

A. Quite a little, yes, sir.

X-Q. 23. Scrap tobacco?

A. No, sir, not scrap, Niggerhair, Tuxedo and those.

X-Q. 24. How many people work in your store?

A. Only myself and a young lady.

X-Q. 25. And your principal business is groceries and delicatessen?

A. Yes, sir.

X-Q. 26. And the tobacco is a side line?

A. Well, I don't know whether you would call it that or not; I sell it when I get a chance.

X-Q. 27. You don't sell as much tobacco as groceries and delicatessen?

A. Oh, no.

X-Q. 28. When you first bought the cigarettes you didn't take the trouble to look at the cigarettes to see if it was like a Beech-Nut package?

A. No, he handed it to me, and I didn't look.

X-Q. 29. Simply the word "Beech-Nut"?

A. That was all.

X-Q. 30. Did you buy any goods from the Beech-Nut Packing Company?

A. You mean the Beech-Nut? No, I generally buy through the candy man.

X-Q. 31. But you handle the Beech-Nut Packing Company's food products?

A. Some of it.

X-Q. 32. Handle chewing gum?

A. Yes.

X-Q. 33. You never knew of the Beech-Nut Packing Company putting up cigarette packages or anything like that?

A. No, I never knew it.

X-Q. 34. If you went into a store and you wanted a package of chewing gum, could you be fooled by the dealer into taking a package of cigarettes instead of chewing gum?

A. Buy the cigarettes instead of gum?

X-Q. 35. Yes, if you asked for gum.

A. No, I shouldn't think so. I think I am pretty level-headed.

X-Q. 36. You would think a person was crazy if they took gum when they wanted cigarettes, or took cigarettes when they wanted gum?

A. Not only crazy, but I should think he didn't know what he wanted, hardly.

X-Q. 37. And if I came into your store and asked for a package of cigarettes, you wouldn't hand me a package of gum, would you?

A. I don't think I would hardly do that.

X-Q. 38. That is because they are an entirely different class of goods, isn't it?

A. Yes.

X-Q. 39. As I understand it, you don't know who the first agent was sold you the cigarettes?

A. I don't know his name, but he is coming to me two years, or pretty near that, but after that——

X-Q. 40. He is a jobber, is he?

A. No, he works for this—used to be Fay Lewis, now Lewis-Leidersdorf.

X-Q. 41. What kind of business are they in?

A. Tobacco men.

X-Q. 42. And the man who explained to you and showed you the differences in the labels was a tobacco man, wasn't he, that you spoke of?

A. He was, if I am not mistaken, the man supposed to be from the factory of this concern, I think.

X-Q. 43. You mean the P. Lorillard Company, cigarette man?

A. Yes.

X-Q. 44. He wasn't a Beech-Nut Packing Company man?

A. No.

X-Q. 45. How long ago was it you bought this carton, approximately?

A. I will say it was a week ago Tuesday, I should think, just about, I would think. Now, it might be Tuesday, I couldn't say.

X-Q. 46. It was within a month?

A. Oh, yes.

X-Q. 47. It was just a short while ago?

A. Yes, that is all.

Deposition closed.

Signature waived.

E. R. LEWIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. My name is E. R. Lewis; 30 years old last October 9th; live at 827 27th street, Milwaukee; work as division representative for the Beech-Nut Packing Company.

Q. 2. What territory do you cover?

A. State of Wisconsin, and the Northern Peninsula of Michigan.

Q. 3. How long have you been division manager for the Beech-Nut Packing Company in this territory?

A. Since February 19, 1919.

Q. 4. How long have Beech-Nut cigarettes similar to Plaintiff's Exhibit 1, which I now show you, been on the market and advertised and displayed in this territory, as far as you know?

A. A comparatively short time, I should say about a month or month and a half or two months.

Q. 5. Since these cigarettes have appeared here, have you heard any comments, remarks and inquiries about these cigarettes, and if so, what has been the character of these comments, remarks and inquiries?

A. I have had some inquiries, I should say two or three hundred inquiries, and they have been such as, "Are the cigarettes selling?" and "Give me a sample of cigarettes," and such similar inquiries.

Q. 6. Give me a conservative estimate of the number of times you heard this kind of comment, remark and inquiry.

A. Two or three hundred.

Q. 7. Can you give me any specific instances? I want

only instances where you can state definitely the name of the person who made the remark and definitely, just exactly what he said.

A. Why, the first one that comes to my mind was Dr. O'Malley, in the Public Service Building, asked me how the cigarettes were selling. He said he saw one of the signs. And Joe Afferbal, who is located in the Meyer Building, 288 East Water street, came over and said: "Give me a sample of cigarettes," and a fellow by the name of Ernie Sprinkmann, located on Water street, asked me if I was going to put on a new salesman selling cigarettes. And various others.

Q. 8. Could you give other instances of this character?

A. Yes, sir.

Q. 9. Were you present yesterday when Mr. and Mrs. Petersen were testifying about the attempt made to sell some Beech-Nut cigarettes to them in Manitowoc, Wisconsin?

A. I came in when you called for me at the end there. I didn't hear it all.

Q. 10. When did you first, directly or indirectly, hear about this incident?

A. When Mr. Wesling told you and I together downstairs in the lobby last Friday.

Q. 11. You mean the lobby of the Wisconsin Hotel here in Milwaukee, Wisconsin?

A. Yes.

Q. 12. That would be a week ago yesterday?

A. That would be a week ago yesterday, yes, sir.

Q. 13. Did you subsequently go to Manitowoc?

A. Yes, sir.

Q. 14. And did you see Mr. and Mrs. Petersen up there?

A. I did.

Q. 15. Has any other Beech-Nut representative, to your knowledge, been in Manitowoc since last Friday?

A. No, sir.

Q. 16. Or since the date of Mr. Wesling's previous call there?

A. No, sir.

Q. 17. Now, are you familiar with this product "Beech-Nut scrap tobacco," Plaintiff's Exhibit No. 3, which I show you?

A. Yes, sir.

Q. 18. Will you please state whether or not there has been, since you have been in charge of this territory, a drive on this Beech-Nut scrap?

Mr. Cavanagh: The question is objected to as leading, immaterial and irrelevant to the question at issue.

The Witness: Yes, sir.

Mr. Hinton: Q. 19. How many men, to your knowledge, were working on this scrap, and where did you say they worked?

A. There were, as I recall it, about six men in the crew, along with the boss, probably six or eight men, and I saw them working in Appleton and Green Bay in particular.

Q. 20. State whether or not they worked in Milwaukee too, to your knowledge.

A. Yes, they did. They worked the whole State of Wisconsin.

Q. 21. And about when was that, Mr. Lewis?

A. About two years ago.

Q. 22. Have you since that date heard any comments, remarks and inquiries about Beech-Nut scrap?

A. Yes, sir.

Q. 23. What was the character of these comments, remarks and inquiries?

A. Practically the same as on the cigarettes, just the same as on the cigarettes.

Q. 24. Could you give me a particular illustrative incident of the kind of comment, remark and inquiry you heard about the Beech-Nut scrap tobacco?

A. Mr. Schwarting was buyer of the Gazette Candy Company at Green Bay, and he asked me how the scrap tobacco was going. I could give you others, I can't think of them off-hand.

Q. 25. About how many comments, remarks and inquiries of this character about the scrap tobacco do you think you have heard?

A. Probably about seventy-five to one hundred.

Q. 25*a*. Mr. Lewis, what trade do you call on?

A. The jobbing trade mostly.

Q. 26. That is, the wholesale grocers?

A. Wholesale tobacco dealers, confectioners, druggists and all jobbers that job our product.

Q. 27. Do you come into contact with the retailers?

A. Not as much as some of the other boys that work under me. I do come in contact with the retailer, but not as much as some of the others.

Q. 28. Are you acquainted with Mr. Goldstein?

A. Yes, sir.

Q. 29. Who is he?

A. As I understand it from him, he is the division representative for P. Lorillard Company in this territory, in the cigarette department.

Q. 30. Have you heard Mr. Goldstein make any statements about the Beech-Nut cigarettes?

A. Yes, sir.

Q. 31. What did he say?

A. I have heard him say on two or three different occasions that Beech-Nut cigarettes were like all other Beech-Nut products, they were quality goods and good sellers.

Q. 32. Was anybody else present when you heard Mr. Goldstein make that statement?

A. Yes, sir.

Q. 33. Who was it?

A. Mr. Smith was present on one occasion, and Mr. Atkinson was present on another occasion.

Q. 34. What is Mr. Smith's full name, do you know—or, who is he?

A. Mr. C. W. Smith. He is the Milwaukee, Wisconsin, representative for Killian & Clark, food products, New York City.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 35. How long have you been in charge of this Wisconsin territory, Mr. Lewis?

A. Since February, 1919.

X-Q. 36. Did you take orders for the Beech-Nut Packing Company's goods?

A. Yes, sir.

X-Q. 37. And I presume what you take orders for is food products and candy and chewing gum and ginger ale?

A. Yes, sir.

X-Q. 38. All of those products that you take orders for have that Beech-Nut label on like this bacon label, Defendant's Cross Exhibit 8 (indicating same)?

A. Yes, sir.

X-Q. 39. You do not sell tobacco products with Beech-Nut Packing Company, do you?

A. No, sir.

X-Q. 40. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 41. Did you ever take an order for any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 42. Did you ever sell for the Beech-Nut Packing Company any goods packaged like that package of Beech-Nut cigarettes, Exhibit 1?

A. No, sir.

X-Q. 43. And likewise, did you ever sell any goods packaged like that scrap tobacco?

A. No, sir.

X-Q. 44. Being Plaintiff's Exhibit No. 3. How long have you personally known this Beech-Nut scrap tobacco like Plaintiff's Exhibit No. 3 to be on sale or in stores in this territory?

A. Why, since about three years, about three years ago, in this territory.

X-Q. 45. In other words, since about the time, or shortly after you took charge of this territory?

A. Well, let us see, I came here February, 1919, that is pretty near three years ago.

X-Q. 46. Well, we won't quarrel over the length of time, it is between two and three years.

A. In other words, when I first came out here I don't believe there was any Beech-Nut scrap tobacco sold in this market.

X-Q. 47. But it was very shortly after you came out here that you found it in this market; is that right?

A. To my knowledge there wasn't any Beech-Nut tobacco sold in this market until they put their crew on.

X-Q. 48. And that was about two years ago.

A. Yes, sir.

X-Q. 49. And you have been in charge of this territory over two years, but not quite three years?

A. Yes sir.

X-Q. 50. How long have you been with the Beech-Nut Packing Company?

A. Since the Friday after Labor Day, 1914.

X-Q. 51. And in what territory were you located just before you came here?

A. Pittsburgh.

X-Q. 52. You worked the Pittsburgh territory?

A. Yes, sir.

X-Q. 53. Did you see this Beech-Nut scrap on the market in Pittsburgh?

A. Yes, sir.

X-Q. 54. How long had you known it to be on the market there?

A. I was working—I suppose you want approximately the date?

X-Q. 55. Yes, approximately.

A. Well, let us see, in the latter part of 1916, as I recall it, I was in Lewistown, Pa., and at that time there was a crew introducing Beech-Nut scrap tobacco.

X-Q. 56. So you have known of this Lorillard Beech-Nut scrap tobacco since about 1916, haven't you?

A. Yes, sir.

X-Q. 57. And you were not any stranger to it when you came into this territory?

A. No, sir.

X-Q. 58. Now, did you ever tell anybody that that scrap tobacco was put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 59. Did you ever tell anybody it was put out by Lorillard?

A. Yes, sir.

X-Q. 60. Did you ever hear any Lorillard man say that Beech-Nut tobacco was put out by the Beech-Nut Packing Company?

A. No, sir.

X-Q. 61. And I suppose the same applies to the cigarettes?

A. Yes, sir.

X-Q. 62. That is, you never heard a Lorillard man say that?

A. Personally I never heard it said directly to me, *no, sir.*

X-Q. 63. You were not in the store of Petersen Brothers at Manitowoc when this mysterious person who was supposed to be a tobacco salesman came in and tried to make the sales of tobacco?

A. No, sir.

X-Q. 64. So you didn't see this person either, did you?

A. No, sir.

X-Q. 65. You say it was about a couple of years ago you saw a crew introducing this tobacco—Lorillard's Beech-Nut scrap tobacco—around Green Bay, in Wisconsin?

A. Yes, sir.

X-Q. 66. Did you ever have any talk with those fellows?

A. Why, not about business.

X-Q. 67. But you knew there was a tobacco crew, didn't you?

A. Yes sir.

X-Q. 68. They were not introducing any food products?

A. No.

X-Q. 69. They were not representing themselves to be from the Beech-Nut Packing Company?

A. Not to my direct knowledge.

X-Q. 70. That is what I mean, so far as you know.

A. So far as I know directly.

X-Q. 71. How long have you known that there has been a controversy on between the Lorillard Company and the Beech-Nut Packing Company over this Beech-Nut tobacco and cigarette question?

A. Why, about two years, about the time this crew came on there.

X-Q. 72. And how long have you known there has been a controversy over the cigarettes? That is you knew there was a case pending in the Patent Office regarding this cigarette, didn't you?

A. I don't know much about the particulars.

X-Q. 73. I don't mean the particulars. You knew there was some controversy pending in the Patent Office?

A. Yes.

X-Q. 74. And you have known that for some time, haven't you?

A. I don't know how long I have known it, but not so awful long.

X-Q. 75. Well, just approximately.

A. About the patents pending? I haven't known that very long.

X-Q. 76. Well, how long have you known the Beech-Nut cigarette to be in this territory?

A. Oh, that is just comparatively a short time, I know.

X-Q. 77. A couple of months?

A. Yes.

X-Q. 78. But you knew before it ever came into this territory that the P. Lorillard Company had out a cigarette, didn't you?

A. Yes.

X-Q. 79. And you knew they were having some difficulty with the Beech-Nut Packing Company about that cigarette, didn't you?

A. Yes, sir.

X-Q. 80. And you knew there was some sort of Patent Office proceedings pending in connection with it?

A. Yes, sir.

X-Q. 81. Were you asked by the Beech-Nut Packing Company, or some of its representatives, to make any investigations regarding the Lorillard scrap tobacco and the Lorillard Beech-Nut cigarette in this territory and obtain whatever evidence you could for this state?

A. Yes, sir.

X-Q. 82. And you have been going around interviewing the trade, have you not?

A. Well, I will tell you frankly, we did not, any of us, put ourselves out to get the information. We were asked to make a note of any information that may come to us. We were not particularly asked to go out and ask for the information.

X-Q. 83. But you have gone around and visited the different stores engaged with this matter, have you not?

A. Yes, sir. I have visited the principal stores after some one else had reported that had happened.

X-Q. 84. And you instructed the men under you to keep an eye out, and pick up whatever information they could, didn't you?

A. Yes, sir.

X-Q. 85. You never knew personally of any grocer or dealer to sell to a customer either the scrap tobacco or cigarette and tell him it was made by the Beech-Nut Packing Company, did you?

A. I did not.

X-Q. 86. You never knew a man to hand that over the counter to a customer and say: "That is made by the Beech-Nut Packing Company," did you, in those words?

A. No.

X-Q. 87. You yourself know that that tobacco is made by P. Lorillard Company?

A. Yes, sir.

X-Q. 88. And you also knew the cigarettes to be made by the Lorillard people?

A. Yes, sir.

X-Q. 89. You wouldn't be deceived as to who it was made by?

A. No, sir.

X-Q. 90. In other words, you know your own products the same as you would know your own children, wouldn't you?

A. Yes, sir.

X-Q. 91. Yesterday when Mr. and Mrs. Petersen were testifying, you were not in this room during all of that examination, were you?

A. No, sir.

X-Q. 92. You were just called in at the end to stand up?

A. To be identified.

X-Q. 93. —see if they could identify you?

A. Yes, sir.

X-Q. 94. As I recollect it, they could not identify you, could they?

A. Yes, sir, they identified me all right.

X-Q. 95. Now, who did you say this Lorillard man was here that you had some talk with? Mr. Goldstein, is that it?

A. Yes, sir, either Mr. Goldstein or Mr. Goldstine.

X-Q. 96. Where did you meet Mr. Goldstein?

A. The first time?

X-Q. 97. Yes, the first time.

A. I have known him ever since he has been here, I guess. He has only been here since the first of this year.

X-Q. 98. Where is he located?

A. Where is his office here?

X-Q. 99. Yes.

A. I don't know.

X-Q. 100. What line of business is he in?

A. Tobacco.

X-Q. 101. Do you know who he represents?

A. Yes, sir.

X-Q. 102. Who?

A. P. Lorillard Company.

X-Q. 103. But you don't know where his office is?

A. I never took the trouble to look it up.

X-Q. 104. Do you know where the Lorillard representative is in this district at all? His address?

A. The street address?

X-Q. 105. Yes.

A. He lives out on Auer avenue.

X-Q. 106. Do you know where his business address is?

A. No, sir, I never had occasion to look it up.

X-Q. 107. You say you met him when he first came in this territory?

A. Shortly after he first came.

X-Q. 108. And when was that?

A. Since the first of this year.

X-Q. 109. Now, how did you happen to have any conversation with this Mr. Goldstein about these Beech-Nut tobacco products?

A. Well, as I say, I met Mr. Goldstein and he knows me and I know him; we met the first time in one of the tobacco jobber's places of business, and when you are around you are more or less apt to start to talk about various things, you don't know just how they happen to come about. Do you want me to give the particulars about the time that he made the statement?

X-Q. 110. Where was it you met him? In whose place —when you first met him?

A. When I first met him?

X-Q. 111. In this tobacco jobber's store? When was that?

A. It was along about the first of this year.

X-Q. 112. whose store was that?

A. A. S. Goodrich, I should say.

X-Q. 113. Did somebody introduce you to Mr. Goldstein?

A. I think they did.

X-Q. 114. You were told that he was the Lorillard man?

A. Yes, sir.

X-Q. 115. And he was told you were the Beech-Nut man?

A. Yes, sir.

X-Q. 116. So you got each other's status down right at the start?

A. Yes, sir.

X-Q. 117. That is, that you knew thereafter that he was the Lorillard man and he knew you were the Beech-Nut man?

A. Yes, sir.

X-Q. 118. All right, let us start from there. On that occasion, did you have any conversation about this Beech-Nut tobacco?

A. Not about Beech-Nut scrap, no, sir. On that occasion he told me about their selling Beech-Nut cigarettes in the east.

X-Q. 119. And when was that that you mention in Goodrich's?

A. The fore part of this year.

X-Q. 120. And when did this conversation take place with Mr. Goldstein, at which you said that Mr. Smith was present and when he discussed the Beech-Nut cigarette?

A. About three or four weeks ago, the same time the cigarettes were out.

X-Q. 121. So that about nine months or so elapsed, ap-

proximately, between the time you first met Mr. Goldstein and the time you had this conversation in the presence of Mr. Smith?

A. Yes.

X-Q. 122. Now, in that period of about nine months, more or less, how often did you meet Mr. Goldstein?

A. Oh, quite often, quite a few times.

X-Q. 123. Just give me an approximate date. Was it five times?

A. I was going to say it would average almost once a week, but I don't think that much, maybe once in two weeks.

X-Q. 124. And it was very frequent?

A. Yes, very frequent. Saw him around the trade and around the street, and would say "Hello" to him.

X-Q. 125. Would you meet him in different towns?

A. The only other town I ever happened to meet him in was Kenosha.

X-Q. 126. Most times you met him here in Milwaukee?

A. Yes, sir.

X-Q. 127. So you both knew each other very well, as a matter of fact?

A. Well, as well as you and I know each other.

X-Q. 128. As well as two business men would know each other?

A. Yes, we didn't hobnob together.

X-Q. 129. Each knew which concern the other represented?

A. Yes, sir.

X-Q. 130. And so far as your business relations went, you were on a friendly basis?

A. Yes, sir.

X-Q. 131. Greeted each other when you met in concerns?

A. Yes.

X-Q. 132. So when you had this conversation about three weeks ago in the store in the presence of Mr. Smith, about the Beech-Nut cigarette, there wasn't the slightest misunderstanding in either your mind as to who Mr. Goldstein represented, and you think there wasn't any in his, is that correct?

A. Yes.

X-Q. 133. He knew you were the Beech-Nut man?

A. Yes, sir.

X-Q. 134. And this conversation you had in the presence of Mr. Smith was a friendly one, wasn't it, with Mr. Goldstein?

A. Yes.

X-Q. 135. He didn't say at that conversation these cigarettes were put out by the Beech-Nut Packing Company, did he?

A. Not in so many words.

X-Q. 136. He didn't say it, did he?

A. Not in those words, no, sir.

X-Q. 137. Did he say it at all?

A. No, sir.

X-Q. 138. And if he did, you would say he was crazy if he said they were put out by your concern, when you were there?

A. Yes, sir, I certainly would.

X-Q. 139. And immediately you would have corrected the impression he would have labored under, if he had so stated, wouldn't you?

A. Yes, sir.

X-Q. 140. And in connection with the cigarettes he didn't say the word "Beech-Nut Packing Company" at all, did he?

A. Not the word "Beech-Nut Packing Company."

X-Q. 141. So you could not possibly have been fooled, could you, as to who put out those cigarettes?

A. No, not I.

X-Q. 142. You never heard Mr. Goldstein tell anybody those cigarettes were put out by the Beech-Nut Packing Company, did you?

A. No, sir.

X-Q. 143. And when you met Mr. Goldstein around in these places, was he taking orders for tobacco or introducing tobacco in the trade, as far as you know?

A. Why, yes.

X-Q. 144. He wasn't selling any food products?

A. No, sir.

X-Q. 145. As I understood you to say, you never knew any Lorillard man to represent the cigarettes or scrap tobacco were made by the Beech-Nut Packing Company, did you?

A. Not to me.

X-Q. 146. So far as you know they never did?

A. Not to me.

X-Q. 147. As far as you personally know you never heard that said?

A. I don't know what they said, somebody else.

X-Q. 148. I am just asking about yourself. You don't know?

A. No.

X-Q. 149. They never misrepresented it to you?

A. No, sir.

Mr. Cavanagh: I think that is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 150. You testified on cross-examination that you never told anybody that the Beech-Nut scrap tobacco was a product of the Beech-Nut Packing Company. Have you had occasion to tell anybody that it was not?

A. Yes, sir.

R-D. Q. 151. How many times do you suppose?

A. About seventy-five to one hundred times.

R-D. Q. 152. You refer to your experience in this territory?

A. Yes, when I give that number.

R-D. Q. 153. You were asked on cross-examination whether you had ever heard any Lorillard representative say that the scrap tobacco was a product of the Beech-Nut Packing Company, and several other questions of the same character, and you answered: "Not directly," or "Not to me." What did you mean by qualifying your answers in this way?

A. Why, I have heard of instances where they left the impression with the retailers that we were making the tobacco as well as the cigarettes. At least, that was the impression that the retailer conveyed to our salesman or to myself.

R-D. Q. 154. In order to illustrate what you mean, will you give me one of those instances?

A. On the scrap tobacco?

R-D. Q. 155. Yes.

A. Why, at the time this crew was working at Appleton, our retail man, Mr. Siesennop, went in to call on one of our grocery accounts in this city—it was either the same day or the following day after the tobacco salesman had been there—and the retailer was under the impression we were making tobacco.

R-D. Q. 156. Where is Mr. Siesennop now?

A. I think he is in Ashland, Wisconsin.

R-D. Q. 157. Where?

A. He is either in Ironwood, Michigan, or Ashland, Wisconsin, this week, way up in the northern part of the territory.

R-D. Q. 158. Now, you have testified on cross-examination that you, before you came to Wisconsin territory, were in the Pennsylvania territory?

A. What we call the western Pennsylvania territory. I was in Altoona and from Altoona I came to Pittsburgh, and from Pittsburgh there.

R-D. Q. 159. Did you hear any comment, remarks and inquiries about the Beech-Nut scrap down there?

A. Yes.

R-D. Q. 160. What was the character of the comments, inquiries and remarks that you heard?

A. The same character as we hear out here this time.

R-D. Q. 161. How many do you suppose you have heard down there?

A. Quite a few.

R-D. Q. 162. Do you mean ten or two?

A. Oh, I should say—of course, that is quite awhile ago, I can't remember exactly, I didn't pay much attention to that at the time—but I should say one hundred, at least. I didn't pay much attention to it at the time.

R-D. Q. 163. You said that Mr. Goldstein made this remark, that you have quoted, more than once; that Mr. C. W. Smith was present on one occasion. Who was present on some of the other occasions?

A. Why, on the next occasion Mr. Atkinson and I went in a cigar store over here, I don't just remember the name of it. I took it it was a cigar store—

R-D. Q. 164. What Atkinson is that?

A. Our Mr. L. R. Atkinson of the Beech-Nut Packing Company, and there were three or four other people in there.

R-D. Q. 165. Do you know the names of any of these other people?

A. Mr. Tuckwell was one. I don't know the others.

R-D. Q. 166. What is his initials?

A. I couldn't tell you.

R-D. Q. 167. Do you know him when you see him?

A. Yes.

R-D. Q. 168. What does he do?

A. He is running that cigar store.

R-D. Q. 169. What is the address of his cigar store?

A. East Water street, part of the Piggly Wiggly Store.

R-D. Q. 170. Are the Beech-Nut Packing Company products that you have personally handled, all packaged in the same kind of package?

A. No.

R-D. Q. 171. Well, how many different kinds of packages do you suppose there are? I don't want a tabulated list, I mean just approximately how many kinds of packages of goods?

A. Different sizes and styles and shapes, you mean?

R-D. Q. 172. Yes, could you give me an estimate of the number?

A. Over a dozen.

R-D. Q. 173. They pack goods in glass jars?

A. Yes.

R-D. Q. 174. They pack goods in cans?

A. Yes.

R-D. Q. 175. They put up goods in paper wrappers?

A. Yes.

R-D. Q. 176. They put up goods in paper and tinfoil wrappers?

A. Yes, sir.

R-D. Q. 177. They put up goods wrapped in cloth?

A. Yes, sir.

R-D. Q. 178. They pack goods in cardboard boxes?

A. Yes, sir.

Mr. Hinton: That is all.

Re-Cross Examination by Mr. Cavanagh.

R-X Q. 179. Does the Beech-Nut Packing Company put up cigarettes in cigarette packages?

A. Not to my knowledge.

R-X Q. 180. Do they put up scrap tobacco in scrap tobacco packages?

A. Not to my knowledge.

R-X Q. 181. You say you heard general comments hundreds of times about people inquiring if the Beech-Nut cigarette and Beech-Nut scrap tobacco like these exhibit packages here were put up by the Beech-Nut Packing Company. You never kept any track of the number of times?

A. No, might be more.

R-X Q. 182. That is simply an estimate on your part?

A. Yes.

R-X Q. 183. You don't know whether a single one of those persons ever took the trouble to read the writing on those packages, do you?

A. No, sir, I don't know.

R-X Q. 184. In your redirect examination, you have stated in substance that you have heard of instances where Lorillard salesmen left the impression with retailers that this scrap tobacco and these cigarettes were made by the Beech-Nut Packing Company. Now, let us get right down to cases on this and be blunt with each other. Do you yourself know of any instance where a Lorillard salesman did that?

A. Let us be frank.

R-X Q. 185. Absolutely.

A. I don't say what the Lorillard salesmen said, I don't know what the Lorillard salesmen said, all I know is what the retailers told us was their impression after the Lorillard salesman had left.

R-X Q. 186. Oh, then your whole answer was based

on hearsay and upon some retailer's mental impression, is that it?

A. My remarks were given as given to me by either my retail man or the dealer.

R-X Q. 187. You yourself could not name any Lorillard man that left such an impression, that you know of?

A. No, sir.

R-X Q. 188. And you yourself were never present when any Lorillard man left such an impression with a retailer?

A. No, sir.

R-X Q. 189. It was simply some sort of gossip that some retailer told you and without giving the man's name or anything else; is that it?

A. I don't know as it was gossip; it was just what he told me.

R-X Q. 190. Well, you yourself don't know of a single Lorillard man?

A. No, sir.

R-X Q. 191. Or a single instance where a Lorillard man deliberately told that those tobacco products were made by the Beech-Nut Packing Company, do you?

A. No, sir.

R-X Q. 192. And what they did tell you, was it some impression?

A. Yes, sir.

R-X Q. 193. And you don't know if those retailers ever took the trouble to read that package, do you?

A. No, sir.

R-X Q. 194. And you know Lorillard's name was on the packages of scrap tobacco and cigarettes?

A. Yes, sir.

R-X Q. 195. And you don't know if one of those retailers ever took the trouble to open up a carton of cigarettes, do you?

A. No, sir.

R-X Q. 196. Or to open up a carton of scrap tobacco?

A. No, sir.

R-X Q. 197. Or to look at the carton of scrap tobacco?

A. No, sir.

R-X Q. 198. What did you say this agent's name of yours was, Mr. Lewis?

A. Siesennop.

R-X Q. 199. You were not with him when he was talking to this retailer, were you?

A. No, sir.

R-X Q. 200. He works for the Beech-Nut Packing Company, this Mr. Siesennop?

A. Yes.

R-X Q. 201. And he brought that situation back to you?

A. Yes, sir, he told it to me the next day.

R-X Q. 202. And this Mr. Atkinson that you were speaking about, he is with the Beech-Nut Packing Company?

A. Yes, sir.

R-X Q. 203. What does he do?

A. He is working on this case under Mr. Hinton's instructions, I believe.

R-X Q. 204. He is a sort of inspector, is he?

A. Yes.

R-X Q. 205. He is from the home office at Canajoharie, N. Y., is he?

A. Yes, sir.

Deposition closed.

Signature waived.

CLARENCE W. SMITH, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Clarence W. Smith is my name; age, 27; occupation, canned foods broker.

Q. 2. Where is your place of business?

A. You mean the office where I work?

Q. 3. Yes.

A. 288 East Water street; 976 38th street, Milwaukee, is my new address. I just moved.

Q. 4. Are you acquainted with a Mr. Goldstein in Milwaukee?

A. I have met Mr. Goldstein.

Q. 5. And who is he?

A. I was introduced to him as a representative of the P. Lorillard Company.

Q. 6. And where was this?

A. In Kern & Sons cigar store, down here on East Water street.

Q. 7. Did you hear Mr. Goldstein make any statement about Beech-Nut cigarettes?

A. Why, I heard Mr. Goldstein make the statement in the presence of Mr. Lewis that "Beech-Nut cigarettes were quality goods, like the rest of the Beech-Nut line."

Q. 8. Was Mr. Lewis, who was present, the Mr. Lewis who is the division manager for the Beech-Nut Packing Company?

A. Yes, sir.

Q. 9. When Mr. Goldstein made this remark did he have Beech-Nut cigarettes with him?

A. He had a package and offered us a cigarette at the time.

Q. 10. Mr. Smith, when did I see you last?

A. About a week ago.

Q. 11. Since that time have you, of your own volition, made any inquiries from people about Beech-Nut cigarettes?

A. Why, on Sunday, this past Sunday, I was talking to my brother-in-law, who is quite a cigarette smoker and cashier of one of the leading banks here, and I asked him as to whether or not he ever knew that the Beech-Nut cigarettes, which he said he had smoked some, were packed by the P. Lorillard Company, and he said he did know it, but it was only recently he had found out they were put up by Lorillard, he was under the impression prior to that time they were put out by the Beech-Nut Packing Company.

Q. 12. I don't think it is permissible to say what people told you that they thought. I simply want any instances, if there have been any, where you asked somebody who made the cigarettes, and then I think you could state just what he said in direct answer to that question. Have there been any such instances as that?

A. Yes, there is just one instance that I know of. A friend of mine by name of William Enke, works over here in the Second Ward Bank; he was up to my house about two weeks ago when I asked him that question. He was smoking one—as a matter of fact it may have been a little longer than that, as a matter of fact, it was the same day the Beech-Nut cigarettes were put on the market here, I don't recollect what day that was, and I put the question to him and he said: "Yes, I bought them as being the Beech-Nut Packing Company cigarette." He said: "That was my opinion, I thought they were put out by the same people that put out Beech-Nut peanut butter."

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 13. Mr. Smith, as I understand it, you are in the food brokerage business?

A. Yes, sir; that is, the canned food brokerage business.

X-Q. 14. Do you handle in your business any of the products of the Beech-Nut Packing Company?

A. No, sir.

X-Q. 15. You don't have any dealings with them whatsoever?

A. No, sir, I am not in the grocery line; the brokerage game is an entirely different line of business.

X-Q. 16. So you don't come into contact, either directly or indirectly, with the Beech-Nut Packing Company, do you?

A. No, we do not.

X-Q. 17. And you have never done a stroke of business for those people?

A. No, sir.

X-Q. 18. Just tell me how you do your business in this food brokerage line.

A. Canned food line?

X-Q. 19. Yes, just briefly.

A. Our line of business is very similar to the stock brokerage business. We represent certain canners and do business for them, that is, sell their goods on a brokerage basis. That is about the sum and substance of the business, method of our doing business.

X-Q. 20. So your business brings you into contact with the food products line?

A. Oh, yes, yes, sir.

X-Q. 21. But it doesn't bring you into contact with the tobacco business, does it?

A. No, sir.

X-Q. 22. You don't handle any tobaccos at all?

A. No, sir.

X-Q. 23. You regard those as entirely distinct classes of goods, tobaccos and foods?

A. Yes.

X-Q. 24. They are different lines of business?

A. I wouldn't say that, not out in this territory they are not, because the average jobber in Milwaukee handles tobacco as well as food stuffs.

X-Q. 25. You don't handle tobacco?

A. Yes, but I am not a jobber, I am in the brokerage business.

X-Q. 26. I mean in your brokerage business?

A. No.

X-Q. 27. But you know that brokers handle tobacco stocks and tobacco goods, don't you?

A. I am not familiar with any of them, no, sir, not in this town here.

X-Q. 28. That is, as far as you are concerned, you don't know anything about the tobacco business at all; is that right?

A. That is right.

X-Q. 29. But if you wanted to buy, as an ordinary purchaser, if you wanted to purchase some chewing gum you would not take a package of cigarettes in place of the gum you asked for, would you?

A. No, sir.

X-Q. 30. And you would regard them as entirely distinct goods, wouldn't you? You couldn't be fooled for a minute, could you?

A. No, sir.

X-Q. 31. And you think a man who would take cigarettes or take scrap tobacco, when he wanted chewing gum or bacon, was crazy, wouldn't you?

A. Yes, I would have to draw that conclusion.

X-Q. 32. Now, when did you first meet this Mr. Goldstein?

A. Oh, I should say it was about three weeks ago; that is approximate, now, I am not just certain when I met him.

X-Q. 33. And that is the first time you ever met him, is it?

A. That is the first time I was ever introduced to him. I saw him before on the street.

X-Q. 34. And this place where you met him, what line of business is that?

A. In the tobacco business, cigar store.

X-Q. 35. Wholesale place?

A. Retail.

X-Q. 36. How did you happen to be in there?

A. I just purchased some cigars.

X-Q. 37. Did you meet Mr. Lewis in there, or was he in there when you went in?

A. Mr. Lewis was in there when I went in.

X-Q. 38. And you ran into Mr. Goldstein in this store; is that it?

A. Yes, sir.

X-Q. 39. And you got talking about the Beech-Nut products, Beech-Nut cigarettes?

A. Yes.

X-Q. 40. Did you know he was a Lorillard man when you went in with Mr. Lewis in that store and met him?

A. No, sir.

X-Q. 41. Did Mr. Lewis introduce you to him?

A. Mr. Lewis introduced me to him, yes, sir.

X-Q. 42. And Mr. Lewis told you that he was with the Lorillard Company, that is, that Mr. Goldstein was with the P. Lorillard Company?

A. Yes, sir.

X-Q. 43. So Mr. Lewis told you that right before Mr. Goldstein?

A. Yes, sir.

X-Q. 44. And then in the course of conversation this matter of cigarettes came up and he offered you a Beech-Nut cigarette, did he?

A. He didn't offer me a cigarette. As I recollect, he offered it to Mr. Lewis.

X-Q. 45. Knowing that Mr. Lewis was a Beech-Nut Packing Company man, he offered him a cigarette?

A. Yes, sir.

X-Q. 46. They were on friendly terms, evidently?

A. Oh, yes.

X-Q. 47. Mr. Lewis and Mr. Goldstein, I mean.

A. Yes.

X-Q. 48. And he didn't say these cigarettes were made by the Beech-Nut Packing Company, did he? Mr. Goldstein didn't say that?

A. No, sir.

X-Q. 49. He said nothing at all that would indicate that he thought they were made by the Beech-Nut Packing Company, did he?

A. Well, I would draw that conclusion from the statement he made to me; if he had made it to anybody else they would have drawn that conclusion.

X-Q. 50. That is, drawn the conclusion they were made by the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 51. Now, I would just like you to give me, as close as you can, his exact words that would lead a person to draw that conclusion. What were Mr. Goldstein's exact words?

A. He said they were quality products, like the rest of the Beech-Nut line.

X-Q. 52. He didn't say the Beech-Nut food products line, did he?

A. No, sir.

X-Q. 53. He didn't say the Beech-Nut chewing gum line?

A. No, sir.

X-Q. 54. He didn't say the Beech-Nut candy line?

A. No.

X-Q. 55. He might have meant the Beech-Nut scrap tobacco line, for all you know, might he not, being a tobacco man?

A. Possibly.

X-Q. 56. Well, did this man Goldstein look like an intelligent man, a man of ordinary commonsense?

A. Well, he had the average intelligence, I would say, yes.

X-Q. 57. Now, you were speaking about drawing a conclusion. In the ordinary course of human conduct, with the Beech-Nut candy company man standing right at your side, and being the man that introduced you to Mr. Goldstein, the Lorillard man, don't you think it entirely improbable that Mr. Goldstein would attempt in any way to misrepresent this cigarette as the product of the Beech-Nut Packing Company with the Beech-Nut Packing Company's division manager standing right there before him and ready to deny it? He couldn't have done that seriously, do you think?

A. Well, that is more than I can say.

X-Q. 58. Well, now, you yourself, just take for example, Mr. Smith, that you are representing, say, the McCormick Harvester people, and you bring in a friend of yours to the establishment of a customer of the McCormick Harvester people who was not selling the harvester, you would not expect that other man to mislead that other man right in front of the McCormick man, would you?

A. No, I wouldn't expect him to.

X-Q. 59. So there was no misrepresentation on Mr. Goldstein's part, so far as you could understand?

A. Well, it was kind of misleading, in a way.

X-Q. 60. He just used the word "Beech-Nut line," didn't he?

A. "Like the rest of the Beech-Nut line," yes, sir.

X-Q. 61. Now, presuming the Beech-Nut line of food products of the Beech-Nut Packing Company to be a high class of goods, might not it have been probable that he meant his cigarettes were as good in the tobacco line as the other Beech-Nut food products were in the food line?

A. Yes, he may have wished to interpret that.

X-Q. 62. Or, as I said before, he might have interpreted in connection with the Beech-Nut scrap tobacco, because that is a Beech-Nut line. He might have done that, mightn't he?

A. He made a rather broad statement to interpret it just that way.

X-Q. 63. But I am going on the presumption, as I understood you to testify, that the division manager of the Beech-Nut Packing Company was standing there. That would be the last moment in the world an ordinary man would make a misrepresentation, wouldn't it?

A. It ought to be.

X-Q. 64. It would seem insane for him to do otherwise, wouldn't it, to you, when the Beech-Nut man was right before him, ready to deny it and catch him up?

(No reply.)

X-Q. 65. That would have seemed far fetched, wouldn't it?

A. I would think so, yes.

X-Q. 66. You didn't take the package of cigarettes in your hands, did you?

A. No, sir, I didn't.

X-Q. 67. But he offered Mr. Lewis a package?

A. Yes.

X-Q. 68. Will you read whose name is on that package (indicating)?

A. "P. Lorillard Company."

X-Q. 69. You don't find the word "Beech-Nut Packing Company" any place on that package, do you?

A. No.

X-Q. 70. It was a package like this that Mr. Goldstein showed Mr. Lewis, wasn't it (indicating)?

A. Yes, sir.

X-Q. 71. So you had before you and Mr. Lewis, of the Beech-Nut Packing Company, the package of cigarettes with "Lorillard" on it, and Mr. Lewis knowing that Mr. Goldstein is the Lorillard man, and you think Mr. Goldstein knowing Mr. Lewis is the Beech-Nut Packing Company man, with the stage set in that way, you don't think a sensible man would represent that to be the Beech-Nut Packing Company's package, do you?

A. He ought not to.

X-Q. 72. It would seem silly, wouldn't it, when it could be so easily disproven, with the facts right in front of you, wouldn't it? Doesn't that strike you that way?

A. Oh, yes.

X-Q. 73. All Mr. Lewis would have to do is to take that package and hand it to you and show Lorillard's name on it, and show it was not theirs, and say: "I have been handling Beech-Nut Packing Company's goods for so many years, and it is not ours," and the man would have had no explanation, Mr. Goldstein, would he?

A. No.

X-Q. 74. You don't smoke these Beech-Nut cigarettes yourself?

A. I smoke no cigarettes at all.

X-Q. 75. You don't chew scrap tobacco, do you?

A. No, sir.

X-Q. 76. You never saw a product of the Beech-Nut Packing Company put up like a package of cigarettes, did you (indicating)?

A. No, sir.

X-Q. 77. And you never saw a product of the Beech-Nut Packing Company like a package of scrap tobacco like this Exhibit 8, did you (indicating)?

A. No, sir.

X-Q. 78. So far as you know the Beech-Nut Packing Company never put out any tobacco products, did they?

A. No, sir.

X-Q. 79. You said—was it your brother-in-law?

A. Yes.

X-Q. 80. (Continuing.) Thought they were Beech-Nut Packing Company cigarettes when he bought them?

A. Yes, sir.

X-Q. 81. You don't know personally whether he ever took the trouble to read the printed matter on the package and see who they were made by, do you?

A. I do not.

X-Q. 82. And likewise, in any other instance that you might have mentioned here, I think you did mention one more, you don't know if that party ever took the trouble to look at the package to see whose name was on it, do you?

A. No, sir.

Mr. Cavanagh: I think that will be all.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 83. You have testified that Mr. Goldstein, exhibiting a package of cigarettes, said: "These cigarettes are quality goods like the rest of the Beech-Nut line." Now, of course, any statement is susceptible of a number of interpretations, some of which have been suggested by Mr. Cavanagh, as, for instance, that Mr. Goldstein meant that the Beech-Nut cigarettes were as good in the tobacco line as the Beech-Nut Packing Company's goods were in some other line. I want to test

the question in this way: If a P. Lorillard representative displayed Beech-Nut cigarettes and made exactly the statement that Mr. Goldstein made to an average person who knew nothing about the situation, what would you say the average person would have understood from that statement?

Mr. Cavanagh: Just one minute. That question is objected to as calling for an opinion, as based upon circumstances which are not proven here. The record conclusively shows that this witness was talking to a Lorillard man in front of a Beech-Nut man, and any question should be based upon that condition of affairs.

Mr. Hinton: I think it is a perfectly fair test of the statement, and it is not to be supposed that Mr. Goldstein would be any more careful with his statements in talking to average persons than he would when talking to a Beech-Nut Packing Company representative.

Mr. Cavanagh: Notice is hereby given that a motion will be made in proper time to strike out all testimony bearing upon the situation of affairs suggested in the last question propounded by counsel for Beech-Nut Packing Company and it is stipulated that this notice will stand for any similar questions relating to the same conditions.

(Last question read to the witness.)

Mr. Hinton: R-D. Q. 84. Do you understand the question?

A. Yes, sir. Why, I would say that the average person would conclude that Beech-Nut cigarettes were made by the same people who put out most of the other Beech-Nut products, such as peanut butter.

R-D. Q. 85. I understand from Mr. Cavanagh that you were asked specifically whether you would accept

a package of Beech-Nut chewing gum in place of a package of Beech-Nut cigarettes. Of course you answered "No." I want to ask you whether, if you were offered a package of Beech-Nut cigarettes bearing what appeared to you to be the same label as was on the chewing gum, you would accept those cigarettes as a product of the same people who made the chewing gum?

A. I don't quite get that question.

(Question read.)

Mr. Hinton: Assuming, of course, that you did not know the facts.

Mr. Cavanagh: The question is objected to as immaterial and irrelevant, as there is nothing in any exhibit or record in this case to show that there is any cigarette package bearing any chewing label similar to that used by the Beech-Nut Packing Company.

(Last question read as follows:

"Q. I understand that Mr. Cavanagh asked you specifically whether you would accept a package of Beech-Nut chewing gum in place of a package of Beech-Nut cigarettes. Of course, you answered: 'No.' I want to ask you whether, if you were offered a package of Beech-Nut cigarettes bearing what appeared to you to be the same label as was on the chewing gum, you would accept those cigarettes as a product of the same people who made the chewing gum, assuming, of course, that you did not know the facts?")

A. Yes, because I very seldom look for the producer's name.

Mr. Hinton: That is all.

Re-Cross Examination by Mr. Cavanagh.

R-X Q. 86. Now, Mr. Smith, one thing is certain: When you left this store, after your conversation with the Lorillard man in the presence of Mr. Lewis, you certainly were not under the impression those cigarettes were put out by the Beech-Nut Packing Company, were you?

A. No, sir.

R-X Q. 87. You knew they were P. Lorillard's cigarettes, didn't you?

A. Yes, sir.

R-X Q. 88. So, as far as what might or might not have been, it did not affect you, you knew they were Lorillard's cigarettes?

A. Yes, sir.

R-X Q. 89. I understood you to say, in regard to the chewing gum and the accepting of chewing gum and cigarettes as the product of the same company, that you never took the trouble to read what was on the label or printed matter?

A. No, sir.

Mr. Cavanagh: That is all.

Re-Direct Examination by Mr. Hinton.

R-D. Q. 90. Did you know before you went into the store where Mr. Goldstein made the remark, that the Beech-Nut cigarettes were not the product of the Beech-Nut Packing Company?

A. Did I know before?

R-D. Q. 91. Yes.

A. Yes, sir.

Deposition closed.

Signature waived.

THEODORE MUELLER, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Will you please state your name, age, residence and occupation?

A. Theodore Mueller; age, 44; residence, 443 64th Avenue; occupation, druggist.

Q. 2. Are you proprietor of a drug store?

A. I am.

Q. 3. Where is your drug store located?

A. I have two stores.

Q. 4. Where are they each located?

A. One at 6324 Greenfield Avenue, and one at 471 East Water Street.

Q. 5. Now, I show you a package of Beech-Nut cigarettes, in this case as Exhibit No. 1. Have you bought and sold those cigarettes in your store?

A. I have.

Q. 6. I wish you would tell me the circumstances under which you claim you ordered these cigarettes.

A. I was approached by a representative from a local tobacco firm and he asked me if we wanted any Beech-Nut cigarettes, and when I heard the name "Beech-Nut" cigarettes I took it for granted it was manufactured by the same firm that made other Beech-Nut products. Of course, we sell lots of Beech-Nut gum and Beech-Nut mints and other Beech-Nut products, so I gave him an order for 1000 to start out with and I asked him how they were selling, and he said they didn't have them in yet but that they expected them shortly and would send them over, and all this time I was under the impression that that was an article manufactured by the same firm

that makes the Beech-Nut gum. And when I received the package I discovered that it was not a Beech-Nut product, not an article manufactured by the same firm that makes Beech-Nut gum.

Q. 7. What do you mean by the "package"—the carton, or what? You said when you received the package, you mean the little package of cigarettes or the carton or the big container, or what?

A. Well, I don't remember that. To tell you the truth, if you asked me now I couldn't tell you what is on the package.

Q. 8. On the little package?

A. On the package, yes.

Q. 9. Could you tell me now whether the name of the manufacturer is written on the little package of cigarettes containing twenty cigarettes?

A. The manufacturer's name?

Q. 10. Yes.

A. I don't know.

Q. 11. Now, you have testified that when this man offered you Beech-Nut cigarettes you immediately ordered a thousand of them, and that you were under the impression that they were a product of the Beech-Nut Packing Company. What, if anything, did that belief on your part have to do with your ordering the cigarettes?

A. Well, we have sold Beech-Nut gum for some years, and it was always a good seller, and I thought anything with the Beech-Nut label on ought to be a good seller. We have had a very good sale on the gum and also on the confects.

Q. 12. How long have you personally sold cigarettes over the counter?

A. Oh, over twenty years.

Q. 13. Have you sold Camel cigarettes over the counter?

A. Yes, a good many.

Q. 14. How many packages did you suppose you have handed out?

A. It would be pretty hard telling; I would have to look over my bills.

Q. 15. What is written on a package of Camel cigarettes underneath the picture of a Camel, do you know?

A. No, I don't.

Q. 16. How many little packages of Lucky Strike cigarettes do you suppose you have handed out? Of course, you can't give the exact number, but approximation—would it be one hundred or five hundred?

A. It would be one hundred thousand or more than that, I would say. We buy them in case lots.

Q. 17. What is written on a package of Lucky Strike cigarettes underneath the red panel with the name "Lucky Strike"?

A. I don't know.

Q. 18. Do you have any difficulty in identifying a package of Camel cigarettes or Lucky Strike cigarettes when you want to get them to hand to a customer?

A. To identify that package?

Q. 19. No, I mean to pick them out from other brands.

A. No.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 20. Mr. Mueller, did you ever hear of the P. Lorillard Company, tobacco manufacturers?

A. Yes, sir.

X-Q. 21. They are very large tobacco manufacturers, aren't they?

A. Yes, sir.

X-Q. 22. And you have handled the Murad, the Mogul and Egyptian Deity cigarettes made by that company?

A. Yes, sir.

X-Q. 23. Different brands?

A. I don't know whether made by that company or not.

X-Q. 24. But you have handled those cigarettes?

A. We sell them, yes.

X-Q. 25. So long as a cigarette brand is a good seller and is made by a reputable concern like Lorillard Company, you would not have any objection to handling that in your store, would you?

A. We are in the business to sell anything that sells.

X-Q. 26. That is what I mean, and if a product, for example a cigarette, is made by a well-known and established manufacturer, and it is a good seller, you have no objection to handling that, have you?

A. No, sir.

X-Q. 27. And as I understand it, when you first ordered these cigarettes and you received them you noticed they were not made by the Beech-Nut Packing Company, didn't you?

A. Yes.

X-Q. 28. As a man purchasing goods you looked and saw they were not a Beech-Nut brand?

A. Yes.

X-Q. 29. I show you this package of cigarettes, Exhibit No. 1, P. Lorillard Company's name is on there, isn't it, as a Lorillard product?

A. Yes.

X-Q. 30. I also show you a carton or box in which the cigarettes, the individual packages, are placed in bulk. Lorillard's name appears on that package, too, doesn't it?

A. Yes, sir.

X-Q. 31. And without going into any details, it was the general appearance and the name on the thing that

led you to know it was not a Beech-Nut Packing Company product, wasn't it?

A. No, the name "Beech-Nut" is so prominent on the package that would strike my eye before anything else.

X-Q. 32. But I am speaking about what did strike your eye that you knew it was not the Beech-Nut brand.

A. After I started to handle them, then I noticed it.

X-Q. 33. You noticed they were not the Beech-Nut people's product?

A. Yes.

X-Q. 34. So you did not labor under any misapprehension when you got those, as to whose cigarettes they were?

A. I was under a misapprehension when I ordered them.

X-Q. 35. The agent did not tell you they were made by the Beech-Nut Packing Company?

A. No, sir, I didn't ask him.

X-Q. 36. You didn't ask him and he didn't tell you?

A. No, sir.

X-Q. 37. You simply told him you would take Beech-Nut cigarettes?

A. Yes.

X-Q. 38. And that man that sold you the Beech-Nut cigarettes—did the man who sold them represent a reputable concern in town?

A. We have found them reputable.

X-Q. 39. What is the name of that concern?

A. Sher & Vinograd on Biddle street.

X-Q. 40. In your dealings you always found those people fair and reputable?

A. I haven't dealt with that firm very long, I have only been in this store since the first of July and we have had occasion to buy from them three or four times in that length of time.

X-Q. 41. But, I mean so far as your dealings with them have been, you have found them to be a reputable concern?

A. Yes.

X-Q. 42. When you opened the carton of cigarettes, did you notice a printed slip in there like this (indicating)?

A. I may have noticed it, but I never read it. I may have seen it. I never pay any attention to that.

X-Q. 43. You never pay any attention to it?

A. No.

X-Q. 44. But you did pay enough attention to see those cigarettes were not Beech-Nut Packing Company's when you got them?

A. I noticed that, yes.

X-Q. 45. Do you handle Beech-Nut scrap tobacco?

A. No.

X-Q. 46. A cigarette package has an individuality all its own, so far as its shape and general appearance goes, hasn't it, so you couldn't have any trouble in picking out a cigarette package from a package of chewing gum, would you?

A. I guess you can tell the difference.

X-Q. 47. If a man came into your store and asked you for a package of Beech-Nut cigarettes, would you hand him a package of Beech-Nut chewing gum in place of the cigarettes he asked for?

A. Not if I was awake.

X-Q. 48. You would think he was crazy if he took chewing gum for cigarettes, wouldn't you?

A. Yes, I should think so. I suppose he would think I was crazy if I gave them to him.

X-Q. 49. And you yourself wouldn't be deceived or confused into accepting chewing gum when you wanted cigarettes, would you?

A. No.

X-Q. 50. And that is because they are an entirely different class of goods; isn't that so?

A. Yes.

X-Q. 51. You never bought any tobacco products or cigarettes from the Beech-Nut Packing Company, did you, direct?

A. Don't smoke cigarettes.

Mr. Cavanagh: I think that is all.

Redirect Examination by Mr. Hinton.

R-D. Q. 52. Mr. Mueller, your attention has been called on cross-examination to this carton, Lorillard's Cross-Exhibit—I think it is No. 6—being a carton containing ten little packages of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1. Do you know whether all of the cartons like this you have received have the word "Lorillard's" written at the top?

A. I couldn't say.

R-D. Q. 53. And on the end (indicating)?

A. I couldn't say.

R-D. Q. 54. So far as these cartons go, you have never looked at all of the cartons that were put out, have you?

A. Never looked at any of them.

R-D. Q. 55. And this carton is like those you got, as near as your recollection goes?

A. I don't know, I would have to look at it again.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

J. E. BRIMAKOW, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

By Mr. Hinton: Q. 1. Please state your name, age, residence and occupation.

A. J. E. Brimakow; thirty-eight years of age; residence, 980 35th street; occupation, manager of the cigar department of the Kiefer Drug Company.

Q. 2. Have you sold Beech-Nut cigarettes similar to Plaintiff's Exhibit 1, which I now show you, in that store?

A. I have.

Q. 3. How long have these cigarettes been on sale in this territory, as far as you know?

A. As far as I know, about two months.

Q. 4. When they were first offered to you, how many did you order?

A. I ordered one case.

Q. 5. How many would that be?

A. That is 10,000.

Q. 6. Is this the average order of a new brand of cigarettes, or wouldn't you consider that a large order?

A. That I would consider, for this place, a large order.

Q. 7. Why did you make such a large order?

A. Being the first one, and on account of the name "Beech-Nut." If it was another one I wouldn't order any at all until they were in town.

Q. 8. Since you have been selling these cigarettes have any comments, remarks or inquiries about the cigarettes been made to you by your customers?

A. Yes.

Q. 9. What is the nature of these remarks?

A. "Made by the Beech Nut Products Company?" and, "If it is as good as the gum, it must be a good cigarette."

Q. 10. Have you heard that kind of remarks more than once?

A. About half a dozen times.

Q. 11. How many cases of these cigarettes have you sold?

A. This is my fifth case.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. This store that you are the manager of the cigar department, is a large drug store, is it not?

A. Well, no, not considered as a large drug store, but as one of the prominent corner cigar stores doing a legitimate business under a full price, not a cut rate. It is one of the largest Rexall stores in the city.

X-Q. 13. And the title of it is the Kiefer Drug Company?

A. Kiefer Drug Company, yes, sir.

X-Q. 14. And that is located where?

A. At 238 West Water street, Milwaukee.

X-Q. 15. How long have you been in charge of the cigar department?

A. I have been in charge just exactly four months. I was with the Central Drug Company at first.

X-Q. 16. Do you know of the P. Lorillard Company?

A. I know them.

X-Q. 17. You have been selling, since you have been here, scrap tobacco known as the "Beech-Nut Scrap"?

A. Beech-Nut scrap, yes.

Mr. Hinton: That is objected to as outside of the line of direct examination.

Mr. Cavanagh: X-Q. 18. And you know that the cigarette package has on it the name "P. Lorillard Co."?

A. P. Lorillard, yes, sir.

X-Q. 19. And that cigarette comes in cartons like this one I show you (indicating)?

A. Yes.

X-Q. 20. Which is marked in this case as Defendant's Cross-Exhibit 9?

A. Yes.

X-Q. 21. And that has the name "P. Lorillard, Beech-Nut" on it?

A. Yes, sir.

X-Q. 22. And in the carton there appears a yellow slip, which I now mark for identification as Defendant's Cross-Exhibit No. 10, and which bears the words "Lorillard's Beech-Nut"?

A. Yes, sir.

X-Q. 23. And when you have a carton of these cigarettes open in your show window, you have this yellow sign in it, do you not?

A. Yes, sir.

X-Q. 24. And that is the way you put it in your window (indicating)?

A. That is the way I always put them in the window, yes.

X-Q. 25. You know the Lorillard Company is a very large tobacco concern?

A. Yes.

X-Q. 26. They handle a good large line of cigarettes?

A. High-grade cigarettes.

X-Q. 27. You have a good sale of their products?

A. We have a good sale of their products.

X-Q. 28. In other words, you have absolutely no objection to ever putting in a P. Lorillard Company tobacco product, have you, because their reputation is good?

A. Sure.

X-Q. 29. Did you look at these packages when you first received them?

A. I did.

X-Q. 30. You saw the name "Lorillard's" on them?

A. Yes, I did.

X-Q. 31. You knew they were Lorillard's cigarettes?

A. Yes.

X-Q. 32. You were perfectly willing to go on and sell Lorillard's goods?

A. Yes.

X-Q. 33. If you went into a store you wouldn't purchase chewing gum or candy, if you wanted cigarettes, would you? That is, I will put the question like this: If you went into a store and wanted to get a package of Lorillard's Beech-Nut cigarettes, you wouldn't be fooled by the salesman into taking a package of chewing gum in the place of cigarettes, would you?

A. No.

X-Q. 34. An entirely different class of goods?

A. Yes, sir.

X-Q. 35. You knew that the scrap tobacco was a Lorillard's tobacco?

A. Always did know it.

X-Q. 36. You would naturally presume this was the same thing, the Lorillard cigarette?

A. Yes, sir.

Redirect Examination by Mr. Hinton.

R-D. Q. 37. Did you know that the cigarettes were not the Beech-Nut Packing Company product before you received them?

A. I knew it.

R-D. Q. 38. That is, before the carton and package came in?

A. Before the carton came. I was told by the P. Lorillard representative they were going to take big. And there is another statement: This is one will take big, that we were compelled to uphold the price on this cigarette, if not we would be discontinued handling it on account of that name "Beech-Nut."

Deposition closed.

Signature waived.

State of Wisconsin, County of Milwaukee, ss.

I, Henry F. Weller, a Notary Public within and for the State and County aforesaid, do hereby certify that the foregoing depositions of Mrs. Amelia Petersen, H. N. Petersen, O. M. Wesling, Miss C. Heller, Miss M. Springer, Carl W. Nemetz, E. J. McFadzen, William C. Weigel, Henry W. Foote, E. R. Lewis, Clarence William Smith, Theodore Mueller and J. E. Brimakow were taken before me, in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and agreement at Room 312, Wisconsin Hotel, Milwaukee, Wisconsin, beginning at 11:00 o'clock A. M., November 4, 1921; that each of the aforesaid witnesses was by me duly sworn; that the testimony of said witnesses was taken by me in shorthand and thereafter reduced by me to typewriting; that the foregoing pages contain a true and accurate transcript of my stenographic notes; that the plaintiff was represented by Sebastian Hinton of Offield, Poole, Hinton & Scott; that the defendant was represented by Richard B. Cavanagh of Meyers, Cavanagh, Whitehead & Hyde, during the taking of said testimony; that the testimony was concluded November 5, 1921 at about 3:00 o'clock P. M.; and signature of each witness was waived; that I am not connected by blood or marriage with either of said parties or interested directly or indirectly in the matter in controversy.

I further certify I have been paid the sum of for taking, transcribing and certifying the foregoing testimony, and that the same is a fair, just and reasonable charge.

HENRY F. WELLER,
Notary Public in and for
Milwaukee County, Wisconsin.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Depositions taken pursuant to notice and by agreement of counsel by and before Leo M. Fox, a Notary Public and Court Reporter, acting as Special Examiner by consent of counsel, at the office of Leo M. Fox, 511 Produce Exchange Bldg., Toledo, Ohio, Wednesday, November 8, 1921, beginning ten A. M.

Present: Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company, plaintiff. Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company, defendant.

OSCAR JOSEPH, a witness produced on behalf of plaintiff, pursuant to notice, by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Oscar Joseph; 32; 1129 Summit St., Toledo, Ohio.

Q. 2. Your occupation?

A. I am in the grocery business, grocery and meat market.

Q. 3. Where is your store located?

A. At the present time, 502 Cherry.

Q. 4. Do you sell tobacco products in this store?

A. Yes.

Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case, Plaintiff's Exhibit No. 3; have you sold this product in your store?

A. A number of years.

Q. 6. How long have you sold it?

A. Between six and seven years.

Q. 7. How much have you sold, approximately—is it a good deal or little?

A. Oh, quite a bit. I cannot remember how much, but we sell an awful bunch of it.

Q. 8. During this six or seven years, that you have been selling this product, whose product did you think it was?

A. Of course the Beech-Nut people.

Q. 9. Do you know who makes that product?

A. I did not really know that always—I thought the Beech-Nut people.

Q. 10. I was in here about fifteen minutes ago and we have just come back to take this deposition. Did you in the meantime, ask a customer anything about this?

A. Yes.

Q. 11. And what did you ask him?

A. I asked him, "Who do you think makes the Beech-Nut tobacco?" He said, "Of course, the Beech-Nut people."

Q. 12. Have you previously heard this matter discussed by the customer?

A. Quite a few.

Q. 13. What have they said?

A. They all say—they talk about who is making the tobacco, they don't stop to think to read the name, they think it is the Beech-Nut people.

Q. 14. Have you heard this discussed a little or a good deal?

A. Quite often.

Q. 15. During the past six or seven years?

A. During the time I was doing business.

Q. 16. Do you know the name of this customer whom you just asked about this?

A. No, I can get you his name easy, he used to work for B. A. Berry; he is working for Wilson Company now.

Q. 17. What is their line?

A. Meat business.

Q. 18. You know him personally?

A. Yes.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 19. Do you do the buying for this concern?

A. Yes.

X-Q. 20. From whom do you buy this Beech-Nut tobacco?

A. We buy it down town now.

X-Q. 21. From the jobber?

A. Yes.

X-Q. 22. You do not buy it from the Beech-Nut Packing Company?

A. No.

X-Q. 23. Never did?

A. No.

X-Q. 24. You never heard of the Beech-Nut Tobacco Company selling food products?

A. No, don't know anything about it.

X-Q. 25. You never heard of it?

A. No.

X-Q. 26. You have bought stuff from the Beech-Nut Packing Company salesmen?

A. No, we buy everything down town.

X-Q. 27. You never took the trouble to read the writing on a package of Beech-Nut scrap?

A. No.

X-Q. 28. You have heard of the P. Lorillard Tobacco Company?

A. Yes, I have heard of them, sure.

X-Q. 29. Do you see Lorillard's name on there (Exhibiting Exhibit 3 to witness)?

A. Yes, of course, if you stop to read.

X-Q. 30. You never bought any of the Beech-Nut Packing Company's goods, that is, their food products, or chewing gum, that was put up like a package of scrap tobacco?

A. Not like the package—same name, everybody thinks it is the same firm.

X-Q. 31. You never saw that name, Lorillard's?

A. No.

X-Q. 32. You never bought any food products or chewing gum that looked like a package of cigarettes?

A. No, not that looks alike; they are different packages.

X-Q. 33. If a man came in your store here, and he wanted to buy some Beech-Nut bacon, or he wanted to buy some Beech-Nut chewing gum, you would not hand him this package of Beech-Nut scrap tobacco for the chewing gum?

A. No. He will tell what he wants, Beech-Nut tobacco, or gum, or bacon.

X-Q. 34. You would think he was crazy if he would take the tobacco instead of the bacon?

A. Yes, he will think I am crazy if I give him tobacco instead of bacon.

X-Q. 35. That is because they are entirely different goods?

A. Yes.

X-Q. 36. This Beech-Nut tobacco is a very good seller?

A. Yes.

X-Q. 37. You know a tobacco concern like Lorillard's, that handles Murads, Moguls and Egyptian Deities, that is a good concern?

A. Yes.

X-Q. 38. You have no objection to handling their goods?

A. No.

X-Q. 39. So far as your business goes, as long as this tobacco is a good seller, it would not make any difference whether it is made by Lorillard or the Beech-Nut Packing Company?

A. No, it would not make any difference to me.

X-Q. 40. As long as it is a good seller?

A. Yes.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 41. Did you know Lorillard Company made the Murad cigarettes before Mr. Cavanagh mentioned it?

A. No, I did not really know.

R-D. Q. 42. Who makes the Egyptian Deity cigarettes, do you know?

A. I don't know.

R-D. Q. 43. Do you know who makes the Camel cigarettes or Fatima?

A. No, by God, I don't remember it; I used to remember all the names of the firms.

R-D. Q. 44. Did you ever notice this name, Lorillard, on the package?

A. If you start to read it.

R-D. Q. 45. Let me ask this question: Did you ever notice the name "Lorillard" on this package before Mr. Cavanagh showed it to you?

A. No.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 46. Then you never took the trouble to investigate or find out who made Beech-Nut scrap tobacco?

A. No, I never paid any attention to it.

R-X Q. 47. It did not make a bit of difference to you who made it, did it?

A. No, of course not.

R-X Q. 48. But you have heard of the Murad cigarettes?

A. I have sold them, I have sold the Murad cigarettes.

Recross-examination closed.

Deposition closed.

Signature waived.

MIKE SABA, a witness produced in behalf of plaintiff, pursuant to notice by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. What is your name, age, residence and occupation?

A. Mike Saba; 1129 Summit street.

Q. 2. You are a partner with Mr. Oscar Joseph in the grocery and meat market?

A. Yes.

Q. 3. Located at 502 Cherry street, Toledo, Ohio; is that correct?

A. Yes.

Q. 4. Do you handle tobacco products in this store, Mr. Saba?

A. Yes.

Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case Plaintiff's Exhibit No. 3; have you sold this tobacco over the counter?

A. Yes, lots of it.

Q. 6. How long have you sold it over the counter?

A. Six or seven years. I used to be on the corner over there, and I moved here.

Q. 7. Now, during those six or seven years you sold this tobacco over the counter, whose product did you think it was?

A. I thought it was the same people—Beech-Nut chewing gum, all the same company.

Q. 8. Did you ever hear any of your customers talk about this tobacco, and who made it?

A. I heard sometime one fellow, he thought chewing gum and Beech-Nut tobacco all one kind, the same people make it, that is all I heard, all I know.

Q. 9. I understand the others did not discuss the question with you, the other customers?

A. Yes.

Q. 10. Have you ever told your customers about who makes this tobacco?

A. No, I did not tell them—I thought the same company made them. You asked me if I thought the Beech-Nut chewing gum and tobacco were made by the same people. I said I do not know, I think it is one people. You told me yesterday. I said I did not know that before.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 11. You never took the trouble to find out who made the tobacco, did you?

A. No.

X-Q. 12. You never read the package?

A. No, I do not read very much, and I did not look.

X-Q. 13. You did not pay any attention to it at all?

A. No.

X-Q. 14. It is a good selling tobacco, isn't it?

A. Yes, it is a good selling tobacco.

X-Q. 15. As long as it is a good selling tobacco, it don't make any difference to you who made it?

A. Yes, that is right; if it is a good seller.

X-Q. 16. A good seller, that is all you are interested in?

A. Yes.

X-Q. 17. You have been finding this to be a good selling tobacco for six or seven years?

A. Yes.

X-Q. 18. And there is quite a demand for it?

A. Yes.

X-Q. 19. If a customer came in this store and he wanted some chewing gum, or wanted some Beech-Nut bacon, you would not give him a package of Beech-Nut scrap tobacco for the bacon?

A. No; if he wanted Beech-Nut bacon or gum, I would ask him what he wanted.

X-Q. 20. You would not confuse him by giving tobacco for bacon?

A. Yes, when he wants bacon, he says bacon, and if he wants chewing gum, he says chewing gum; or if he wants tobacco, he says tobacco.

X-Q. 21. That is, because they are entirely different goods, tobacco is not like chewing gum?

A. No.

X-Q. 22. Chewing gum is not put up like this tobacco package?

A. No.

X-Q. 23. It don't look like that?

A. No.

X-Q. 24. You don't know whether these customers ever took the trouble to find out who made the tobacco, do you?

A. There is some fellow might.

X-Q. 25. But you never took the trouble to find out who made it?

A. No.

Cross-examination closed.

Deposition closed.

Signature waived.

JOHN JOZSA, a witness produced in behalf of plaintiff, pursuant to notice, by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is John Jozsa; age, 36; residence, 2344 Calidonia.

Q. 2. Your occupation?

A. Meat cutter and grocery clerk.

Q. 3. Where are you employed, Mr. Jozsa; what store are you employed at?

A. I worked in Jacobs' grocery on Front street, and in Rachies', on Adams—it is not in business any more; I worked at 324 South street. That place is closed now, but I worked there.

Q. 4. Where are you now employed?

A. Saba & Joseph.

Q. 5. That is at 502 Cherry street?

A. Yes.

Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Have you in the course of your working in these various stores, including this one, sold this tobacco over the counter?

A. Yes, sir, a lot of times.

Q. 7. How long have you sold it over the counter?

A. The first time I worked in the grocery store was in 1911 and 1912. That is the first time I worked in the grocery in connection with meat.

Q. 8. In that store?

A. Yes.

Q. 9. How long have you been working in this store here?

A. Since July.

Q. 10. 1921?

A. Yes.

Q. 11. How long did you work in that first grocery store?

A. Just even two years.

Q. 12. Then, what was the next one you worked in?

A. At Ratchie's, on Adams street.

Q. 13. How long did you work there?

A. I worked there about eight months.

Q. 14. Then the next one that you worked in?

A. Next one, I started in August and quit in March, about six or seven months.

Q. 15. Then you came here?

A. I came here in July.

Q. 15*a*. Now, during this time that you have been selling this scrap tobacco over the counter, whose product did you think it was?

A. I thought it was the Beech-Nut people; I never looked at the name, but Beech-Nut, I heard of those products before.

Q. 16. You have heard of Beech-Nut products before?

A. Yes.

Q. 17. Can you name some of these other Beech-Nut products?

A. Oh, they have bacon, and dried beef, and hams, and chewing gum.

Q. 18. Do you know now who makes this product?

A. I do not know of any one else than the Beech-Nut people.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 19. What is the name of the concern that makes the Beech-Nut ham and bacon, what is their names, do you know?

A. No, I cannot remember that, because I did not handle any of their products for quite a while.

X-Q. 20. So you do not know really who makes the Beech-Nut bacon?

A. No.

X-Q. 21. You never took the trouble to read the printing on the package to see who made the Beech-Nut scrap, did you?

A. No. Generally when somebody wants tobacco in a hurry, I just grab it and give it to them.

X-Q. 22. You never even took the trouble to look at it to see who made it?

A. No.

X-Q. 23. You see the name Lorillard on there, don't you?

A. Yes.

X-Q. 24. If a customer came into your store and he wanted to buy some bacon, or wanted to buy some Beech-Nut chewing gum, and he asked you for bacon or gum, you would not hand him out tobacco for bacon or gum?

A. No.

X-Q. 25. Entirely different kind of goods, aren't they?

A. Oh, yes.

X-Q. 26. You would not confuse bacon or chewing gum with tobacco, would you?

A. No, because they would say bacon or tobacco or gum.

X-Q. 27. Entirely different goods?

A. Yes, oh yes.

X-Q. 28. Bacon and chewing gum are not put up to look like this tobacco package, are they?

A. No.

X-Q. 29. You could tell the difference about them in a glance, couldn't you?

A. Yes.

Cross-examination closed.

Deposition closed.

Signature waived.

LLOYD SCHULTZ, a witness produced in behalf of plaintiff, pursuant to notice by agreement of counsel, first being duly sworn, in response to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. Lloyd Schultz, 914 South street, Toledo, Ohio; grocery clerk.

Q. 2. Where are you employed?

A. Saba & Joseph, corner Huron and Cherry streets, Toledo, Ohio.

Q. 3. That is 502 Cherry street?

A. Yes.

Q. 4. How long have you been employed there?

A. Going on eight years.

Q. 5. Do you sell tobacco products in that store?

A. Yes.

Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3; have you sold this tobacco in this store?

A. Yes.

Q. 7. For how long?

A. Ever since I was here, that they handled it.

Q. 8. How many years would that be approximately, or roughly?

A. Six or seven years.

Q. 9. Have you yourself personally handed it to customers over the counter?

A. Yes.

Q. 10. Have you handed it a good deal or little?

A. Quite a bit.

Q. 11. Now, whose product did you think it was all this time?

A. I thought it was all the same thing, Beech-Nut, I never knew the difference. I never looked at it and never knew the difference but what it was Beech-Nut, all comes from the same place.

Q. 12. Can you name any other Beech-Nut things?

A. Yes. Beech-Nut bacon, Beech-Nut peanut butter, Beech-Nut beans, and quite a few things.

Q. 13. And chewing gum?

A. Yes, I always said tobacco, but I know better, it ain't now.

Q. 14. Do you know now who made this product?

A. I know you don't make it. Before I thought it was the same people that made the gum and tobacco.

Q. 15. Who told you?

A. The gentleman out there; the salesman, Mr. Atkinson.

Q. 16. When did he tell you he did not make this product?

A. Yesterday.

Q. 17. Had he told anybody else in the store at the same time he told you?

A. Yes, the two bosses.

Q. 18. Mr. Saba and Mr. Joseph?

A. Yes.

Q. 19. Were you in the store in approximately the fifteen-minute interval between the time I first came in this morning up to the time I come back, and did you hear Mr. Joseph ask a customer about this scrap tobacco?

A. Yes.

Q. 20. Who was this customer?

A. A meat salesman.

Q. 21. Do you know him?

A. Yes.

Q. 22. What is his name?

A. We call him Otke, Otkenheimer is his name.

Q. 23. By whom is he employed?

A. By Wilson & Co.

Q. 24. What did Mr. Joseph ask him?

Mr. Cavanagh: That is objected to; it is calling for hearsay.

Mr. Hinton: This is offered in corroboration of Mr. Joseph's statement.

Q. 25. Now, what did Mr. Joseph ask him, and what did he say?

A. He was talking about tobacco and he thought the tobacco and gum all come from one company.

Q. 26. Who said this?

A. This meat salesman.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 27. What is the name of the concern that makes peanut butter?

A. The Beech-Nut?

X-Q. 28. Yes; what is the name of the concern?

A. I never paid attention particularly to the name itself.

X-Q. 29. So you don't know what concern made it?

A. No.

X-Q. 30. Same as to the bacon and gum?

A. Yes.

X-Q. 31. Did you ever hear of P. Lorillard Company, tobacco people?

A. I may have heard of them, but not paid any attention to it.

X-Q. 32. Do you use tobacco?

A. Yes, I do.

X-Q. 33. Smoke?

A. Yes.

X-Q. 34. Did you ever smoke Murad cigarettes?

A. No, I always smoke Camels.

X-Q. 35. Do you chew tobacco?

A. Very seldom.

X-Q. 36. Did you ever chew any of this Beech-Nut tobacco?

A. I never did.

X-Q. 37. But you have been selling it for five or six years?

A. Yes.

X-Q. 38. It is a good seller?

A. Yes, good seller, best seller we got.

X-Q. 39. You never do any of the buying for this store, do you?

A. No.

X-Q. 40. You never have bought chewing gum or tobacco for the store?

A. No.

X-Q. 41. You never took the trouble to read the wording on this package?

A. No, never paid any attention to it.

X-Q. 42. So you wouldn't know whether it was Smith, Jones or Brown's tobacco?

A. I know it was the Beech-Nut people; that is all I know about it.

X-Q. 43. You went by that name "Beech-Nut"?

A. Yes.

X-Q. 44. That is all?

A. Yes.

X-Q. 45. You did not pay any attention to who manufactured it or where it came from, or anything?

A. No.

X-Q. 46. When the customers come in like this customer you spoke of this morning, you never got a package of tobacco to compare it with a package of chewing gum, to see who made it, did you?

A. No.

X-Q. 47. Just simply had some idle conversation and paid no further attention to it; is that right?

A. Yes.

X-Q. 48. If you wanted to find out whether a newspaper was of a certain date, or a product was made by a certain concern, and you were enough interested, you would read the printing matter and see?

A. Yes.

X-Q. 49. But you were not interested in this case, and paid no attention?

A. I did not pay any attention.

X-Q. 50. If you went into a store and wanted some Beech-Nut peanut butter or chewing gum, could you be fooled by the dealer in taking a package of tobacco instead of gum?

A. No, I am too much experienced for that.

X-Q. 51. In other words, you would think a man was crazy for taking tobacco for gum?

A. He ought to know better. If a man would ask for Beech-Nut peanut butter, he would not expect a man to give him Beech-Nut tobacco. If he would ask for tobacco, he would not expect him to give him peanut butter.

X-Q. 52. You never saw a package of chewing gum or a glass of peanut butter put up to look like the tobacco package like this?

A. No.

X-Q. 53. You could tell a tobacco package when you see it?

A. Yes.

X-Q. 54. You can tell a cigarette package?

A. Certainly can.

X-Q. 55. You never saw any chewing gum, or peanut butter, or ham put up like cigarette packages, did you?

A. No.

Cross-examination closed.

STIPULATION.

It is stipulated by and between the parties hereto, through their respective counsel, that if the witnesses whose names are appended hereto were called they would testify as follows, except with respect to the particular length of time within which these witnesses had sold the Beech-Nut scrap tobacco over the counter; that the length of time during which each of said witnesses have sold the scrap tobacco over the counter is given in the appended list of witnesses and is to be understood as to being incorporated in the testimony of each witness.

Direct Examination.

I am a retail grocery, handling tobacco products. I have stocked and sold Beech-Nut scrap tobacco identical with Plaintiff's Exhibit No. 3 in this case for a period of ....., stated opposite my name in the appended list. I always believed that this tobacco was a product of the Beech-Nut Packing Company until I was advised in November, 1921, by a representative of the

Beech-Nut Packing Company that this tobacco was not a product of that company. I have purchased the tobacco through a jobber located in Toledo, Ohio.

On cross-examination the witness would testify as follows:

I never took the trouble to read the printed matter on the package and did not notice the name "Lorillard," or the name of the manufacturer, and paid no attention to the matter at all, as this Beech-Nut scrap tobacco is a good selling tobacco, which I have had on sale for a number of years past, and have bought at different times, and I would sell it irrespective of what company made it. Furthermore, I have never purchased or sold or known of a product of the Beech-Nut Packing Company to resemble a package of scrap tobacco, or a package of cigarettes, and furthermore, I would not sell a customer this scrap tobacco when he asks for Beech-Nut chewing gum or Beech-Nut bacon, or Beech-Nut food products of any sort, nor would I be confused or deceived myself into accepting this Beech-Nut scrap tobacco for Beech-Nut gum or Beech-Nut food products, as I regard the same as entirely distinct and different class of goods.

LIST OF WITNESSES.

Frank O'Connell, 616 Jefferson St., Toledo, O. (sold tobacco over counter two years);

Henry Dieckman, 713 Monroe St., Toledo, O. (sold tobacco over counter two years);

W. Shaffer, 434 Dorr St. (sold tobacco over counter for one year);

H. A. Neff, 1129 Monroe St. (sold tobacco over counter for about a year).

It is further stipulated, if Isabel Shaffer were called, she would testify on direct and cross-examination, in accordance with the foregoing stipulation except that she is employed in the Shaffer Drug Store, 629 Cherry St., Toledo, Ohio, instead of a grocery store, as in the case of other witnesses, and that she has been selling the Beech-Nut tobacco for several years.

CERTIFICATE.

State of Ohio, County of Lucas, ss:

I, Leo M. Fox, hereby certify that I am a notary public within and for the County of Lucas, State of Ohio, and court reporter; that the foregoing depositions of Oscar Joseph, Mike Saba, John Jozsa and Lloyd Schultz were taken by me acting as Special Examiner by agreement of counsel, pursuant to notice, and by agreement of counsel; that these depositions were taken stenographically by me and by me reduced to written form, at this office beginning November 7, 1921, at 10 A. M., and ending the same day; that each witness was duly sworn before he testified, except with respect to these witnesses whose testimony was stipulated as appears in the record; that the signature of each witness was waived by agreement of counsel; that I am not related by blood or marriage to any of the parties to this case or interested directly or indirectly therein. I further certify that I have been paid $ ....., my fees for taking and transcribing the foregoing testimony, and that the same is a fair, just and reasonable charge.

LEO M. FOX,
Notary Public, Lucas County, Ohio.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} Equity No. 3056.

Deposition taken in behalf of plaintiff, before Sarah E. Harvey, Notary Public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at Room 1737 First National Bank Building, Chicago, Illinois, beginning Friday, January 13, 1922, at 2:30 P. M.

Present: Sebastian Hinton, H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

FRANK M. FAIRFIELD, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Q. 1. Your name is Frank M. Fairfield; your address is 10422 Longwood drive, Chicago; your age is 55 years; occupation, lawyer; is that correct?

A. That's correct.

Q. 2. Where is your office, Mr. Fairfield?

A. 39 South LaSalle street, Chicago. My law office.

Q. 3. Have you any other office?

A. At International Anti-Cigarette League, 58 West Washington street, Chicago.

Q. 4. Are you actively interested in the work of the International Anti-Cigarette League?

A. I am chairman of the Board of Directors.

Q. 5. Do you play an active part in any other public movements that bring you into touch with large numbers of people?

A. For five years I have been District Commissioner of the Boy Scouts of America. I am chairman of the Board of Examiners of the American Red Cross Life Saving Corps. I am chairman of the Boy Scout Committee of the Hamilton Club of Chicago. I am one of the officers of the American Swimming Association of Boston. I am one of the organizers and have always been secretary of the Sane Fourth Association. I have practiced law in Chicago for twenty-five years—no, more than that.

Q. 6. How long have you taken part in the Anti-Cigarette movement?

A. I have been interested in that for some six or seven years. I have been actively engaged in it for the past five years. I was one of the organizers of the legal work of incorporating the International Anti-Cigarette League.

Q. 7. When was that league organized?

A. Incorporated in March, 1920—that is, the present organization. The old league was incorporated in 1899.

Q. 8. Will you please name the officers of the International Anti-Cigarette League?

A. Dr. D. H. Kress—President, Takoma Park, Washington, D. C.

Treasurer—William T. Smith, Department Manager Marshall Field & Company.

Secretary—Mrs. Alice H. Mather, former lecturer of the Illinois Federation Parent-Teacher Associations.

Vice-presidents—

Hudson Maxim, high-explosive inventor, New York City.

Rev. John Timothy Stone, Fourth Presbyterian Church in Chicago.

Wu Ting Fang, Shanghai, China.

Dr. Winfield Scott Hall, head department Social Hygiene, Board of Temperance and Moral Welfare, Presbyterian Church, Berwyn, Illinois.

Mrs. Lorraine Elizabeth Wooster, State Superintendent of Schools, Topeka, Kansas.

Rev. S. B. Edmonson, First M. E. Church, Lake Forest,, Illinois.

C. W. Barrett, M. D., gynecologist and head of department Cook County Hospital, also professor of gynecology, University of Illinois and Chicago Polyclinic School.

Frederick M. Sisson, of Howland School, Chicago.

Q. 8*a*. Will you please name the directors of the League?

A. The directors are myself, chairman of the board.

Judge Victor P. Arnold, Judge of the Juvenile Court, Chicago.

Mrs. Frank L. Bellows, president of the League of Cook County Women's Clubs.

R. D. Klees, managing director Union League Foundation for Boys' Clubs, Chicago.

Mrs. Alice H. Mather, lecturer Illinois Federation Parent-Teacher Association.

Charles S. Roberts, First National Bank of Chicago.

Frederick L. Rossback, ex-president Hamilton Club, Chicago, and president of the Washington Shirt Company of Chicago, Minneapolis and other large cities where they have stores.

A. N. Marquis, is the founder and editor of "Who's Who in America."

William T. Smither, department manager of Marshall Field & Company, Chicago.

Q. 9. What is the purpose of the International Anti-Cigarette League?

A. The object is to safeguard the health and morals

of the youths from the use of cigarettes and tobacco, and provide those who are addicted to the tobacco habit with a prescription for a cure, upon request.

Q. 10. What is the slogan of the League?

A. The slogan is "Give the Boy a Square Deal."

Q. 11. What is its geographical field?

A. No limit.

Q. 12. How much of the world do you cover at present?

A. United States, Canada, and eighteen foreign countries.

Q. 13. How does the league organize its work through that field?

A. Through local units, in cities, towns, villages, wherever there is an influential body of citizens who indicate that they are interested in our work.

Q. 14. Do you find interest is taken in many communities?

A. A great many communities.

Q. 15. What class of people are found to take an interest in this?

A. Prominent, influential people, who are interested in the welfare of the boy especially. Men's clubs, women's clubs, and business men.

Q. 16. About how many local units have you in the United States?

A. I presume six hundred.

Q. 17. What is the nature of the work that the League carries on through these local units?

A. Educational, curative, law enforcing.

Q. 18. In regard to what do you give out information?

A. In regard to the detrimental effects of the cigarette on the human system, and especially upon the boy. Injurious effects of the cigarette upon them. We also give prescription for a cure wherever it is requested—cure for cigarette or tobacco habit.

Q. 19. To whom do you aim to give this information?

A. Everybody. Boys, adults, legislators, anybody that is seeking it. Everybody that is seeking it.

Q. 20. Will you name some of the agencies beside your own members through which you reach the boys?

A. Reach them through Boy Scouts of America, Y. M. C. A., colleges, schools, Salvation Army, organizations organized for the safeguarding of the health and morals of boys—a great many different organizations.

Q. 21. Through what agencies do you reach grown people?

A. International Education Association, Parent-Teacher Association, through Salvation Army, women's clubs, men's clubs, and a great many other organizations and adult organizations, too numerous to mention.

Q. 22. In how many forms do you distribute your educational matter?

A. Through printed matter, pamphlets, letters, correspondence, moving picture films, lecturers—any way it is desired or suggested by those who wish our co-operation.

Q. 23. About how many pieces of printed literature do you send out per month?

A. Well, up to about a year ago, when we were working alone, we sent out about 17,000 a month. Since then we have quite a number of co-operating agencies who are making a great demand upon us for our literature. I may say we are sending out 100,000 copies a month. I shouldn't be surprised if we would soon be sending out a half million a month.

Q. 24. Do you send out larger quantities at times?

A. Whenever there is any special demand for a large quantity, we try to do our best to fulfill the demand.

Q. 25. Can you give an instance?

A. For instance, the Salvation Army is putting on a

Smokeless Sunday, and it should use, I believe, about one million copies.

Q. 26. Have you any of this printed literature with you?

A. Yes, I have some here illustrative of what we are sending out.

Q. 27. Were these printed by the International Anti-Cigarette League?

A. Yes, sir.

Q. 28. Did you get these out of the regular supply from which you distribute?

A. Yes, sir. That is a lot illustrating what we are sending out. That is not all.

The collection of material produced by the witness, comprising fourteen pieces bound together in a book, is offered in evidence, as Plaintiff's Exhibit No. 9, "Fairfield Illustrative Collection Anti-Cigarette Literature."

Mr. Cavanagh: The above testimony and the exhibits objected to as immaterial and irrelevant to this issue.

(The witness continues his answer.) I might also say, when a few minutes ago I was mentioning some of the ways in which we were reaching the boys, that we also reach the boys through the Rotary Clubs and the Boys' International Clean Life Army.

Q. 29. Do your allied organizations distribute this literature for you?

A. Yes. Well, I wouldn't say for us. They distribute for themselves as well as us. They are quite as much interested in the welfare of the boys as we are.

Q. 30. How else do they co-operate with the League?

A. By exhibiting our moving pictures. By using lecturers. Well, various ways—anything to extend the information which we have obtained with reference to the cigarette and tobacco.

Q. 31. Will you please name some of the organizations that are officially allied with your League?

A. Boys' Club Federation.

Boy Scouts of America.

Boys' Workers Association.

Chicago Boys' Club.

Chicago Federation of Settlements.

Chicago Sunday School Association.

Department of Education, Chicago, through Peter A. Mortensen, the Superintendent of Schools.

Juvenile Protective Association.

Lower North Community Council.

Salvation Army.

Union League Foundation for Boys' Clubs.

National Education Association.

Illinois Federated Parent-Teacher Association.

Y. M. C. A.—Young Men's Christian Association, if you please.

Federated Women's Clubs.

Woman's Christian Temperance Union.

Boys' International Clean Life Army.

Rotary Clubs, and a good many others, too numerous to mention.

Q. 32. How are the Rotary Clubs interested in the work of the League?

A. Why, we co-operate with them in the organization of the Boys' International Clean Life Army. I also wish to say they show our moving picture films. They are very much interested in the welfare of the boy. They do all they can to promote the welfare of the boy, of the youth of the country, they distribute our literature, we co-operate in any way that's for the benefit of the boy, to protect them from acquiring the cigarette habit and to promote the best interest of the boy.

Q. 33. Just briefly, what are the Rotary Clubs?

A. The Rotary Clubs are organizations of the cities, villages and towns, not only the United States, but foreign countries, composed of the medium business and professional men, the leaders in their communities, organized for the mutual benefit of the community and one of their objects stands out very prominently. It is the welfare of the boy. They do a great deal for the benefit of the boy.

Q. 34. What is the Boys' Clean Life Army?

A. The Boys' Clean Life Army is part of our organization, the members of which pledge themselves to refrain from the use of cigarettes and tobacco, or intoxicating liquors, and lead a moral life until they are twenty-one years of age. It was organized with the co-operation of the Rotary Clubs.

Q. 35. About how many families does your League reach; that's in the United States?

A. Well, we reach some six hundred thousand (600,000) through the Boy Scouts of America. It is safe to say we reach a million families.

Q. 36. How do you find the public receives your ideas?

A. They are very receptive.

Q. 37. How do you know this?

A. Not only our ideas, but the ideas of a very large percent of the citizens of the United States. We know that by the great number of letters of inquiry which we receive about our work and about the requests we have for the prescription for the cigarette and tobacco cure.

Q. 38. Have you with you any illustrative specimens of these letters of which you have just spoken?

A. I have a very few here.

Q. 39. Were these letters received in the regular course of business of the League?

A. They were.

Q. 40. Did they go over your desk?

A. They did. Went through it.

Q. 41. Do you produce them from the files of the League?

A. Yes.

Q. 42. Are these photostatic copies of this collection of letters?

A. Yes.

The witness produces a collection of letters, and it is stipulated by and between the counsel that photostatic copies of the letters may be received in evidence in lieu and with the same force and effect as the originals. Collection of photostatic copies is produced, offered and introduced in evidence as Plaintiff's Exhibit No. 10, Fairfield Illustrative Collection of Letters Received by Anti-Cigarette League.

Q. 43. Mr. Fairfield, what did the Anti-Cigarette League do during the late war?

A. Ceased activities.

Q. 44. Why was that?

A. The Government was furnishing the Army and Navy with cigarettes.

Q. 45. When did the League resume its operations?

A. After the war.

Q. 46. Why was that?

A. On account of the reaction we saw coming.

Q. 47. Is that reaction actually taking place?

A. It is.

Q. 48. How do you know this?

A. From quantity of letters we receive in reference to our activities, for information, literature, from the amount of applications we have for the cigarette cure, for the prescription for cigarette cure—a great many of those come from ex-service men who formed the cigarette habit while in the war.

Q. 49. Do you find any opposition to your activities?

A. The only opposition I have ever discovered is from the tobacco interests, who have become alarmed with our activities and are taking action to counteract what we are doing, the excitement that is being created since the war.

Q. 50. Can you give an instance of effort to counteract your activities?

A. The allied tobacco industries was formed, to hold an exposition at the Coliseum in Chicago in September last, to counteract the nation wide agitation against smoking, for their self preservation, and to increase the interest of the people engaged in that industry to protect their interests.

Q. 51. How did you hear of this exposition?

A. Through a letter that was written by them in June last, notifying of the intention to hold this exposition, and over the telephone—a conversation with its manager. We asked about securing space in the Coliseum at the time of this exposition.

Q. 52. Have you this letter with you?

A. I have.

Q. 53. Did this letter come to you in the regular course of your business?

A. It did.

Q. 54. Do you produce it out of the files of the International Anti-Cigarette League?

A. I do.

Q. 55. Is this a photostatic copy?

A. Yes.

Photostatic copy of the letter just produced by the witness is produced, introduced and offered in evidence as Plaintiff's Exhibit No. 11, Allied Tobacco Industries Exposition Letter. It is stipulated that the photostatic copy may be offered and introduced with all the force and effect of the original.

By Mr. Cavanagh: The same objection of immateriality and irrelevancy as pertains to the letters heretofore produced by this witness, was made as to this letter and the testimony concerning the same.

Q. 56. Mr. Fairfield, does your League keep in touch with legislation in the various states on the tobacco and cigarette question?

A. Yes.

Q. 57. Has any legislation prohibiting or regulating the use of tobacco in any of the states been passed?

A. Four of the states have laws prohibiting the sale of cigarettes and a great many of them have laws prohibiting the sale of cigarettes to minors. There is also legislation pending in several states now.

Q. 58. Mr. Fairfield, I show you a package of cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1. Have you ever seen a package of those cigarettes before?

A. Yes, sir. Many times.

Q. 59. Where have you seen them?

A. I first saw them in the hands of boys. I have seen them on sale and on display at cigar—tobacco stores.

Q. 60. When you first saw them, who did you think was the maker of them?

A. Beech-Nut Packing Company.

Q. 61. Why did you think that?

A. The name and label on it.

Q. 61*a*. When you saw them afterwards, whose product did you think they were?

A. I always thought they were the product of the Beech-Nut Packing Company, until I was advised a few weeks ago by Mr. Hinton.

Q. 62. What did you thing of the Beech-Nut Packing Company for making a cigarette?

A. Well, I always had a very high regard for the

Beech-Nut Packing Company. They had advocated purity in products during their entire existence. I presumed everything that they produced was pure until I saw that they were putting out a cigarette. I presumed that they were on account of their name, label on it. And I thought they were degenerating—going down hill. Trying to impose upon the people by claiming that they could produce a pure cigarette, taking advantage of the good name that they had created for a great many years for purity of product. Taking advantage of the people by getting them to accept the cigarette under the guise of purity.

Q. 63. Would you use Beech-Nut products while you were under that impression?

A. Not if I knew it.

Q. 64. How do members of the International Anti-Cigarette League and its sympathizers look upon cigarettes and the makers of cigarettes?

Mr. Cavanagh: That question is objected to as calling for hearsay.

A. Why, they condemn the cigarette and the manufacturers the same as I do.

Mr. Cavanagh: In so far as this witness' testimony pertains to the history of the anti-cigarette campaign and the documents produced in connection therewith, all this line of testimony is objected to as immaterial and irrelevant, because not pertinent to the issue in this case, and such objection is also applied to any exhibits produced in connection with this line of testimony, and it is stipulated by and between counsel for the parties that such objection may stand as if made to each question pertaining to such line of examination.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 65. Mr. Fairfield, did you ever personally purchase a package of these Beech-Nut cigarettes?

A. No, sir.

X-Q. 66. Like Plaintiff's Exhibit No. 1?

A. No, sir.

X-Q. 67. Did you ever smoke any of these Lorillard Beech-Nut cigarettes?

A. No, sir. I never did, I am sure.

X-Q. 68. You never took the trouble to look at a package of those cigarettes to see whose name was on it as maker, did you?

A. Well, I can readily see the name "Beech-Nut" and the Beech-Nut label.

X-Q. 69. Do you see the name P. Lorillard on it?

A. Yes.

X-Q. 70. Did you ever hear of P. Lorillard Company?

A. Yes, sir.

X-Q. 71. Large manufacturers, aren't they?

A. I believe they are.

X-Q. 72. As a matter of fact, in connection with your anti-cigarette work, you know that the P. Lorillard Company is one of the largest tobacco manufacturers in the United States?

A. I believe they are. Yes.

X-Q. 73. It is really an enormous concern. You know that from your business?

A. I understand it is.

X-Q. 74. You don't find the name of the Beech-Nut Packing Company on that package of cigarettes, do you?

A. Not the "Packing Company." I don't.

X-Q. 75. You find Lorillard's name on there, and not that of Beech-Nut Packing Company; you would presume that was Lorillard's product, would you not?

A. I didn't examine closely. Beech-Nut here in three

places. Most prominent, and I always was of the impression that that was put out by the Beech-Nut Packing Company until Mr. Hinton advised me otherwise.

X-Q. 76. If you see Lorillard's name on a package of cigarettes, wouldn't you think that was the Lorillard tobacco people?

A. I don't know whether I would or not.

X-Q. 77. If you saw Armour's name on a piece of goods, would you think that was Armour's?

A. It depends upon what else I saw upon the package.

X-Q. 78. You mean to say that a manufacturer's name on a package wouldn't mean a thing to you?

A. I didn't say that.

X-Q. 79. Suppose you see the name General Electric Company on a piece of electrical apparatus. Wouldn't that indicate that that was manufactured by General Electric Company?

A. If there was nothing else. Depends upon what else was on a package.

X-Q. 80. If you see two manufacturers' names on the package?

A. I presume I wouldn't know.

X-Q. 81. Right on that point. Do you find the name Beech-Nut Packing Company on that cigarette package?

A. No, but I find their label here and their name more prominent than anything else.

X-Q. 82. Where do you find their name—the Beech-Nut Packing Company—on that package? You said you find their name on it.

A. Beech-Nut and the label.

X-Q. 83. You mean the word "Beech-Nut"?

A. Yes.

X-Q. 84. But you don't find the name of the Beech-Nut Packing Company on it, do you?

A. I don't find the words "Packing Company."

X-Q. 85. You don't find the words "Beech-Nut Packing Company"?

A. No. I didn't say that was the name of the corporation.

X-Q. 86. You really don't know the name of the corporation?

A. I shouldn't say that. I have always been governed by the word "Beech-Nut." That was their brand.

X-Q. 87. Did you ever hear of the Beech-Nut Packing Company—the food products people—putting out tobacco products?

A. No.

X-Q. 88. Now, as I understand from your direct examination, you approved of the food product goods of the Beech-Nut Packing Company, did you not? You said they stood for purity and the like.

A. I said that.

X-Q. 89. So you would have no objection to dealing with the Beech-Nut Packing Company in connection with its food products, would you?

A. Not until I understood that they were putting out cigarettes.

X-Q. 90. Leaving aside the question of putting out cigarettes for a minute, so long as they put out food products, such as bacon, preserves, chewing gum, candy, you had no objection to dealing with them, when you approved of those products, did you?

A. So long as I believed that they were putting out pure products, I had no objection to dealing with them.

X-Q. 91. Well, don't you consider preserves to be just the same as cigarettes or tobacco products?

A. Absolutely not.

X-Q. 92. Do you consider chewing gum to be in the same class as cigarettes or tobacco products?

A. Absolutely not. Now, I don't know anything harmful in gum.

X-Q. 93. Do you know of anything harmful in cigarettes or tobacco products?

A. Yes.

X-Q. 94. What?

A. I know the effect they have upon the boy.

X-Q. 95. I understand from some of your literature which you have produced that it is harmful to the human being in the opinion of those preparing that letter, in various ways?

A. It is harmful to them. You will have to consult the people who prepared that letter as to what their opinion is.

X-Q. 96. You don't stand sponsor for this literature you have produced?

A. What do you mean by sponsor?

X-Q. 97. You don't believe in what's set out in that literature?

A. Yes, sir.

X-Q. 98. So that literature represents your opinion as to the use of tobacco?

A. I didn't say that.

X-Q. 99. Now, you don't object to the use of chewing gum, do you?

A. I have never had any objection.

X-Q. 100. But you do object to the use of cigarettes, do you not?

A. I haven't said that I objected to their use.

X-Q. 101. But aren't you one of the officers engaged in the anti-cigarette campaign?

A. Yes, sir.

X-Q. 102. Without meaning at all to be impertinent, you wouldn't engage in an anti-cigarette campaign unless you objected to the use of cigarettes, would you?

A. We are seeking to protect the health and morals of boys.

X-Q. 103. Well, don't you believe that the use of chewing gum and candy is harmful to the health and morals of boys?

A. Not necessarily.

X-Q. 104. Don't you consider candy and chewing gum to be just the same as tobacco products?

A. The same?

X-Q. 105. Yes.

A. I didn't know there was much similarity.

X-Q. 106. You consider them to be entirely different?

A. What's that?

X-Q. 107. You consider them to be different—chewing gum and candy to be different from tobacco?

A. They don't seem to have the evil effects upon children that cigarettes do. I mean, candy and chewing gum don't have the same bad effects that tobacco would have.

X-Q. 108. I understand from your various official positions that you have stated that you do not personally approve of the use of tobacco products, particularly cigarettes, and therefore you are frankly engaged in forwarding an anti-cigarette campaign. You know that the cigarette or the tobacco industry is a segregated or separate industry in itself, isn't it? That is, a food product manufacturer doesn't usually make tobacco products and the tobacco manufacturer doesn't usually deal in food?

A. I haven't made any study of that.

X-Q. 109. Oh! I thought that you had made some study of the tobacco industry. Do you know how cigarettes are made?

A. Not exactly.

X-Q. 110. Do you know how the tobacco is treated to remove the nicotine and other by-products?

A. Not exactly.

X-Q. 111. Do you know how much nicotine remains in cigarette tobacco after it has been through the nicotine extractor?

A. Never analyzed it.

X-Q. 112. As a matter of fact, you didn't know they used a nicotine extractor in making cigarette tobacco?

A. I haven't given the matter much of any study.

X-Q. 113. Have you ever been through one of the big tobacco manufactories, when they are making cigarettes?

A. No.

X-Q. 114. So you don't know how the raw leaves are treated, or the tobacco separated or blended or the nicotine or other by-products extracted?

A. No, sir.

X-Q. 115. You are not familiar with the manufacturing process?

A. No.

X-Q. 116. You don't chew tobacco, Mr. Fairfield?

A. Chew? No.

X-Q. 117. You don't smoke cigarettes, do you?

A. Not now.

X-Q. 118. I understood you in your direct examination to say that the Rotary Clubs of this country were engaged in supporting, or rather I might say, forwarding your anti-cigarette campaign; is that correct?

A. That's a fact.

X-Q. 119. Have these Rotary Clubs any central headquarters or central point as an organization, or are they merely individual clubs?

A. They have a general organization.

X-Q. 120. Do you know where that central headquarters is located?

A. Yes, sir.

X-Q. 121. Where?

A. Chicago.

X-Q. 122. Do you know who is in charge there?

A. Secretary?

X-Q. 123. Secretary and president.

A. Chesly Perry is the secretary.

X-Q. 124. Headquarters of these Rotary Clubs is in Chicago?

A. Yes.

X-Q. 125. Now, I understood you to also say that, in your direct examination, the scope and extent of your Anti-Cigarette organization has grown a great deal recently, that is, since the war?

A. Yes.

X-Q. 126. Do you know how much or in what proportion the tobacco and cigarette business has grown since the war?

A. No, I don't.

X-Q. 127. You don't know how the present 1921 or 1922—say—output of tobacco products, especially cigarettes, compares in volume and value in dollars and cents with the output in—say—1914 and 1915?

A. How it compares?

X-Q. 128. You cannot say whether it has increased or decreased?

A. Yes, sir.

X-Q. 129. What do you think?

A. Increased.

X-Q. 130. It has increased? Prior to the passage of the Eighteenth Amendment were you engaged in the anti-liquor campaign?

A. No.

X-Q. 131. Never were in that?

A. No.

X-Q. 132. Simply opposed to the tobacco business?

A. I wouldn't say that. I haven't taken any active part in anti-liquor campaign.

X-Q. 133. But you do take part in the anti-tobacco campaign?

A. I think we would be better off without it. So do you.

X-Q. 134. Now, I cannot say that I do think so. Now, I understood you to testify in your direct examination that certain states had passed laws against the use of cigarettes or tobacco, or at least in a general way placed certain general restrictions on it. You have also testified that you are a lawyer by profession. You don't know of any provision in the Constitution of the United States that prohibits the sale of tobacco and cigarettes, do you, Mr. Fairfield?

A. In the Constitution?

Mr. Cavanagh: Yes.

A. No.

X-Q. 135. You do know that the tobacco manufacturers pay large revenue taxes to the United States on tobacco, cigarettes and the like, don't they?

A. Yes.

X-Q. 136. So far as the United States Government goes, the tobacco and cigarette business is a legitimate business at the present time?

Mr. Hinton: Objected to as irrelevant and immaterial, and outside the scope of the direct examination. I don't think we ought to discuss the merits or demerits of the anti-tobacco campaign.

A. Not prohibited by the United States law.

X-Q. 137. Tobacco and cigarettes are sold in the United States under the laws of the United States, as shown by the revenue stamp on the box, are they not?

A. It is apparent that there is no federal statute prohibiting their sale.

X-Q. 138. They are permitted to be sold under certain conditions and upon the payment of certain taxes?

A. Apparently, if they are not prohibited.

X-Q. 139. You never went into a store to buy a pack of these Lorillard Beech-Nut cigarettes like Plaintiff's Exhibit No. 1, thinking that they were a package of cigarettes made by Beech-Nut Packing Company, did you?

A. I never bought a package of them.

X-Q. 140. As I understand it, to sum up the whole matter, you think that tobacco products like cigarettes are entirely different class of goods from food products, don't you?

A. Tobacco is different from food.

X-Q. 141. Yes. And you wouldn't buy food products or chewing gum or candy, if you called for tobacco, and *vice-versa* you wouldn't buy tobacco if you called for chewing gum?

A. Not if I were in my right mind. If I wanted a food and I was sane, I wouldn't buy tobacco in its place.

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 142. Mr. Fairfield, up to the time, as you have testified, when you were told by Mr. Hinton that these cigarettes, Plaintiff's Exhibit No. 1, were not made by the Beech-Nut Packing Company, was there any doubt in your mind that they were made by Beech-Nut Packing Company?

A. Why, I supposed, of course, that they were made by Beech-Nut Packing Company. Most prominent thing on the package. You have to look closely to see the name of P. Lorillard.

R-D. Q. 143. Do I understand, Mr. Fairfied, that the work of the International Anti-Cigarette League is confined exclusively to combatting the cigarette habit in boys?

A. No.

R-D. Q. 144. I find, for instance, in this illustrative literature of yours, various passages, such as, for instance, "Men in middle life with a fixed tobacco habit of years, after reading our scientific literature are impelled to stop smoking, etc." Is it a fact that you combat the cigarette habit wherever you find it, among adults as well as boys?

A. We combat the tobacco habit—the use of tobacco, in any form, and we send out information, scientific information, which is the result of laboratory investigations, as to the effect of tobacco on the human system. Our moving picture films illustrate the ill effects of tobacco on the vital organs of the human body, and we are endeavoring to educate people of all ages as to the effect of tobacco on their systems.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 145. With this Anti-Cigarette League, are you on a retainer or salary with that League?

A. No, sir.

R-X Q. 146. Do all the work free, without any compensation whatsoever?

A. Not only devote my time without a penny's compensation, but I contribute money to its support.

R-X Q. 147. So that you are first and last opposed to tobacco and the use of tobacco in all its phases and all its works?

A. I think—I know tobacco is injurious to a human system.

R-X Q. 148. Now, I think, you have said that you thought this cigarette package was put out by the Beech-Nut Packing Company because of the label. Do you know what the regular label of the Beech-Nut Packing Company looks like?

A. I have seen it a great many times.

R-X Q. 149. Can you look at that cigarette package and tell me if that label is like the Beech-Nut Packing Company label?

A. It resembles it.

R-X Q. 150. In what respects?

A. When I looked at that I thought, of course, that was a Beech-Nut Packing Company's label.

R-X Q. 151. Because of that Beech-Nut?

A. The whole label on there.

R-X Q. 152. I show you a Beech-Nut Packing Company label. Has that cigarette label got that wide red band, with that word Beech-Nut printed on it?

A. A good deal of writing on there.

R-X Q. 153. Has it that red band on there?

A. It doesn't have the red band just like that there one.

R-X Q. 154. It hasn't a beech-nut in the middle, with two green leaves?

A. This has two beech-nuts.

R-X Q. 155. And no green leaves; is that right?

A. No.

R-X Q. 156. And there are some differences between the labels, to cut this short?

A. There are differences between this thing which you show me and the label on the Beech-Nut cigarettes, which I doubt if a person would notice without close inspection.

R-X Q. 157. And, as I understand it, you never took the trouble to look at or inspect this pack of cigarettes when you saw it in the store?

A. I didn't take the trouble to inspect it closely.

Mr. Cavanagh: That's all.

Deposition closed.

Signature waived.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} Equity No. 3056.

STIPULATION.

It is stipulated by and between the parties, that a book marked by the notary, acting as Special Examiner by consent of counsel, as follows: "Plaintiff's Exhibit No. 12 (A to A 11)" and containing thirty-seven sheets, may be offered and received in this case. It is stipulated that this book contains the following subject-matter:

Plaintiff's Exhibit No. 12-A is a circular letter sent out by Lorillard Company under date of June 22, 1921, to jobbers and distributors; and it is stipulated that this exhibit is a sample of a general circular letter sent out on or about that date to jobbers and dealers distributing the Lorillard Beech-Nut cigarettes, subject to correction, if error appear.

Plaintiff's Exhibit No. 12-B is a circular letter from the P. Lorillard Company, sent out under date of August 4, 1921, and it is stipulated that this exhibit is a sample of a general circular letter sent out on or about that date to jobbers and dealers distributing the Lorillard Beech-Nut cigarettes, subject to correction if error appear.

Plaintiff's Exhibit No. 12-C; it is stipulated that this is a printed circular generally distributed by the Lorillard Company to jobbers and dealers in the states mentioned therein on or about October 27, 1921. Each of the foregoing three circular letters relates to defendant's Beech-Nut cigarettes, Plaintiff's Exhibit No. 1.

Exhibit No. 12 (D and E) are a letter and its envelope, received in ordinary course of business of the plaintiff, and the enclosure therewith, respectively.

Exhibits 12 (F and G) are, respectively, a letter and its envelope, and enclosure, received by Beech-Nut Packing Company in due course of business.

Exhibits No. 12-H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V and W are letters received by Beech-Nut Packing Company in due course of business.

Exhibit 12-X is original correspondence with American Grocery Society, Inc., comprising a letter from the Beech-Nut Packing Company and American Grocery Society reply thereto, of June 26, 1920.

Exhibits No. 12-Y, Z, A-1, A-2, A-3, are original letters received in due course of business by Beech-Nut Company.

Exhibit No. 12-A-4 is a letter written to Beech-Nut Packing Company by Engels Company, of New York, and the torn sign attached thereto is the sign referred to in the letter.

Exhibit No. 12-A-5 comprises a letter received in due course of business by Beech-Nut Packing Company, under date of October 15, 1920, the regular office copy of the reply thereto of October 30, 1920, and the original reply to the letter, of November 6, 1920, all transpiring in due course of business.

Exhibit No. 12-A-6, A-7, A-8, A-10 and A-11 are original letters received in due course of business.

It is stipulated by and between the counsel hereto that each of the letters and documents of Plaintiff's Exhibits No. 12-D to 12, A-11 inclusive, was received or dispatched in ordinary course of business, is genuine and authentic and was signed by the person whose name appears thereon—subject to the following:

Defendant is herewith supplied with photographic cop-

ies of each of the exhibits herein referred to for investigation thereof, and defendant reserves the right at any time before sixty days in advance of the trial, to challenge the authenticity and genuineness of any of the foregoing exhibits, and plaintiff in that event agrees to produce, where obtainable, the persons who signed the same, and subject them to examination by defendant, if so requested to do, or to prove the signatures by other testimony, failing which to withdraw the exhibit.

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevance.

Plaintiff calls upon defendant to admit the authenticity and genuineness of each of the foregoing exhibits, under the provisions of Equity Rule 58.

OFFIELD, POOLE, HINTON & SCOTT,
Attorneys for Plaintiff.
RICHARD B. CAVANAGH,
Attorney for Defendant.

State of Illinois, County of Cook, ss.

I, Sarah E. Harvey, a Notary Public within and for the County of Cook and State of Illinois, do hereby certify that the foregoing deposition of Frank M. Fairfield was taken on behalf of Beech-Nut Packing Company, in pursuance of notice, before me, at the office of Offield, Poole, Hinton & Scott, 1737 First National Bank Building, in the City of Chicago, in said county on the 13th day of January, 1922; that said witness was by me duly sworn before the commencement of his testimony; that the testimony of said witness was taken by me stenographically and by me transcribed to writing; that the defendant herein was represented by counsel, Richard B. Cavanagh, Esq.; that said testimony was commenced

at 2:30 P. M., on the 13th day of January, 1922, and concluded on the same day; that the signature of the witness was waived by consent of counsel; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy; and that I have received $15.40.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Chicago, in said county, this 18th day of January, 1922.

SARAH E. HARVEY,
Notary Public.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Depositions taken in behalf of plaintiff, before S. F. Davis, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of George B. Roach, on South Main street, in the City of Pembroke, Christian County, Kentucky, beginning Monday, January 16th, 1922, at 3 o'clock P. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; and Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

GEORGE B. ROACH, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposed as follows:

By Mr. Johnson.

Q. 1. Your name is George B. Roach; your residence South Main street, Pembroke, Kentucky; your age 38 years; and your occupation grocer; is that correct?

A. Yes, sir.

Q. 2. Where is your grocery located?

A. North Main street, Pembroke, Kentucky.

Q. 3. What is the name of your concern?

A. G. B. Roach Grocery.

Q. 4. How long have you been doing business here?

A. About two years.

Q. 5. Have you handled any Beech-Nut products here?

A. Yes.

Q. 6. What ones, principally?

A. Beech-Nut butter, peanut butter, pork and beans, chewing gum.

Q. 7. Had you handled Beech-Nut products prior to your coming to Pembroke?

A. Yes, sir.

Q. 8. How long have you known of Beech-Nut products?

A. About as long as I can remember.

Q. 9. What have they stood for in your mind?

A. Well, a high-grade of quality.

Q. 10. Have you ever engaged in the tobacco business?

A. Yes, sir, I have traveled for a tobacco manufacturing company—the Brite Tobacco Company, of Bowling Green, Kentucky.

Q. 11. When did you first hear of Beech-Nut tobacco?

A. About a year ago.

Q. 12. How was that?

A. I saw some posters in a show window, at Bowling Green.

Q. 13. When you saw these posters, who did you think was putting out this Beech-Nut tobacco?

A. The Beech-Nut Packing Company.

Q. 14. Why?

A. Because the name and trade-mark on it resembled the same that were used by the Beech-Nut Packing Company.

Q. 15. I show you a package of Beech-Nut scrap tobacco, in evidence in this case as Plaintiff's Exhibit No. 3—when did you first see a package of this tobacco?

A. About the first of August, 1921.

Q. 16. Who did you think was putting out this tobacco when you saw the package?

A. I thought it was being put out by the Beech-Nut Packing Company.

Q. 17. Why?

A. Because the trade-mark and label resembled the same they were using.

Q. 18. Who was using?

A. The Beech-Nut Packing Company.

Q. 19. Who first showed you a package of this tobacco?

A. A traveling salesman that came into the store—said that he was here representing Beech-Nut tobacco—I don't believe he called it anything else at that time.

Q. 20. When was that?

A. That was along about the first of August—the first package I ever saw he showed it to me.

Q. 21. Did you handle this tobacco at that time?

A. No, I did not.

Q. 22. Did you have a package of it in your hand?

A. He gave me a package and told me to take it and use it and see how I liked it.

Q. 23. Did you buy any from him?

A. No, I did not.

Q. 24. Did he say whom he represented?

A. I don't remember that he did—he told me he was selling Beech-Nut tobacco.

Q. 25. What impression did he make as to who he represented?

A. Beech-Nut Packing Company.

By Mr. Cavanagh: That is objected to on the ground, Mr. Johnson, that no foundation has been laid showing that the witness had any idea who he was representing.

Q. 26. What made you think that?

A. Well, because he said in the conversation that I

knew the Beech-Nut trade-mark and knew what it stood for—anything put out under the Beech-Nut trade-mark had to be the highest quality.

Q. 27. What was the effect of his remarks on you?

A. Well, I was convinced that it was put out by the Beech-Nut Packing Company.

Q. 28. How long did your conversation last with him, about how long?

A. About fifteen minutes.

Q. 29. When did you learn definitely that this tobacco was made by someone else?

A. Mr. Hamilton, the salesman for the Beech-Nut Packing Company, came here, and I asked him why it was they were working two salesmen for the same company in the same district. He said they wasn't—why? I told him there was a Beech-Nut man here a few days ago selling tobacco, and he said it was a different concern.

Q. 30. Have you seen the Beech-Nut tobacco man again?

A. Yes.

Q. 31. When?

A. About two months later.

Q. 32. What occurred between you and him then?

A. Well, I told him that I understood that the Beech-Nut Packing Company was raising "Cain" about them using their trade-mark, and he said that they had sold the trade-mark to the Beech-Nut Packing Company, and had reserved the right to use the trade-mark on tobacco —he said that they had sued them once on the trade-mark and lost it, and he didn't think that they could gain it this time.

Q. 33. Do you know this tobacco man's name?

A. I have been told it was Bacon. Mr. Hamilton asked me who it was when he first learned of it, and a boy by the name of McCombs was working with me, and he re-

membered a remark that was made as he was going out the door—"he didn't know whether it was bacon or ham, but he didn't want either one."

Q. 34. Did he introduce himself to anybody in your store?

A. I suppose he did when he came in, is the reason the boy knew his name.

By Mr. Cavanagh: That is all hearsay, and calls for merely an opinion of what somebody else knew.

Q. 35. How many clerks did you have in your store?

A. One at the time.

Q. 36. Didn't he introduce himself to the clerk?

A. He did when he came back the third time—he came there three times.

Q. 37. What did he say his name was then?

A. Bacon.

Q. 38. Did he have any posters or advertising matter with him in your store?

A. Not that I saw.

Q. 39. Did he place any Beech-Nut tobacco signs while he was here in Pembroke?

A. I didn't see him place any, but the same day I saw some placed in Wood's drugstore and a display of tobacco.

Q. 40. Please describe this tobacco salesman.

A. Well, he was about five feet and a half tall, and weighed something like 150 or 60 pounds.

Q. 41. Did you see him the third time?

A. Yes, sir.

Q. 42. When was that?

A. That was about around November 21st.

Q. 43. What year?

A. 1921—I was out of the store at the time he called, and Mr. Bryan Foster, my clerk, told me that the Beech-Nut tobacco man had just called and said he would be

back in a few minutes—Mr. Bacon—but he didn't come back, and I saw him then in a few minutes afterwards get in a Ford car and drive off on the other side of the street.

Q. 44. Was there any mark on the car?

A. I think there was—I think there was a sign of Beech-Nut tobacco on it.

Q. 45. Was this the time he introduced himself to your clerk, Mr. Foster?

A. Yes, sir.

Cross-Examined by Mr. Cavanagh, for Defendant.

X-Q. 1. Mr. Roach, were you ever personally present when this man introduced himself as Mr. Bacon to your clerk?

A. No, sir.

X-Q. 2. So you weren't there at all when he said his name was Bacon?

A. Well, he introduced himself to me the first time he came in as Mr. Bacon—that is what I wouldn't swear whether Mr. Bacon or something else now.

X-Q. 3. But you were not present when he introduced himself to your clerk?

A. No, he merely told me Mr. Bacon had called on me while I was out.

X-Q. 4. So all of your answers as to what took place as between this alleged man, Bacon, and the clerk, is based on what the clerk told you, and not on your own personal knowledge—isn't that right?

A. He showed me the package of tobacco he gave him, and I know——

X-Q. 5. Now, in order to save time, when he was talking to the clerk, you weren't there, were you?

A. No, I was out of the store.

X-Q. 6. So, whatever he told the clerk is based on what the clerk told you?

A. Yes.

X-Q. 7. I understand you yourself met a person who showed you or handed you a package of Beech-Nut tobacco?

A. Yes.

X-Q. 8. Like this package of scrap tobacco (exhibiting package to witness)?

A. Yes, sir.

X-Q. 9. He didn't say he represented the Beech-Nut Packing Company, did he?

A. No, he said he was selling Beech-Nut tobacco.

X-Q. 10. You say you were in the tobacco business at one time?

A. Yes, sir.

X-Q. 11. When did you start in the tobacco business, and how long were you in it?

A. Well, I traveled a very short time, so far as that is concerned, a couple of months, during a vacancy I had between moves, from Bowling Green here.

X-Q. 12. About what year was that, or how long ago?

A. That was in 1920.

X-Q. 13. Didn't you ever hear of the P. Lorillard Company?

A. No, I couldn't say I ever heard of them.

X-Q. 14. You didn't know that the P. Lorillard Company was one of the largest tobacco concerns in the world?

A. No, sir, I did not.

X-Q. 15. You being in the tobacco business, but for a short while, must have been pretty familiar with some of the brands—did you ever hear of Climax chewing tobacco?

A. No, sir.

X-Q. 16. Did you ever hear of Egyptian Deity cigarettes?

A. What kind?

X-Q. 17. Egyptian Deity.

A. No, sir.

X-Q. 18. Did you ever hear of the Murad cigarettes?

A. No, sir.

X-Q. 19. Did you ever hear of the Mogul cigarettes?

A. No, sir.

X-Q. 20. You say the first time you ever saw this Beech-Nut tobacco like that Lorillard package of scrap tobacco was about a year ago, wasn't it?

A. Yes, sir—no, sir, I said last August.

X-Q. 21. Last August?

A. Yes, sir.

X-Q. 22. You yourself haven't the slightest idea how long that package of tobacco has been on the market, have you?

A. No, sir.

X-Q. 23. Did you sell tobaccos up there at your store?

A. Yes, sir.

X-Q. 24. What kind—what brands did you sell up there?

A. Well, I sold mighty near everything handled in this section of the country.

X-Q. 25. From whom did you buy your supply?

A. I bought a great many direct from the factory, but a good part of it from DeWerthern, at Hopkinsville.

X-Q. 26. Now, I understand that you have handled Beech-Nut Packing Company's food products, haven't you?

A. Yes.

X-Q. 27. You are very familiar with its label, are you not?

A. Yes, sir.

X-Q. 28. I show you a label, which is already in this case as Defendant's Exhibit No. —, Beech-Nut Label—does that represent the Beech-Nut Packing Company's Label?

(Witness examines label handed him.)

A. I was thinking they had two beeches—two of the nuts on it.

X-Q. 29. You mean in the middle here, where this nut is on the green leaf?

A. Yes, sir.

X-Q. 30. You thought that had two nuts?

A. Yes, sir.

X-Q. 31. So you couldn't say whether that was the Beech-Nut Packing Company's label or not?

A. Well, I have always taken it that everything put up in the Beech-Nut trade-mark belonged to one company—put up under the Beech-Nut label belonged to one company.

X-Q. 32. But outside of that—that doesn't quite answer my question—you don't know whether that is the Beech-Nut Packing Company's label or not, do you?

A. Well, I told you I thought they had the two nuts on it.

X-Q. 33. So you couldn't swear that was the Beech-Nut Packing Company's label, as you remember it?

A. Well, I would swear if a can of goods come out with that label on it—I would swear it was put up by the Beech-Nut Packing Company.

X-Q. 34. I asked you about the label I handed you, if you could identify that as the Beech-Nut Packing Company's label?

A. Well, now, I couldn't swear that was the Beech-Nut label here, if it was cut off the package.

X-Q. 35. Then, I understand your answer to be you couldn't identify that as the Beech-Nut Packing Com-

pany's label, you couldn't swear positively that was the label you knew before today?

A. No, I wouldn't swear that was absolutely it.

X-Q. 36. Now, will you look at that label a minute (referring to Beech-Nut Packing Company's label), there is quite a difference between those two labels (referring to label on package of scrap tobacco), is there not?

(Witness examines the two labels.)

A. Yes, when a man takes those and puts them right side by side, there is a difference—I can see a difference, but at an ordinary glance I wouldn't pay any attention to the difference.

X-Q. 37. So you didn't pay any attention to the label at all?

A. No—not in the same colors.

X-Q. 38. On this package of Beech-Nut scrap tobacco the name "P. Lorillard Company" is on that, isn't it?

A. Yes.

X-Q. 39. You don't find the name of the Beech-Nut Packing Company on that package, do you?

A. No.

X-Q. 40. You never saw a food product of the Beech-Nut Packing Company put up in any package that had those red radiant lines like that sun-burst?

A. No, sir.

X-Q. 41. And that package of tobacco hasn't got any red band with the word "Beech-Nut" printed on it, like that wide red band?

A. No, sir.

X-Q. 42. And the package of Beech-Nut scrap tobacco you have in your hand, that has got two beech-nuts on it, hasn't it?

A. Yes.

X-Q. 43. And in this case, it has got a single beech-nut on a green label, hasn't it?

A. Yes, sir.

X-Q. 44. So there is quite a difference between the label on that package and the label which I have shown you, isn't there?

A. Yes, sir.

X-Q. 45. Now, how long have you been in the grocery business all told?

A. Well, something over two years—two years and a half, I reckon.

X-Q. 46. And during that time what Beech-Nut products have you handled—that is, products of the Beech-Nut Packing Company?

A. Well, I have handled pork and beans and peanut butter, Beech-Nut chewing gum, catsup—is all I recall right now.

X-Q. 47. You never bought any tobacco products from the Beech-Nut Packing Company?

A. No, sir.

X-Q. 48. You never bought any scrap tobacco from the Beech-Nut Packing Company?

A. No, sir.

X-Q. 49. Never knew their salesman, Mr. Hamilton, to offer you any tobacco products for sale, did you?

A. No, sir.

X-Q. 50. You know that the tobacco business is an entirely different business from the food business, don't you?

A. Well, I can't say that I do.

X-Q. 51. Well, I thought you were in the tobacco business at one time—did Brite sell food?

A. But in the retail line they handle both.

X-Q. 52. I am not talking about the retail line—did Brite manufacture or sell any food products?

A. No, sir.

X-Q. 53. Did you ever hear of a tobacco manufacturer that did manufacture food products?

A. No, I don't know that I have.

X-Q. 54. And you never heard of a food manufacturer that manufactured tobacco products, did you?

A. Well, if a man knows, but some companies put out things they don't manufacture.

X-Q. 55. But I am asking you, do you know of any food concern that ever manufactured tobacco products?

A. No, I do not.

X-Q. 56. As I understand you, you folks down here in Kentucky are in the tobacco region, are you not?

A. Yes, sir.

X-Q. 57. The burley tobacco region?

A. Yes, sir.

X-Q. 58. Now, the tobacco industry down here has a distinct standing in itself—you make a crop of tobacco and strip it and ship it to the tobacco markets, and it is sold to tobacco people the world over?

A. Yes.

X-Q. 59. And it is a distinct industry from anything in the food line, isn't it?

A. Yes, sir.

X-Q. 60. Now, if a man came into your store and he wanted to buy a package of Beech-Nut chewing gum and asked you for that, you wouldn't hand him a package of that Beech-Nut scrap tobacco for chewing gum, would you?

A. Why certainly not—if he called for chewing gum, I would give him what he called for.

X-Q. 61. You would think he was crazy if he took tobacco when he called for chewing gum, or if he took chewing gum when he called for tobacco—you would think he was crazy if he did either one, wouldn't you?

A. Sure.

X-Q. 62. And without the intention in any way to be offensive at all—you would think you would be crazy to

give a man chewing gum when he wanted tobacco, or tobacco when he wanted chewing gum?

A. Yes.

X-Q. 63. And that is because chewing gum and tobacco are an entirely distinct character of goods—they have different uses?

A. Yes, sir.

X-Q. 64. They belong to entirely different classes, don't they?

A. Yes.

X-Q. 65. And it is the same way when you compare tobacco with baked beans and jellies and other food products—they are entirely different classes of goods, aren't they?

A. Well, they are used for different purposes.

X-Q. 66. They are different classes of goods—you consider tobacco to be different from food?

A. Sure.

X-Q. 67. Now, when this party that you say was Mr. Bacon came in your store, I understand he left you a package of this Lorillard scrap tobacco, did he not?

A. Yes.

X-Q. 68. And you never took the trouble to examine that package or to look at it and see whose product it was?

A. No, sir.

X-Q. 69. Didn't pay any particular attention to it at all?

A. No, sir.

X-Q. 70. And you didn't ask him to leave any credentials to show whether he was from the Lorillard Company, or any other company, did you?

A. No, sir.

X-Q. 71. He didn't leave any card showing who he represented, did he?

A. I don't remember it, if he did.

X-Q. 72. And for all you know, he might not have been from the P. Lorillard Company, isn't that so?

A. Well, I hardly think he would try to sell a "drop" shipment unless he was representing the company.

X-Q. 73. Well, there is one thing sure, he didn't say he was from the Beech-Nut Packing Company, did he?

A. No, sir.

X-Q. 74. So he made no misrepresentation at all as being from the Beech-Nut Packing Company, did he?

A. Well, he left me under the impression he was.

X-Q. 75. But he didn't say he was?

A. No, he did not.

X-Q. 76. Simply said he was selling Beech-Nut tobaccos, isn't that right?

A. Yes, sir.

X-Q. 77. And this Lorillard scrap tobacco has the name "Beech-Nut" on it, hasn't it?

A. Yes.

X-Q. 78. So he could say with perfect truthfulness he was selling that "Beech-Nut" scrap tobacco, couldn't he?

A. Yes, sir.

X-Q. 79. You don't handle any Beech-Nut tobacco or Beech-Nut cigarettes, do you?

A. Recently I have been handling Beech-Nut cigarettes.

X-Q. 80. Who did you buy them from?

A. DeWerthern, at Hopkinsville.

X-Q. 80*a*. So you didn't buy them from the tobacco manufacturer, but you bought them through a jobber—isn't that right?

A. Yes.

X-Q. 81. You buy those by the carton, don't you?

A. Yes, sir.

X-Q. 82. I show you a carton of cigarettes, already in evidence as Defendant's Exhibit ——; is that the kind you buy?

A. Yes, sir.

X-Q. 83. That says, "Lorillard's Beech-Nut Cigarettes," doesn't it?

A. Yes, sir.

X-Q. 84. And you have opened a package of these cartons, have you not?

A. Yes.

X-Q. 85. And you have noticed in them certain yellow and white slips like these I show you?

A. Yes, sir.

X-Q. 86. This yellow slip which appears in this carton says, "Lorillard's Beech-Nut Perfect Cigarettes," doesn't it?

A. Yes.

X-Q. 87. And on these white slips, which are headed "Please Read," you find "P. Lorillard Company, Manufacturer, New York City," doesn't it?

A. Yes, sir.

X-Q. 88. There is no Beech-Nut Packing Company's name on these packages?

A. I know their boxes since I have handled them.

X-Q. 89. So you know these cigarettes are products of the P. Lorillard Company, don't you?

A. I do now.

X-Q. 90. And you know they are not products of the Beech-Nut Packing Company?

A. I know it now, but I didn't.

X-Q. 91. Well, you continued to handle them since you knew they were Lorillard's, haven't you?

A. Well, I knew they were before I started.

X-Q. 92. So you knew that before you first started to handle them?

A. Yes, on account of a conversation that came up between us on the second call.

X-Q. 93. So, when you bought those cigarettes and put them on sale, you didn't buy them on the belief they were products of the Beech-Nut Packing Company—you knew they were Lorillard's?

A. Well, I was perfectly satisfied they wasn't the Packing Company's, but I didn't know whose they were.

X-Q. 94. But the minute you look at the cigarettes, there is plenty of evidence to show they are Lorillard's, isn't there?

A. Yes, sir.

X-Q. 95. I understand that you handle those cigarettes right up to the present time?

A. I have handled them for the last few months.

X-Q. 96. And you have handled them up to the present time?

A. Yes, sir.

X-Q. 97. You are still handling the Beech-Nut cigarette, are you?

A. I was up until last Saturday night, when I was unfortunate enough to have a fire which caused me to temporarily close my store. This fire occurred last Saturday night in Pembroke, and practically destroyed the building.

Redirect Examination by Mr. Johnson.

R-D. Q. 1. You have already said on direct, Mr. Roach, have you not, that when you first saw the package of this Beech-Nut scrap tobacco and Beech-Nut tobacco posters, that you thought that the Beech-Nut Packing Company was the maker thereof?

A. Yes, sir.

R-D. Q. 2. When this tobacco salesman was in your store offering to sell his Beech-Nut tobacco the first time, you have already said he talked to you?

A. Yes, sir.

R-D. Q. 3. What impression did he give you from his conversation?

A. Well, I just thought he was representing the Beech-Nut Packing Company, from the fact that he said that all goods sold under the Beech-Nut brand had to come up to Beech-Nut reputation, and not knowing Beech-Nut tobacco, I naturally thought it was a Beech-Nut produuct.

R-D. Q. 4. Did you keep a general grocery store, Mr. Roach?

A. Yes, sir.

R-D. Q. 5. Did you sell tobacco and cigarettes?

A. Yes, sir.

R-D. Q. 6. Is that a common thing in the grocery trade?

A. Yes, sir.

Re-Cross Examined by Mr. Cavanagh for Defendant.

R-X Q. 1. Now, Mr. Roach, this man didn't say he was from the Beech-Nut Packing Company, did he?

A. Well, I have answered that.

R-X Q. 2. That he did not?

A. Yes, sir.

R-X Q. 3. I am awful sorry I have to make you answer again.

A. That is all right.

R-X Q. 4. And furthermore, you never took the trouble to find out who made this tobacco, did you—you didn't look at it carefully enough, did you—you didn't see Lorillard's name on it, and you didn't see the Beech-Nut Packing Company's name on it—wasn't enough interested?

A. Well, I didn't look for the name.

R-X Q. 5. That is what I say—you made no investigation as to who made it?

A. No, I did not.

R-X Q. 6. And this salesman didn't sell you any tobacco at the time at all, did he, of this Beech-Nut scrap tobacco?

A. He offered it for sale, but I didn't buy any.

R-X Q. 7. But he did leave a package with you?

A. Yes.

R-X Q. 8. And you could have looked at that package of tobacco that salesman left with you to your heart's content, if you wanted to, couldn't you?

A. Yes, sir.

R-X Q. 9. And you had the privilege of handing that package of Beech-Nut scrap tobacco over to the Beech-Nut Packing Company's agent whenever he called at your store thereafter, if you wished to do so?

A. I didn't have it when he called—I gave it to my father.

R-X Q. 10. So you wasn't enough interested in it to keep it?

A. I don't use it.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff,*
vs.
P. Lorillard Company, *Defendant.*
} In Equity, No. 3056.

CERTIFICATE.

State of Kentucky, County of Christian, sct.

I, S. F. Davis, a Notary Public in and for the county and state aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing

deposition of George B. Roach was taken in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, at Pembroke, Christian County, Kentucky, beginning Monday, January 16th, 1922; that said witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony, and that the testimony was taken in Pembroke, Christian County, Kentucky, beginning at 3 o'clock P. M., and ending at 4 o'clock P. M., on January 16th, 1922; that the said deposition of the witness was read by said witness before signing same, except where the signature of the witness was waived, as indicated on the deposition.

I further certify that I am not connected by blood or marriage with either of the parties hereto, or interested directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies, in accordance with the attached bill, amounting to $..... (See certificate on next succeeding deposition for amount of fees, etc.)

In witness whereof, I have hereunto set my hand and official seal, this 16th day of January, 1922.

My commission expires February 24th, 1923.

S. F. DAVIS,
Notary Public, Christian County, Ky.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Depositions taken in behalf of plaintiff, before S. F. Davis, a Notary Public and Court Reporter, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of George B. Roach, on South Main street, in the City of Pembroke, Christian County, Kentucky, beginning Tuesday, January 17th, at 1:50 P. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; and Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

BRYAN O. FOSTER, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposed as follows:

By Mr. Johnson: Q. 1. Your name is Bryan O. Foster; your residence South Main Street, Pembroke, Kentucky; your age twenty-five years, and your occupation, clerk in grocery store of G. B. Roach Grocery; is that correct?

A. Yes, sir.

Q. 2. Where is the Roach grocery store?

A. It is on North Main.

Q. 3. What town?

A. In Pembroke.

Q. 4. How long have you been working for the G. B. Roach grocery store?

A. The last time since November, 1921, beginning November 21st.

Q. 5. Did you work for them before?

A. I did last fall.

Q. 6. Have you handled Beech-Nut Packing Company's products?

A. Yes.

Q. 7. Will you name some of them you have handled, please?

A. Handled Beech-Nut pork and beans, and peanut butter and chewing gum and mints.

Q. 8. Are you familiar with the Beech-Nut Packing Company's label?

A. Yes, sir, I think so.

Q. 9. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3—did you ever see a package of this tobacco before?

(Witness examines the package handed him by attorney.)

A. Yes, sir.

Q. 10. When?

A. The first time I remember was along in the summer.

Q. 11. When you saw it, who did you think was putting it out?

A. I thought the Beech-Nut Packing Company was putting it out.

Q. 12. Why did you think that?

A. Well, from the name and label I just supposed they were putting it out.

Q. 13. I show you a package of cigarettes, now in

evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen a package of those cigarettes before?

A. Yes, sir.

Q. 14. When?

A. Well, the first time that I remember for sure was along in the fall.

Q. 15. When you saw it, who did you think was putting them out?

A. I thought the Beech-Nut people—Beech-Nut Packing Company was putting them out.

Q. 16. Why did you think that?

A. From the name of the cigarettes and label on them?

Q. 17. How long did you think this tobacco and cigarettes were put out by the Beech-Nut Packing Company?

A. Until the 21st day of November—I found out it was a different concern.

Q. 18. How did you happen to learn differently then?

A. Well, the Beech-Nut man—that is the tobacco man come in, and it happened that the Beech-Nut Packing Company's man was here the same day, and I asked Mr. Roach how come two men representing the Beech-Nut people were here the same day, and so he told me.

Q. 19. Did you talk to the Beech-Nut tobacco man when he came in that day?

A. Yes, sir.

Q. 20. Did he introduce himself to you?

A. Yes, sir.

Q. 21. What did he say to you at that time?

A. He come in and told me that he was Mr. Bacon, with the Lorillard Tobacco Company, and was handling that Beech-Nut cigarettes and tobacco.

Q. 22. Then what happened between you?

A. He looked over the stock of cigarettes and things

we had, and I told him Mr. Roach wasn't in, and so he said he would be back in a little while before he left town to see him again.

Q. 23. When did Mr. Roach come in?

A. Just as he was leaving.

Q. 24. What did you tell Mr. Roach at that time?

A. I told him there was—as well as I remember, I expressed it in this way: "There is a Beech-Nut tobacco man here," something like that, and told him he had just been in to see him.

Q. 25. Did you see him again?

A. Yes, sir, when he was leaving town, I pointed him out as he was leaving town and told Mr. Roach he wouldn't be back, he was leaving town.

Q. 26. How did he leave?

A. In a Ford roadster.

Cross-Examined by Mr. Cavanagh for Defendant.

X-Q. 1. What was the date you met this Lorillard tobacco man?

A. It was the 21st day of November.

X-Q. 2. About what time?

A. Well, it was in the afternoon, if I am not badly mistaken.

X-Q. 3. That date—the 21st day of November, 1921, was the first time you ever saw that man, wasn't it?

A. Yes—that I know of.

X-Q. 4. And as I understand you, he came into Mr. Roach's store and introduced himself as from the Lorillard Company?

A. Yes, sir.

X-Q. 5. And that he was selling this Beech-Nut scrap tobacco?

A. Yes.

X-Q. 6. And the Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 7. And you told him that he would have to see Mr. Roach about putting this scrap tobacco and these cigarettes in stock, didn't you?

A. I told him I didn't do the buying—he would have to see Mr. Roach.

X-Q. 8. Yes—then he said he would return a little later?

A. Yes, sir, said he would see him before he left town.

X-Q. 9. And he told you his name was Mr. Bacon?

A. Yes, sir.

X-Q. 10. Now that date was the first time you had ever seen this man, wasn't it?

A. That I know of, yes.

X-Q. 11. The first time he had ever spoken to you and introduced himself?

A. Yes, the first time I had been introduced at all.

X-Q. 12. Have you ever seen that man since the 21st day of November, 1921?

A. Well, no, I don't recall seeing him since.

X-Q. 13. He hasn't been into your store and made any effort to sell you any tobacco since then?

A. Well, I wouldn't say that he hasn't been there since. I know he was there then.

X-Q. 14. But you personally, yourself, have never seen him since that time?

A. No, I don't know of him being there since then.

X-Q. 15. So that fact is taken as understood that that was the only time so far as you know, he was ever in your store?

A. Yes, sir.

X-Q. 16. And when he was there he said he was from the Lorillard Company and he was selling these tobaccos?

A. Yes, sir.

X-Q. 17. Now, when was it, as near as you can tell, the first time you ever saw a package of tobacco like this Lorillard scrap tobacco?

A. Well, it was in the latter part of the summer, in August, I believe.

X-Q. 18. Where did you see it?

A. At Hopkinsville.

X-Q. 19. You didn't buy any of it, did you?

A. No, it was given to me.

X-Q. 20. Who gave it to you?

A. Some traveling man come in the room I was in—in fact, there was eight or ten men in there—so he handed it out to anybody that chewed at all.

X-Q. 21. Did you chew any of the tobacco?

A. Yes, sir.

X-Q. 22. Pretty good chewing tobacco, isn't it?

A. A little sweet.

X-Q. 23. A little sweet, but good tobacco?

A. Yes, it is good tobacco, if they would leave the sweet off of it.

X-Q. 24. Tobacco chewers all have different tastes, don't they?

A. Yes.

X-Q. 25. You see Lorillard's name on that package, don't you?

(Witness examines package.)

A. Yes.

X-Q. 26. Will you look at it and see if you can find the Beech-Nut Packing Company's name on it any place?

A. No, I don't see the packing company's name on it.

X-Q. 27. So when this tobacco was handed you, you never even looked to see whose name was on it, did you?

A. Well, about all that struck me, I suppose, was that it was Beech-Nut stuff.

X-Q. 28. You didn't pay any attention to who made it—anything of that sort?

A. No, I don't know that I paid any attention as to who made it—I don't know that I did.

X-Q. 29. That didn't make any difference to you at that time at all?

A. Well, not right then I don't suppose it did.

X-Q. 30. Have you sold any of these Beech-Nut cigarettes?

A. Yes, sir.

X-Q. 31. When was the first time you saw a package of these Beech-Nut cigarettes?

A. It was along in the fall.

X-Q. 32. Where did you first see them?

A. Well, I was in Hopkinsville when I first saw them —I was there when they did a right smart Beech-Nut advertising—Beech-Nut cigarette advertising.

X-Q. 33. You didn't buy any of them, did you, that you recall?

A. No, I didn't buy any until after I started to work here—then I smoked some.

X-Q. 34. You notice P. Lorillard Company's name on that cigarette, don't you?

A. I do, yes, sir.

X-Q. 35. And when you said you first thought they were put out by the Beech-Nut Packing Company, the food people, you never took the trouble to look at the package and see whose name was on it, did you?

A. Well, before then I had seen them, but I wasn't for sure how the style of the Beech-Nut Manufacturer's name run.

X-Q. 36. You didn't know the name of the Beech-Nut Packing Company?

A. I didn't know for sure at that time.

X-Q. 37. You don't find the Beech-Nut Packing Company's name on that package, do you?

A. No, sir.

X-Q. 38. But you do find "P. Lorillard Company," on it?

A. Yes, sir.

X-Q. 39. You have heard of the Lorillard Company, have you not?

A. Well, not until I seen that tobacco, I don't know that I ever have, no, sir.

X-Q. 40. Have you ever sold much tobacco?

A. Well, I reckon a right smart.

X-Q. 41. You have sold these cigarettes (referring to cigarettes made by P. Lorillard Company) at Mr. Roach's store, have you?

A. Yes, sir.

X-Q. 42. They come in that kind of a carton I show you—a large carton like this, which has been put in evidence in this case Defendant's Exhibit No. ——?

A. Yes, sir.

X-Q. 43. And that has "Lorillard's Beech-Nut Perfect Cigarettes" on it?

A. Yes, sir.

X-Q. 44. You don't find the Beech-Nut Packing Company's name on it?

A. No, sir.

X-Q. 45. Did you ever hear of or sell the Climax chewing tobacco—Climax plug?

A. Well, I haven't since I have been with him, no, sir.

X-Q. 46. Well, did you ever hear of it?

A. Yes, sir.

X-Q. 47. And to shorten this examination, you have heard of the Murad cigarettes, the Moguls, Egyptian Deities?

A. I am not sure about that.

X-Q. 48. You have heard of the Helmars?

A. Yes.

X-Q. 49. And the concern that makes all those cigarettes must be pretty prominent in the tobacco world, wouldn't you say?

A. Well, I don't hardly know about that.

X-Q. 50. But you know they are wide selling brands of cigarettes, don't you?

A. Well, we haven't the trade for them—they may be in some places; we don't have a trade for that class of cigarettes.

X-Q. 51. Do you use cigarettes?

A. Yes, sir.

X-Q. 52. You have seen those brands advertised and in cigar stores in Hopkinsville and elsewhere?

A. I have seen them advertised.

X-Q. 53. I understood you to say that you thought that this Lorillard Beech-Nut scrap tobacco was put up by the Beech-Nut Packing Company because of the label—are you familiar with the label of the Beech-Nut Packing Company?

A. Well, I considered that I was.

X-Q. 54. I show you a Beech-Nut Packing Company mint label, which is in this case as Defendant's Exhibit ——, does that look like the Beech-Nut label?

A. Well, at a glance of the eye it does.

X-Q. 55. It has got the name of the Beech-Nut Packing Company on it, hasn't it?

A. Yes, sir.

X-Q. 56. You are familiar with this wide red band of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 57. This stands out on all their packages, doesn't it?

A. Yes, sir.

X-Q. 58. And that has a single beech-nut in the middle on the green leaf?

A. Yes, sir—I hadn't noticed it hardly that close.

X-Q. 59. There is quite a difference between those two labels now, isn't there—look at them?

A. Yes, as far as the labels are concerned, get them both together there is quite a difference in them.

X-Q. 60. Now, you never knew the Beech-Nut Packing Company to put out any food products, or gum, or candy, in packages having those wide red lines like a sun-burst on it, did you?

A. The Beech-Nut Packing Company?

X-Q. 61. Yes.

A. No, I don't recall seeing it.

X-Q. 62. That sun-burst, I will call it, is pretty prominent on the package, you can tell it is Beech-Nut tobacco?

A. Yes.

X-Q. 63. You never knew the Beech-Nut Packing Company to sell packages of any of their food products that resembled in shape the package like this tobacco is put up in?

A. You mean in shape?

X-Q. 64. Yes, like this tobacco?

A. No, I never seen any of their packages shaped like that.

X-Q. 65. As a user of tobacco, you could tell that was a tobacco package, couldn't you?

A. Well, I think I could.

X-Q. 66. And you never knew them to put up any packages of stuff that looked like a package of cigarettes?

A. No, sir.

X-Q. 67. You can tell a cigarette package a mile off—it's got an individuality all of its own?

A. Yes, if I wanted to smoke I could.

X-Q. 68. As a matter of common sense a package of cigarettes has a shape and appearance all its own?

A. Yes, sir.

X-Q. 69. And you can readily tell them on the shelf of a store?

A. Yes, sir.

X-Q. 70. You never sold any tobacco products that you yourself knew came from the Beech-Nut Packing Company, did you—the food people?

A. Well, I didn't know they come from them—I thought they did.

X-Q. 71. No, I mean in your own mind and from your own knowledge, that came from the Beech-Nut Packing Company?

A. I never sold any tobacco I know now come from there, no sir.

X-Q. 72. You never heard of them putting out tobacco products as a matter of fact, did you?

A. No, I never have.

X-Q. 73. If a man came into your store and asked you for a package of Beech-Nut scrap tobacco or for a package of Beech-Nut cigarettes, would you sell him a package of Beech-Nut chewing gum, or Beech-Nut candy, or Beech-Nut food products in place of toabcco and cigarettes?

A. No, sir.

X-Q. 74. You would think that man was crazy if he took one for the other, wouldn't you?

A. Yes, sir.

X-Q. 75. And that is because they are an entirely different class of goods, aren't they?

A. Sure.

X-Q. 76. Tobacco is tobacco?

A. Yes, sir.

X-Q. 77. And it is recognized in the trade and by men

of common sense that tobacco isn't the same as chewing gum and food; isn't that right?

A. Yes, sir.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

CERTIFICATE.

State of Kentucky, County of Christian, Sct.

I, S. F. Davis, a Notary Public in and for the county and state aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing deposition of Bryan O. Foster, was taken in behalf of Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, at Pembroke, Christian County, Kentucky, beginning Tuesday, January 17th, 1922; that said witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the said testimony was taken in Pembroke, Christian County, Kentucky, beginning at 1:50 P. M. o'clock, January 17th, 1922, and ending at 2:15 P. M. o'clock, January 17th, 1922; that the said deposition was read by said witness before signing same, except where the signature of the witness was waived, as indicated on the deposition.

I further certify that I am not connected by blood or

marriage with either of the parties hereto, or interested directly or indirectly, in the matter of controversy.

I also certify that I have been paid my fees as Special Examiner, for this deposition and the deposition of George B. Roach hereto attached, and for copies taken, in accordance with the attached bill, amounting to $37.00

In witness whereof I have hereunto set my hand and seal this the 17th day of January, 1922.

My commission expires February 24th, 1923.

S. F. DAVIS,
Notary Public, Christian County, Kentucky.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Deposition taken in behalf of plaintiff, before Mary T. Kenney, a Notary Public in and for Bourbon County, Kentucky, acting as Special Examiner by consent of counsel, at the Bourbon County Court House, Paris, Kentucky, beginning Friday, January 20th, 1922, at 10:30 o'clock A. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; R. B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

CHARLES P. COOK, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Q. 1. Your name is Charles P. Cook; your residence 12th and Cypress street, Paris, Kentucky; your age, 45 years; occupation, grocer; is that correct, Mr. Cook?

A. Yes.

Q. 2. Under what name, and where, do you do business?

A. Charles P. Cook & Company, 726 Main street, Paris, Kentucky.

Q. 3. How long have you been in the grocery business?

A. Over twenty-two years.

Q. 4. Have you handled Beech-Nut Packing Company products?

A. Yes, sir.

Q. 5. How long?

A. Almost ever since I have been in business.

Q. 6. Please name some of them that you have handled.

A. Chewing gum, mints, breakfast bacon, peanut butter, jellies, macaroni, spaghetti.

Q. 7. What have you found, in your experience, to be the quality of Beech-Nut Packing Company's line of products?

A. It is high class.

Q. 8. How have they sold with you?

A. Good.

Q. 9. What does the Beech-Nut label on a line of goods mean to you?

A. It means quality.

Q. 10. Do you sell tobacco and cigars in your grocery store?

A. Yes, sir.

Q. 11. How long have you done this?

A. Ever since I have been in business.

Q. 12. Is it a common thing for grocery stores to sell tobacco?

A. With all of them in this section of the country.

Q. 13. Are you selling Beech-Nut chewing gum in your store at present?

A. Yes, sir.

Q. 14. Where do you expose this gum for sale?

A. In a case on top of the cigar case.

Q. 15. Are any other of the Beech-Nut products displayed for sale near your tobacco?

A. Well, I have got some on the shelf behind it, and in front of it, too.

Q. 16. How close is that to the tobacco?

A. Well, I would say that the jellies are right directly behind it, and peanut butter and breakfast bacon are right opposite the case, only a few feet.

Q. 17. I show you a package of Beech-Nut scrap tobacco, in evidence in this case as Plaintiff's Exhibit No. 3. Have you ever seen packages of this tobacco before?

A. Yes, sir.

Q. 18. Do you handle it?

A. Yes, sir.

Q. 19. When did you first know of it?

A. Why, four or five years ago; first time I ever saw it a salesman came into my place of business, and stated that he was selling Beech-Nut tobacco.

Q. 20. What occurred between you and the tobacco salesman at that time?

A. I told him that I didn't know that the Beech-Nut Packing Company put up tobacco, and he stated that this was a new product, or one of their new products.

Q. 21. What was the effect on you of this conversation?

A. Well, I am not certain that I bought Beech-Nut tobacco at that time, wouldn't say positive, but I think I did. We were perfectly willing to handle it alright enough, because we had been handling other Beech-Nut stuff, and thought the quality would be like all other Beech-Nut stuff.

Q. 22. What makes your memory of your conversation with the Beech-Nut tobacco salesman on the day you have told about, so clear in your mind?

A. Well, Mr. Mattox, who sells Beech-Nut stuff, was in the store at the time, and I told him that I didn't know that the Beech-Nut Packing Company put out tobacco, and he stated himself that he didn't know it either, that it wasn't on his list, he would find out about it.

Q. 23. Would you take this package for a Beech-Nut product?

A. Well, I can't say that. I will say that the Beech-Nut name is what appealed to me. I never paid so much

attention to the package as I did to the name that was on it. That's what impressed me.

Cross-Examination by Mr. Cavanagh.

X-Q. 24. You say that it was about four or five years ago when this tobacco salesman first came into your store to sell you Beech-Nut tobacco?

A. Yes, sir.

X-Q. 25. And was Mr. Mattox, the Beech-Nut Packing Company salesman, in the store at that time?

A. Yes, sir.

X-Q. 26. So the two salesmen practically met in the store?

A. Well, I don't know that he met the other one there, but Mattox was in the store at the time.

X-Q. 27. And the salesman had sample packages of the Beech-Nut scrap tobacco, like this exhibit, there with him, did he not?

A. He had a package; I wouldn't say positively that it was that package, but I never saw one different from that.

X-Q. 28. But it had the red lines on it—as near as you can recollect, it had the same general appearance?

A. Near as I can remember, it was the same package.

X-Q. 29. And at that time this tobacco salesman didn't say he was from the Beech-Nut Packing Company, did he?

A. Not when he introduced himself. He said he was selling Beech-Nut tobacco.

X-Q. 30. Now, you have heard, of course, of P. Lorillard Company, have you not?

A. I hadn't heard of them at that time—until I looked at the package of tobacco.

X-Q. 31. Now, when you looked at the package, you saw the name Lorillard on it?

A. Yes, but not at that time.

X-Q. 32. I mean when you did take the trouble to look at it?

A. Yes.

X-Q. 33. And that indicated to you that it was a Lorillard tobacco product?

A. Yes, sir.

X-Q. 34. Now, I understand that you also handle in your store the various Beech-Nut food products?

A. Yes, sir.

X-Q. 35. And I further believe that your county, or neighborhood here, is more or less interested in the growth of tobacco—this is the tobacco section here in Kentucky, is it not?

A. Yes, sir, center of it.

X-Q. 36. You would never confuse a food product with tobacco, would you?

A. Not likely to.

X-Q. 37. You regard tobacco as an entirely different class of goods from bacon and chewing gum, do you not?

A. We regard them as a different thing, but we carry them both, if that's what you mean.

X-Q. 38. You do regard tobacco products as different from food products, do you not; that is, they have different uses and are different goods?

A. I don't understand exactly how you mean that. We consider tobacco as much a part of our line as we do the groceries.

X-Q. 39. Yes, but the tobacco industry is a distinct line of business in itself?

A. Oh, yes.

X-Q. 40. Just the same as steel or oils or grain are different lines of business—isn't that right?

A. Well, they are distinct lines of business to the men that handle tobacco alone, but with us they are not distinct lines of business.

X-Q. 41. Well, now, for instance, in your stores you sell a great many articles that are in no way related, do you not?

A. Yes, sir.

X-Q. 42. You sell brooms?

A. Yes, sir. Mops.

X-Q. 43. Washboards?

A. Washboards.

X-Q. 44. And these brooms, mops, washboards and other articles are in no way connected with food, are they?

A. Except that I sell them in the same store, as a part of my same stock.

X-Q. 45. But that is the only connection with them—a man wouldn't buy a broom to eat on his table for breakfast, would he?

A. Not much.

X-Q. 46. And a man wouldn't buy tobacco to eat for breakfast?

A. No, he wouldn't want it for breakfast; might want it beforehand.

X-Q. 47. If a person came into your store and wanted to buy some Beech-Nut bacon, or a package of Beech-Nut chewing gum, put out by the Beech-Nut Packing Company, you wouldn't hand him, or give him, a package of this Lorillard Beech-Nut scrap tobacco, would you?

A. Not apt to.

X-Q. 48. And you would think he was crazy if he took it when he wanted chewing gum or bacon, wouldn't you?

A. Of course.

X-Q. 49. You have never bought any tobacco from the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 50. And you never knew them to sell any, did you?

A. No, sir.

X-Q. 51. You never knew the Beech-Nut Packing Company to put out a package in its line that looked like this Lorillard scrap tobacco package, did you?

A. No. The package itself didn't have any effect on me at all; just a matter of hearing the name, Beech-Nut Packing Company, in connection with the tobacco.

X-Q. 52. You mean simply the word Beech-Nut?

A. Yes, sir.

X-Q. 53. You never heard of, or saw, a package of the Beech-Nut Packing Company food products having that red sunburst or red radiating lines on it, did you?

A. No, sir.

X-Q. 54. And as a merchant engaged in the grocery business and in selling these various products, you can pick out that as a tobacco package, at a glance, wouldn't you?

A. I would now, knowing this package of tobacco.

X-Q. 55. As a matter of fact, if this package was on the shelf, with its red sunburst or radiating lines, and the general appearance of it—that lets you know it is the Beech-Nut tobacco package, doesn't it?

A. Of course.

X-Q. 56. And you can tell it from any other tobacco package, at a glance?

A. Yes, sir.

X-Q. 57. As I understand it, you are still buying this Lorillard Beech-Nut scrap tobacco?

A. Yes, sir.

X-Q. 58. It is quite a good seller for its kind, isn't it?

A. It's about as good a seller—really the only scrap tobacco we have at all.

X-Q. 59. And you have been buying it for a number of years, knowing it is Lorillard tobacco?

A. Yes, sir.

X-Q. 60. And you know the P. Lorillard Company has a good reputation for its manufactured tobacco?

A. Yes, sir.

X-Q. 61. So, having known for a number of years past that this was the Lorillard Company's scrap tobacco, you haven't the slightest objection to buying and selling this tobacco, have you?

A. None whatever.

X-Q. 62. You never heard of any tobacco manufacturing concern packaging and selling food products, did you?

A. Not that I know of.

X-Q. 63. And likewise you never heard of a food concern that was in the tobacco manufacturing business?

A. No, sir, only the impression that I got here.

X-Q. 64. Down here in Bourbon County and around this section of Kentucky, the tobacco industry is quite a business, as I understand it—that is, they have tobacco associations, and they have tobacco warehouses, and they have tobacco markets, for buying and selling the crop, and the like, have they not?

A. Yes, sir.

X-Q. 65. And these tobacco markets and warehouses, they don't store and sell food products or chewing gum, do they?

A. No, sir.

Signature waived by consent of parties.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

CERTIFICATE.

State of Kentucky, County of Bourbon, ss.

I, Mary T. Kenney, a Notary Public within and for the State of Kentucky, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing deposition of Charles P. Cook was taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me at Paris, Bourbon County, Kentucky, on Friday, January 20th, 1922; that the foregoing witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me, and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken in Paris, Kentucky, beginning at 10:30 o'clock A. M., and ending at 11 o'clock on Friday, January 20th, 1922; that the signature of said witness was waived by agreement of counsel, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested, either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner, and for copies made, in accordance with the attached bill, amounting to $7.47.

In witness whereof I have hereunto set my hand and official seal this 23rd day of January, 1922.

MARY T. KENNEY,
Notary Public, Bourbon County, Ky.

My commission expires January 13th, 1924.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Depositions taken on behalf of plaintiff before Garland A. Thomasson, a notary public, acting as Special Master by consent of counsel and pursuant to notice, and by agreement of counsel at the Pelton studio, 9½ North West Pack Square, and at Pennell's cigar store, 14 Patton Ave., Asheville, North Carolina, beginning Monday, January 23, 1922, at 10:15 A. M.

Present: Mr. H. McClure Johnson, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Mr. R. B. Cavanagh, of Meyers, Cavanagh, Whitehead and Hyde, for P. Lorillard Company.

H. W. PELTON, a witness produced on behalf of the plaintiff, pursuant to notice and agreement of counsel, being first duly sworn, and in response to interrogatories propounded by Mr. Johnson, deposes as follows:

By Mr. Johnson: Q. 1. Your name is H. W. Pelton?

A. Yes.

Q. 2. Your residence is 124½ Montford Avenue, Asheville, N. C.?

A. Yes.

Q. 3. Your age is forty?

A. Yes.

Q. 4. Your occupation professional photographer; is that correct?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. Pelton Studio, 9½ North West Pack Square.

Q. 6. What town?

A. Asheville, North Carolina.

Q. 7. Do you know the Pennell cigar store at 14 Patton Avenue, Asheville, North Carolina?

A. Yes, sir.

Q. 8. What floor in the building is it?

A. First floor.

Q. 9. Has it a front show window facing the sidewalk?

A. Yes, sir.

Q. 10. Did you ever photograph that show window?

A. Yes, sir.

Q. 11. When?

A. Yesterday, January 22.

Q. 12. What is the date?

A. January 22, 1922.

Q. 13. On whose instructions?

A. Mr. Atkinson's of the Beech-Nut Packing Company.

Q. 14. Did you take the photograph, develop it and print it yourself?

A. I took the photograph, and developed it and had someone else print it.

Q. 15. Someone in your studio?

A. Yes.

Q. 16. Is this photograph, which I show you, marked Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display, the photograph you took of the Pennell cigar store front show window and display therein on January 22, 1922 (handing to witness)?

A. Yes, sir.

Mr. Johnson: This photograph, marked as I

have described, is introduced and offered in evidence as Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display.

Q. 17. Does Pennell's name show on the window or front of his store?

A. No, sir, I have not seen it.

Cross-Examination by Mr. Cavanagh.

X-Q. 18. What time yesterday did you take this picture?

A. Yesterday morning, somewhere between eleven and twelve.

X-Q. 19. And after you took the picture, what did you do, did you develop the plate right away?

A. Very soon afterwards.

X-Q. 20. Did you touch up the plate in any way at all?

A. No, sir.

X-Q. 21. Would you say that that photograph is an absolutely accurate representation of that window and the contents of it?

A. Yes, sir.

X-Q. 22. Did you take this from the outside of the store or the inside?

A. The outside.

X-Q. 23. And it was an absolutely bright day when you took it, was it?

A. It was cloudy, but the light was good.

X-Q. 24. It was a good light for taking a photograph as this shows?

A. Yes, sir.

X-Q. 25. Yes. Look at this package of Beech-Nut cigarettes, you see the name P. Lorillard Co. on it (indicating and handing to witness)?

A. Yes, sir.

X-Q. 26. And that is the black against the red here, isn't it?

A. Yes, sir.

X-Q. 27. Do you notice the name P. Lorillard Co. on the photographic representation of those packages?

A. No.

X-Q. 28. Does it show on any of those three Beech-Nut cigarettes signs, does it show on the photograph?

A. I don't notice that. I don't see it on there.

X-Q. 29. As a matter of fact, it is absolutely absent on those pictures, isn't it?

A. Yes, sir.

X-Q. 30. How far is this Pennell cigar store from this building here—how near is it?

A. Yes, one block from here.

X-Q. 31. Did you notice on those Beech-Nut signs in that window, on each of those packages or pictures on the cigarette packages, the words "P. Lorillard Co."?

A. No, sir.

X-Q. 31*a*. And then if the signs in the window show on those Beech-Nut panels or pictures the words "P. Lorillard Co." on the package, then you would say that was not an accurate representation of the window, would you not—of the signs in the window?

A. I was asked if it was a representation of the articles in the window.

X-Q. 32. You don't quite understand.

A. I understand what you say, and I know that a black photograph on red will photograph black.

X-Q. 33. But it would show that name on there, would it not?

A. It might not even if they were there. Red and black show black; a black photograph is black—

X-Q. 34. Then you are not certain, are you?

A. It depends on the depth of the red, and the sen-

sitiveness of the photographic plate whether or not the letters would be at all visible or not.

X-Q. 35. But to get back to my question, if the three Beech-Nut signs in the window, which I have marked in pencil for identification as A, B and C, showed on the picture of the Beech-Nut cigarette package the words "P. Lorillard Co.," as you look in the window, then this photograph would not be a true representation, would it?

A. You mean a representation, a true representation of all the colors?

X-Q. 36. Or the words on there?

A. In that particular case it might not be on account of the inability of the plate to photograph black against red.

X-Q. 37. If you looked in that window and saw on the signs the name "P. Lorillard Co.," on the bottom of those packages—cigarette packages of the signs, the same as is on the cigarette package itself—that is the name—then that photograph would not truly show that window and the packages and the reading matter of the signs, would it?

A. It would show the window and the packages.

X-Q. 38. But not the reading matter?

A. But not necessarily the reading matter; no, sir.

By Mr. Cavanagh: The photograph introduced by the plaintiff as Plaintiff's Exhibit No. 13 is now objected to on the ground that it does not accurately show the signs in the window, nor does it reproduce accurately the pictures or signs on the Beech-Nut cigarette.

And the deposition of this witness, in connection with this photograph is also objected to on the same grounds.

Redirect Examination by Mr. Johnson.

R-D. Q. 39. Is this photograph, marked Plaintiff's Exhibit No. 13, which you took of the Pennell cigar store window, in colors?

A. No, sir.

R-D. Q. 40. Do colors necessarily show in photographic prints, ordinary photographs?

A. Prints are shown in different degrees of grays and whites, different colors will photograph with different intensities from white to black.

R-D. Q. 41. Is this photograph a correct photographic representation of this show window and the display therein, when taken with the usual photographic materials?

A. Yes, sir.

By Mr. Cavanagh: Question objected to on the ground that the witness has testified that the name "P. Lorillard Co." does not show on the packages. Counsel for the P. Lorillard & Company understands that after this deposition has been taken an adjournment will be taken to the cigar store where the window in question is located and, therefore, counsel insists that an adjournment be taken over to the cigar store to determine this matter at once.

Adjournment thereupon taken to said Pennell's cigar store, 14 Patton Avenue, Asheville, N. C.

By Mr. Cavanagh: An adjournment was taken to the Pennell cigar store. The witness examined the show window of which Plaintiff's Exhibit No. 13, introduced this morning, was supposed to be a photograph. And the cross-examination of the witness Mr. H. W. Pelton by Mr. Cavanagh continued:

R-X Q. 42. Mr. Pelton, in my presence, you have just

sitiveness of the photographic plate whether or not the letters would be at all visible or not.

X-Q. 35. But to get back to my question, if the three Beech-Nut signs in the window, which I have marked in pencil for identification as A, B and C, showed on the picture of the Beech-Nut cigarette package the words "P. Lorillard Co.," as you look in the window, then this photograph would not be a true representation, would it?

A. You mean a representation, a true representation of all the colors?

X-Q. 36. Or the words on there?

A. In that particular case it might not be on account of the inability of the plate to photograph black against red.

X-Q. 37. If you looked in that window and saw on the signs the name "P. Lorillard Co.," on the bottom of those packages—cigarette packages of the signs, the same as is on the cigarette package itself—that is the name—then that photograph would not truly show that window and the packages and the reading matter of the signs, would it?

A. It would show the window and the packages.

X-Q. 38. But not the reading matter?

A. But not necessarily the reading matter; no, sir.

By Mr. Cavanagh: The photograph introduced by the plaintiff as Plaintiff's Exhibit No. 13 is now objected to on the ground that it does not accurately show the signs in the window, nor does it reproduce accurately the pictures or signs on the Beech-Nut cigarette.

And the deposition of this witness, in connection with this photograph is also objected to on the same grounds.

Redirect Examination by Mr. Johnson.

R-D. Q. 39. Is this photograph, marked Plaintiff's Exhibit No. 13, which you took of the Pennell cigar store window, in colors?

A. No, sir.

R-D. Q. 40. Do colors necessarily show in photographic prints, ordinary photographs?

A. Prints are shown in different degrees of grays and whites, different colors will photograph with different intensities from white to black.

R-D. Q. 41. Is this photograph a correct photographic representation of this show window and the display therein, when taken with the usual photographic materials?

A. Yes, sir.

By Mr. Cavanagh: Question objected to on the ground that the witness has testified that the name "P. Lorillard Co." does not show on the packages. Counsel for the P. Lorillard & Company understands that after this deposition has been taken an adjournment will be taken to the cigar store where the window in question is located and, therefore, counsel insists that an adjournment be taken over to the cigar store to determine this matter at once.

Adjournment thereupon taken to said Pennell's cigar store, 14 Patton Avenue, Asheville, N. C.

By Mr. Cavanagh: An adjournment was taken to the Pennell cigar store. The witness examined the show window of which Plaintiff's Exhibit No. 13, introduced this morning, was supposed to be a photograph. And the cross-examination of the witness Mr. H. W. Pelton by Mr. Cavanagh continued:

R-X Q. 42. Mr. Pelton, in my presence, you have just

examined or looked at the show window of the Pennell Cigar Store, and particularly the three Beech-Nut panels or signs. During this examination you noticed on each of the pictures or representations of the packages of cigarettes the words "P. Lorillard & Co." shown prominently on the package, did you not?

A. Yes, sir.

R-X Q. 43. And those words "P. Lorillard Co." do not appear upon the photograph of the packages which has been introduced in evidence as Exhibit 13 of plaintiff. Those words "P. Lorillard Co." do not show on this photograph?

A. Not so that we could see it.

R-X Q. 44. They do not show there at all, do they?

A. They do not show.

R-X Q. 45. So that so far as those particular Beech-Nut signs go this photograph is not a true representation of what you can see in the window when you stand on the sidewalk, is it?

A. This photograph is a representation—as far as you can get it.

R-X Q. 46. But it doesn't show the words "P. Lorillard Co."?

A. No, sir, it doesn't.

R-X Q. 47. So it is not really a true representation, is it?

A. As far as we can get it photographically, it is.

R-X Q. 48. Do you mean to say that when a picture of any object shows printing on it, and you take a photograph in which that printing is entirely absent, to the eye, that that is an accurate photograph?

A. I cannot answer that question by "yes" or "no." I would have to put in a few qualifying words, there are different colors, different degrees of intensity of lights and shades. A photograph reproduces in monotone, and different degrees of color.

R-X Q. 49. Well, to cut this whole matter short, the signs in the window show the name "P. Lorillard Co." prominently on these pictures of the package?

A. Yes.

R-X Q. 50. And they are not shown in the photograph?

A. No.

Mr. Cavanagh: The objection to the reception of the photograph in evidence because it is not an accurate representation and as not accurately showing the Beech-Nut cigarette signs in the window is repeated.

Redirect Examination Continued by Mr. Johnson.

R-D. Q. 51. Is there any question at all in your mind that this is not a correct photographic reproduction of that window and the display in it?

A. I consider it a correct photographic representation, with the ordinary photographic materials.

R-D. Q. 52. In order to bring out the colors of black and red, would you have to use other than the usual photographic materials?

A. Yes, sir. A red light is used in the dark room because plates are not sensitive to red. The ordinary photographic plate not being sensitive to the deeper shades of red and not sensitive to black, photographs of both are practically the same degree of intensity of monotone, so while the letters may be there, we cannot see them. So of the white clouds and the sky. The plates are sensitive to blue, very sensitive. Very sensitive to white. So if we get a picture on a blue background the whole thing will appear white. The clouds have been photographed on the blue sky, but we cannot see any differentiation between the two.

By Mr. Cavanagh: Further cross-examination.

R-X Q. 53. You could take a photograph of that window to show the words "P. Lorillard Co." and they would show up on that photograph the same as they do show in the window, couldn't you?

A. With the same materials to use?

R-X Q. 54. No, but you could take a photograph?

A. Yes.

R-X Q. 55. Will you do that for me?

A. I cannot do it on short notice.

R-X Q. 56. Will you take such photographs for me?

A. I would be glad to.

R-X Q. 57. They can be taken all right; it can be taken?

A. Yes, sir.

Deposition closed.

Signature waived.

W. C. PENNELL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposed as follows:

By Mr. Johnson: Q. 1. Your name is W. C. Pennell?

A. Yes, sir.

Q. 2. Residence is 304 Hillside Street, Asheville, North Carolina?

A. Yes, sir.

Q. 3. Your age is forty years?

A. Yes, sir.

Q. 4. Your occupation a retail tobacco dealer and news agent, is that correct?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. Pennell's Cigar Store, 14 Patton Avenue, Asheville, North Carolina.

Q. 6. How long have you been in that business?

A. About thirty months.

Q. 7. Do you handle any of the Beech-Nut Packing Company's products, and name some of them that you handle?

A. Mints, gums, penny bars, caramels.

Q. 8. How long have you handled Beech-Nut products, Mr. Pennell?

A. Ever since I have been in business.

Q. 9. How have they sold with you?

A. Pretty well.

Q. 10. What does the Beech-Nut Packing Co. label stand for with you?

A. Well, nothing more than any other line of merchandise as far as that goes. It is merchandise that we have a demand for.

Q. 11. I show you a package of Beech-Nut cigarettes, in evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen packages of these cigarettes before?

A. Yes, sir.

Q. 12. Do you sell them in your store?

A. Yes, sir.

Q. 13. How long have you handled them?

A. The best of my recollection it is about four or five months.

Q. 14. On what floor of the building is your store?

A. First floor.

Q. 15. Does your front store window face the sidewalk?

A. Yes, sir.

Q. 16. For what purpose do you use this show window?

A. Display purposes.

Q. 17. Are you displaying Beech-Nut products in your window at the present time?

A. No, sir. I am displaying Beech-Nut advertising matter, but there is no Beech-Nut products in there.

Q. 18. Have you a photograph of the display now in your window?

A. Yes, sir.

Q. 19. Who took this photograph?

A. Mr. Pelton.

Q. 20. What is his business?

A. Photographer.

Q. 21. Where?

A. Pack Square, Asheville, North Carolina.

Q. 22. When did Mr. Pelton take it?

A. The first one was made Saturday afternoon, and the other one yesterday afternoon, or yesterday sometime. I don't know whether it was in the afternoon or not.

Q. 23. On whose instructions did he take this picture?

A. Why, Mr. Atkinson's I presume.

Q. 24. Is this photograph, already in evidence in this case as Plaintiff's Exhibit No. 13, Pennell's Cigar Store Window Display—how long has this display, shown in this picture, been in that window?

A. Four or five days.

Q. 25. Who put it in?

A. I did.

Q. 26. Were the Beech-Nut hard candies and gum advertised in there longer than that?

A. They were in there previous to that.

Q. 27. About how long have you had the Beech-Nut Company's ads. in there?

A. About ten days.

Q. 28. Are these the Beech-Nut cigarette posters here in the center at the back (indicating)?

A. Yes, sir.

Q. 29. Who put them in there?

A. I did.

Q. 30. How did you happen to do it?

A. Simply to make a back ground to keep people out of the window.

Q. 31. When did you put them in there with reference to the time that the Beech-Nut Packing Company's display was put in there?

A. That was a day or two afterwards.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. You also show in your window besides these Beech-Nut cigarette signs and the Beech-Nut mints, you also display other articles and products of other concerns?

A. Strollers, Chesterfields, Fatima cigarettes.

X-Q. 2. Shaving cream?

A. Shaving cream, pipes, cigarette holders, magazines.

X-Q. 3. In other words, this is your general display window, isn't it?

A. Yes, sir.

X-Q. 4. And it faces one of the principal streets in the city?

A. Yes, sir.

X-Q. 5. You use that window to display any goods that you might handle?

A. Yes, sir.

X-Q. 6. You have heard of the P. Lorillard Company, haven't you?

A. Yes, sir.

X-Q. 7. You know that it is a large tobacco company, do you not?

A. Well, it is supposed to be.

X-Q. 8. Well, I know that you know the various brands

of good cigarettes, such as the Murads, and also the Climax tobacco?

A. Yes, sir.

X-Q. 9. And the Union Leader, and other well known brands of tobacco?

A. Yes, sir.

X-Q. 10. And the words "P. Lorillard Company" appear on this cigarette package, does it not?

A. Yes, sir.

X-Q. 11. And do you handle P. Lorillard scrap tobacco?

A. Yes, sir.

X-Q. 12. I wish to show you a package of this tobacco, which is in evidence in this case as the Plaintiff's Exhibit No. 3; is it a *fac-similie* representation of the scrap tobacco (handing to witness)?

A. Yes, sir.

X-Q. 13. That has the name "Lorillard's" on it?

A. Yes, sir.

X-Q. 14. And that is a P. Lorillard Company product?

A. It is supposed to be.

X-Q. 15. So far as you know, it is the P. Lorillard Company product?

A. Yes, sir.

X-Q. 16. How long have you been handling that tobacco?

A. Ever since I have been in business.

X-Q. 17. And that is a good selling tobacco?

A. Yes, sir.

Objection by Mr. Johnson to these questions in regard to P. Lorillard Company's scrap tobacco as being subject-matter outside the direct examination.

X-Q. 18. Now, in connection with this photograph. Would you mind stepping out to the window with me just a second. You have kindly stepped out in front to the

street, and in front of your show window, and have looked at the three Beech-Nut cigarette panels appearing thereon, to which I directed your attention, and you have also compared the same while standing at the window, with this photograph?

A. Yes, sir.

X-Q. 19. This photograph doesn't represent, truly represent those cigarette panels, does it?

A. No, it doesn't all show.

X-Q. 20. What is omitted there?

A. Well, the bottom of this panel, the letters that are there are not shown.

X-Q. 21. That is, the name P. Lorillard Co. doesn't show?

A. No, sir.

X-Q. 22. But it does appear on the signs in the window?

A. Yes, sir.

X-Q. 23. And the letters on those signs are rather large, are they not?

A. Fairly so.

X-Q. 24. You can see them standing in front of the window?

A. You can see them from the street.

X-Q. 25. So that this picture is not a true representation?

A. Well, it doesn't show it all.

X-Q. 26. I understand that in addition to tobacco you sell chewing gum, don't you?

A. Yes, sir.

X-Q. 27. If a customer comes in your store and wants to buy a package of Beech-Nut cigarettes or Beech-Nut scrap tobacco, you wouldn't hand him a package of Beech-Nut chewing gum, would you?

A. No, sir.

X-Q. 28. You would think he was crazy if he took it, wouldn't you?

A. Well, I wouldn't say that. If he says he wants a package of Beech-Nut. I say, what?

X-Q. 29. Suppose he asks you for Beech-Nut gum?

A. Suppose he asks me for Beech-Nut gum——

X-Q. 30. You wouldn't hand him Beech-Nut cigarettes?

A. No, sir, I would not, certainly.

X-Q. 31. Tobacco is an entirely different product from gum?

A. Yes, sir.

X-Q. 32. An entirely different class of goods?

A. Yes, sir.

X-Q. 33. And a man wouldn't go around swallowing a package of cigarettes for breakfast?

A. I don't know about that.

X-Q. 34. You wouldn't buy them and sell them——

A. Some men do lots of things.

X-Q. 35. You wouldn't do it, would you?

A. No, sir, I would not.

X-Q. 36. You never knew of the Beech-Nut Company selling any tobacco products at all, did you?

A. No, sir, not to my knowledge.

Redirect Examination by Mr. Johnson.

R-D. Q. 37. Are the Beech-Nut cigarette posters in the window, to which Mr. Cavanagh has called your attention, are they in colors?

A. I don't remember.

R-D. Q. 38. Are there colors on them?

A. I don't remember about that. I never paid enough attention to say whether they were or were not.

R-D. Q. 39. Step out and look at them again. Since

you gave your last answer have you looked at the posters in the window?

A. Yes, sir.

R-D. Q. 40. Are the Beech-Nut cigarette posters in colors?

A. About five colors on it.

R-D. Q. 41. Are the names P. Lorillard Company, to which Mr. Cavanagh has called your attention, in color?

A. Black, I think. I don't remember just which it is.

R-D. Q. 42. Black on what?

A. On the posters. Black on red.

Recross-Examination by Mr. Cavanagh.

R-X Q. 43. How long do you intend to let that exhibit remain?

A. Well, it was my intention to change it today, sir.

R-X Q. 44. So I understand, then, that you intend to redress your window today?

A. Yes, sir.

Re-Redirect Examination by Mr. Johnson.

R-D. Q. 45. In the ordinary course of business, how often do you change your window display?

A. Well, average about every four days.

R-D. Q. 46. If you change it in the near future, it will be in the regular ordinary course of your habit, wouldn't it?

A. Yes, sir.

R-D. Q. 47. Has your store front or the show window of which this is a photograph, your name on it anywhere?

A. No, sir, it has not.

R-D. Q. 48. In regard to these Beech-Nut posters—cigarette posters—at the back of this window display, where did you get those in order to put them in the window?

A. My recollection is I got them down at Barbee's and Clark's. I get all those posters and things down there.

R-D. Q. 49. With reference to the time that you were arranging the display which is in that window, and as shown in that photograph, when did you get the posters, the Beech-Nut cigarette posters?

A. Why, the Beech-Nut posters were brought in here by Mr. Hawkins. I had some Chesterfield cards sitting up there, and they were dirty, and I wanted to take them out.

R-D. Q. 50. Did you go down and get these Beech-Nut cigarette posters at that time, after you had rigged up the rest of the window?

A. Yes, sir.

Re-Re-Cross-Examination by Mr. Cavanagh.

R-X Q. 51. How long have you been buying and selling the Beech-Nut cigarettes?

A. I have been buying and selling the Beech-Nut cigarettes before they were ever put on the market here. I bought them from dealers out of town.

R-X Q. 52. And you are still selling them?

A. Yes, sir.

R-X Q. 53. And you know they are Lorillard's cigarettes?

A. Sure. Yes, sir, I knew it all the time.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

State of North Carolina, County of Buncombe, ss.

I, Garland A. Thomasson, a Notary Public within and for the state and county above written, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of H. W. Pelton and W. C. Pennell, were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me at Asheville, Buncombe County, North Carolina, beginning January 23, 1922; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken by short-hand by me and reduced to typewriting by me; that the defendant party hereto was represented by R. B. Cavanagh at the taking of such testimony; that the testimony was taken in Asheville, Buncombe County, North Carolina, beginning at 10:15 A. M., and ending at 11 o'clock A. M., January 23, 1922; that the signature of each of the witnesses was waived by counsel, as indicated on the depositions.

I am not connected by blood or marriage to either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fee as Special Examiner and for copies taken in accordance with the attached bill, amounting to $32.95.

In witness whereof I have hereunto set my hand and notarial seal, this the 26th day of January, 1922.

GARLAND A. THOMASSON,
Notary Public.

My commission expires April 19, 1923.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff,*
vs.
P. Lorillard Company, *Defendant.*
} In Equity, No. 3056.

Depositions taken in behalf of plaintiff, before W. M. Walters, a Notary Public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the W. T. Hill grocery store, 10 Mason street, West Greenville, S. C., beginning Tuesday, January 24th, 1922, at 2:25 o'clock P. M.

Present: H. McClure Johnson, Esq., of Messrs. Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

WILLIAM T. HILL, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Direct Examination by Mr. Johnson.

Q. 1. Your name is William T. Hill?

A. Yes, sir.

Q. 2. Your residence is 8 Traction Street, West Greenville?

A. Yes, sir.

Q. 3. Your age is 59 years?

A. Yes, sir.

Q. 4. Your occupation is proprietor of grocery store and meat market?

A. Yes, sir.

Q. 5. Under what name do you do business, and where?

A. W. T. Hill, Mason street, No. 10, West Greenville, S. C.

Q. 6. How long have you been in the grocery business?

A. About twenty-five years.

Q. 7. How long where you are now?

A. A year and a half.

Q. 8. Have you handled Beech-Nut Packing Company products?

A. Yes, sir.

Q. 9. Will you name some, please, which you have handled?

A. Well, I handle the Beech-Nut chewing gum, Beech-Nut peanut butter, and some other things that I handle, such as pork and beans and some other things I might not mention just now, but I have handled all of the goods pretty well.

Q. 10. How have they sold for you?

A. Fine; been good sale.

Q. 11. What has been your experience with people wanting them?

A. They come in to buy especially gum and that peanut butter, and if I don't have it they would go somewhere else, and said that's what they wanted, and so they go somewhere else; I reckon they want it.

Q. 12. What does the Beech-Nut label stand for to you?

A. Quality.

Q. 13. Do you sell tobacco and cigarettes in your store?

A. Yes, sir.

Q. 14. Alongside of your groceries?

A. Yes, sir.

Q. 15. Is it a common thing in your part of the country

for tobacco and cigarettes to be sold alongside of groceries?

A. Yes, sir.

Q. 16. I show you a package of Beech-Nut cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1; and a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3. When did you first hear of this tobacco and these cigarettes?

A. Why, a special man came around here sometime last fall, I think about the last or first of November, or first of September, and he offered that Beech-Nut tobacco for sale.

Q. 17. What month was that?

A. First of November, as near as I can recollect.

Q. 18. What did you say to him?

A. Well, I just have to commence sort of in my own way. You know we have men to come in here every day to sell something. As nigh as I recollect, I was by myself when he came in here. He asked me about the tobacco, and I had never heard tell of it. I told him I would not buy none now, but probably later on. I talked on and explained to him I didn't like buying new things. He went on then to ask me about how the Beech-Nut stuff sold, such as peanut butter and gum, and so on, and I told him it was a fine seller. "Well," he said, "this tobacco will make you just such a seller as Beech-Nut." I turned around to him and said, "The Beech-Nut Company putting out tobacco?" He talked on and I don't know I got any direct answer. Don't think I did.

Q. 19. What was the effect on you of what he did and said at that time?

A. Well, I just put it up that they had put out tobacco.

Q. 20. Who did you think put it out?

A. The Beech-Nut Company, that's who I thought.

Q. 21. When did you find out it was not made by the Beech-Nut Packing Company?

A. Later on someone came and asked me about the man coming here trying to sell Beech-Nut tobacco and that was the first I knew of it. I reckon it was around the latter part or the first of December they come in. That was the first I heard anything about it being wrong.

Q. 22. Are you familiar with the Beech-Nut Packing Company labels?

A. Yes, sir.

Q. 23. When you look at the Beech-Nut Packing Company labels, do they look like that?

A. Yes, sir, very much.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Did this gentleman that tried to sell you tobacco tell you what concern he represented?

A. No.

X-Q. 2. He didn't say he represented the Beech-Nut Packing Company?

A. No, sir, I don't think he did.

X-Q. 3. And he didn't say that he was selling the tobacco for the Beech-Nut Packing Company?

A. No, sir, I don't think so.

X-Q. 4. Did you buy any tobacco from him?

A. No, sir.

X-Q. 5. Have you ever had in stock or bought or sold tobacco like this package of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1?

A. No, sir.

X-Q. 6. Have you ever had in stock or bought or sold tobacco like this package of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3?

A. No, sir.

X-Q. 7. So you have never had occasion to buy any

of this tobacco or these cigarettes, or kept them in stock?

A. No, sir; I had a chance to buy them, though.

X-Q. 8. So that you have never bought any of this tobacco or any of these Beech-Nut cigarettes under the impression of getting them from the Beech-Nut Packing Company?

A. No, sir, never bought any at all.

X-Q. 9. Now, this party that came in here said this tobacco would make as good a seller as the Beech-Nut line of goods; food products and chewing gum?

A. That's right.

X-Q. 10. Now, if I were to tell you that in 1919 the manufacturer of this scrap tobacco sold fourteen millions of dollars worth of it, or over two millions of dollars over the whole business of the Beech-Nut Packing Company, you would say I told the truth in saying it was a good seller?

A. Yes, sir, I believe I would.

X-Q. 11. Now, you notice the name "Lorillard" is on there, do you not?

A. Yes, sir.

X-Q. 12. Did you ever hear of the P. Lorillard Tobacco Company?

A. I don't know, I think——

X-Q. 13. You notice the name of the P. Lorillard Company on the cigarettes?

A. Yes, sir.

X-Q. 14. You don't find the name of the Beech-Nut Packing Company anywhere on these packages?

A. No, sir.

X-Q. 15. But you do find it on the peanut butter and other products?

A. Yes, sir.

X-Q. 16. Now, you speak of the label of the packages looking like the label of the Beech-Nut Packing Company

on the food products. I am referring to the tobacco and cigarette labels and food labels. Did you ever see a package of any goods of the Beech-Nut Packing Company you sold that had those red, radiating lines, like a sunbeam?

A. No, sir, I never did.

X-Q. 17. You never saw anything the Beech-Nut Packing Company put out like these red lines, did you?

A. Well, I never saw anything put out by that company with those red lines.

X-Q. 18. You never saw any package of the Beech-Nut Packing Company that looked like scrap tobacco?

A. No, sir.

X-Q. 19. Now, a cigarette package has an appearance or individuality all of its own, doesn't it?

A. Yes, sir.

X-Q. 20. You can tell cigarette packages as far as you can see?

A. Yes, sir.

X-Q. 21. You never knew anything put up by the Beech-Nut Packing Company like these cigarettes?

A. No, sir.

X-Q. 22. As I understand, in keeping this store or establishment here, you sell fresh meats, canned goods, tobacco, food products, general merchandise line, brooms, and the like; and you also sell candies and chewing gum, so naturally you are an experienced man in your grocery line?

A. Yes, sir.

X-Q. 23. Now, if a man came into this store and asked you for a package of Beech-Nut Chewing gum, would you hand him out a package of Beech-Nut cigarettes for chewing gum?

A. No, sir.

X-Q. 24. Neither would you hand him a package of this Beech-Nut scrap tobacco when he wanted chewing gum or peanut butter, would you?

A. No, sir.

X-Q. 25. So you think a man who would take cigarettes or tobacco when he wanted chewing gum or peanut butter would be crazy?

A. Why yes, we have a Scripture like that; and I would think that I was crazy, too.

X-Q. 26. That's because they are entirely different classes of goods?

A. Yes, sir.

X-Q. 27. They are known in your business as entirely different commodities?

A. Yes, sir.

X-Q. 28. No man who's got one ounce of wits left would ever take food products for tobacco products?

A. No, sir.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
} In Equity, No. 3056.

Deposition taken in behalf of plaintiff, before W. M. Walters, a notary public, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the Imperial Hotel, West Washington Street, Greenville, S. C., Tuesday, January 24th, 1922.

Present: H. McClure Johnson, Esq., of Messrs. Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

WYATT P. JENNINGS, a witness produced on behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Direct Examination by Mr. Johnson.

Q. 1. Your name is Wyatt P. Jennings?

A. Yes, sir.

Q. 2. Your residence is No. 333 Richardson Street, Greenville, S. C.?

A. Yes, sir.

Q. 3. Your age is twenty-two years next May?

A. Yes, sir.

Q. 4. Your occupation is traveling salesman?

A. Yes, sir.

Q. 5. By whom are you employed?

A. By the Beech-Nut Packing Company.

Q. 6. How long have you been employed by them?

A. Two years the first of next May.

Q. 7. In what capacity?

A. Salesman.

Q. 8. What do you sell for them?

A. Full line of Beech-Nut Packing Co. products.

Q. 9. What is your territory?

A. Fourteen counties in what is known as the "Piedmont" section of South Carolina.

Q. 10. To what class of trade do you sell Beech-Nut Packing Co. products?

A. General stores, cigar stores in large cities, and a great many of the general stores and smaller stores.

Q. 11. Are those retail stores?

A. Yes, sir; retail stores.

Q. 12. Is it common in your territory for the general stores and grocery stores to handle tobacco and cigarettes alongside of the groceries?

A. Yes, sir.

Q. 13. I show you a package of Beech-Nut cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1; and a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3. Have you ever seen packages of these cigarettes and tobacco before?

A. Yes, sir.

Q. 14. Have you ever seen them displayed for sale alongside the Beech-Nut Packing Company's goods or in the same room?

A. Yes, sir.

Q. 15. Have you seen this in a good many instances?

A. Yes, sir.

Q. 16. When did you first see these Beech-Nut cigarettes offered for sale in this territory?

A. Along about the first of October, 1921.

Q. 17. Have you since then seen them on sale generally through your territory?

A. Yes, sir.

Q. 18. Have you seen them displayed in windows of stores and the like?

A. Yes, sir.

Q. 19. Have you seen advertising and posters of these cigarettes?

A. Yes, sir.

Q. 20. Have you, in the course of your traveling about from place to place for the Beech-Nut Packing Company, heard remarks, comments or inquiries about these cigarettes?

A. Yes, sir.

Q. 21. Please state the nature of these remarks, comments or inquiries.

A. I walk into a man's store and the first thing they say is: "How long have you been putting them out—the Beech-Nut cigarette?" They ask you how they are selling; want to know if they are as good as the other products, gum and candies. Causes lots of confusion. Good many around; they ask if it is as good as other products and say that if it is as good as others, it *is* good.

Q. 22. Can you give a conservative estimate as to the number of times you have heard inquiries, comments or remarks of that nature since you first heard of these cigarettes?

A. Five hundred times.

Q. 23. Is that a conservative estimate?

A. Yes, sir.

Q. 24. Can you describe any instances of these inquiries such as you have just mentioned?

A. Yes, sir.

Q. 25. Please give several such instances; only cases where you remember the name of the speaker, the place, and what was said.

A. Todd Drug Company, Spartanburg, S. C.; Dr. Todd, proprietor. I was calling on Dr. Todd one morning along in November, somewhere in November. The question of Beech-Nut cigarette was brought up; he wanted to know how it was selling; said something about the label looking so much alike; lots of people thought it was the same thing as the Beech-Nut Packing Company. Said if it was as good as other products, it would sell good. He was under the impression himself that it was made by the Beech-Nut Packing Company. I corrected him and told him it was made by other people.

Q. 26. Can you describe another instance?

A. Webb-Cason Drug Store, Anderson, S. C.; Dr. Cason is buyer. One morning in October he mentioned something about the Beech-Nut cigarette; had noticed where it was put out; it looked like it was making a wonderful seller; had lots of calls for it, and with the quality and merit of the Beech-Nut Packing Company's other products, he said that the Beech-Nut cigarette would sell good. I corrected him and told him it was made by other people; that we did not put it out.

Q. 27. Can you name another instance?

A. Sprott Cigar Store, Spartanburg, S. C.; Mr. Sprott, proprietor. Walked in one morning in November. Mr. Sprott, the first thing he asked me: "Jennings, I want to buy some Beech-Nut cigarettes; lots of people have called for them and I want to know if it is as good as the gum and candies, as I have lots of calls for them. I want to know where I can get them." He said he thought they would go good. I corrected him and told him that this cigarette was not made by the Beech-Nut Packing Company.

Q. 28. Can you name another instance?

A. J. W. Hill, West Greenville, S. C., Grocery. In October, Mr. Hill said—he mentioned the Beech-Nut cigarette. He said he wanted to handle some of them if he was sure the quality was as good in the cigarette as it was in the Beech-Nut gum and other products, it would make him a wonderful seller. I corrected him that we did not put it out.

Q. 29. Do you have similar inquiries, remarks and comments in regard to the Beech-Nut scrap tobacco?

A. Not so much as the cigarette.

Q. 30. Have you experienced some such instances?

A. Not the same cases the tobacco as the Beech-Nut cigarette.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Did one person ever ask you if the Beech-Nut scrap tobacco was made by the Beech-Nut Packing Company?

A. I can't remember all of them now; several cases that they have asked.

X-Q. 2. Just give me the names of the people.

A. Waldrop & Turner, Greenville, S. C.

X-Q. 3. What's their address?

A. Coffee street.

X-Q. 4. What line of business?

A. Grocery.

X-Q. 5. Do they handle the Beech-Nut scrap tobacco?

A. Yes, sir.

X-Q. 6. Do you know how long they have been handling it?

A. No, sir.

X-Q. 7. When did they ask you?

A. Several months ago.

X-Q. 8. The latter part of 1921?

A. Yes, sir.

X-Q. 9. I understand you to say that you are a salesman for the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 10. How long have you had the South Carolina territory?

A. Two years this coming May.

X-Q. 11. Ever since you have been in this territory you have seen this Beech-Nut scrap tobacco around?

A. I don't know; I don't remember that far back.

X-Q. 12. But you do remember you saw it for many months before that party made that inquiry?

A. I cannot say that.

X-Q. 13. This Beech-Nut tobacco is a large seller in tobacco stores and grocery stores. Do you mean to say you have been calling around on the trade during those two years and did not see that?

A. I do say I have seen the tobacco, but this has been about a year.

X-Q. 14. So you have seen it about a year on the market?

A. Yes, sir.

X-Q. 15. Now, you mentioned in your direct examination the names of several people that asked you about the cigarettes and whether they were made by the Beech-Nut Packing Company. You do not know of your own knowledge whether these people ever took the trouble to examine those cigarettes and see whose name was on there?

A. I cannot answer that. I was going by what they say.

X-Q. 16. You don't know whether they ever took the trouble?

A. They have gone to the trouble.

X-Q. 17. You know they have looked on the package?

A. Yes, sir.

X-Q. 18. The Beech-Nut Packing Company's name does not appear on that?

A. No, sir.

X-Q. 19. The name Lorillard does appear on that scrap tobacco?

A. Yes, sir.

X-Q. 20. Did you ever sell any tobacco products for the Beech-Nut Packing Company?

A. No, sir.

X-Q. 21. Did you ever know of the Beech-Nut Packing Company putting out any tobacco products, such as cigarettes and scrap tobacco?

A. No, I have not.

X-Q. 22. You receive, in the course of your business you receive lists containing the various items of goods the Beech-Nut Packing Company put out. That is, to make myself clear, whenever the Beech-Nut Packing Company puts out a new product, you are notified of that in some way, aren't you?

A. Yes, sir.

X-Q. 23. And it's added to your list?

A. Yes, sir.

X-Q. 24. You have practically a complete list, at some time or other, of all food products they handle, don't you?

A. But they are not all food products.

X-Q. 25. What is not a food product?

A. Gum.

X-Q. 26. Gum comes under the Pure Food Law, doesn't it?

A. Yes, sir.

X-Q. 27. And the Pure Food Law covers food products?

A. Yes, sir. But I would not call it a food product.

X-Q. 28. As a matter of fact, you don't know whether gum is a food product or not?

A. I would say, some people would not say so.

X-Q. 29. Would you call it a confection?

A. I would.

X-Q. 30. There is one thing certain; gum isn't tobacco.

A. No, sir.

X-Q. 31. They are distinct classes of goods?

A. Sure, they are different.

X-Q. 32. If you wanted to buy peanut butter or Beech-Nut gum you could not be confused in accepting scrap tobacco for it?

A. Well, in a case like that, at some time any man will call for a package of Beech-Nut and the merchant will throw out Beech-Nut tobacco.

X-Q. 33. If you asked the man for Beech-Nut chewing gum, could you be deceived into taking tobacco?

A. No, sir. If I called for it, I would want it.

X-Q. 34. You would know the difference?

A. Yes, sir. I know the difference between tobacco and gum.

X-Q. 35. You would know the difference right away, and would not be confused for a minute on it?

A. I would look at the name.

X-Q. 36. I am speaking of the two kinds of goods; you would not be confused a minute?

A. If I called for a certain piece of goods they are going to give it to me.

X-Q. 37. If they did offer tobacco and you wanted chewing gum, you would not take it?

A. I would study for a minute; I would be under the same impression.

X-Q. 38. I am not asking you about impressions. If you went in and wanted to buy a 5-cent package of Beech-Nut chewing gum and asked for gum, and he handed you either a package of cigarettes or Lorillard's scrap tobac-

co, you would not take either one of these for the goods you wanted—the gum?

A. No.

X-Q. 39. Now, you are around in the grocery trade, are you not?

A. Yes, sir.

X-Q. 40. You notice the Star soap?

A. Yes, sir.

X-Q. 41. You know there is a Star ham?

A. Yes, sir.

X-Q. 42. You know there is a Star chewing tobacco?

A. I have heard of that. My idea is not to take up tobacco, because I never come in contact.

X-Q. 43. So you never had any interest in the tobacco line?

A. No, sir.

X-Q. 44. So you are not at all familiar with the tobacco line?

A. No, sir.

X-Q. 45. You don't know whether there is a Star tobacco?

A. No, sir.

X-Q. 46. You have heard of Liggett-Myers Tobacco Company?

A. Yes, sir.

X-Q. 47. You have never heard of their famous Star chewing tobacco?

A. No, sir.

X-Q. 48. You have heard of the Star ham and Star soap?

A. Yes, sir.

X-Q. 49. It comes by the name of "Armour's Star Ham"?

A. Yes, sir.

X-Q. 50. It's got "Armour's" on there, same as Lorillard's Beech-Nut tobacco?

A. Yes, sir.

X-Q. 51. You are pretty familiar with the Beech-Nut Packing Company's forms and shapes and dress of packages?

A. Yes, sir.

X-Q. 52. Did you ever know of the Beech-Nut Packing Company putting out a package resembling this scrap tobacco?

A. Looks very much like the label.

X-Q. 53. In other words, you have never known of the Beech-Nut Packing Company to put up a package of goods in its general shape resembling this package of Beech Nut scrap tobacco, and had red, radiating lines on it?

A. I have never noticed it very closely.

X-Q. 54. Did you ever know of the Beech-Nut Packing Company to put up anything like that at all?

A. No.

X-Q. 55. You never noticed that the Beech-Nut Packing Company put up anything in a package that had that red sunburst on it, did you?

A. No, I have not.

X-Q. 56. You can tell a cigarette package, so far as its shape and appearance goes, as far as you can see it, can't you?

A. Sure, you can tell it.

X-Q. 57. It's got an individuality and shape all of its own, hasn't it?

A. It's got a shape.

X-Q. 58. In other words, whether it is Beech-Nut cigarette, or whether it is Chesterfield cigarette, or Lucky Strike, or any other cigarette, you can tell them when you see them on the shelves; you can tell they are cigarettes?

A. Sure you can.

X-Q. 59. You never knew the Beech-Nut Packing Com-

pany to put out any package in the form or shape of a cigarette package?

A. No, sir.

X-Q. 60. Never heard of them doing that?

A. No, sir.

X-Q. 61. Now, when you told these parties, about whom you spoke—that if the Beech-Nut Packing Company did not put out these cigarettes and scrap tobacco, you said that you did not put it out, didn't you?

A. Yes, sir.

X-Q. 62. Who did you tell them put it out?

A. I didn't tell who put it out, but told them the Beech-Nut Packing Company didn't.

X-Q. 63. Do you know whether any of these men you spoke of bought any of it?

A. Sure, they were handling the stuff.

X-Q. 64. You were the regular salesman calling there in behalf of the Beech-Nut Packing Company?

A. Yes, sir.

X-Q. 65. You never knew of any Lorillard men selling food products?

A. No, sir.

X-Q. 66. Do you know who the Lorillard agent is in this district?

A. I met Mr. Dorr.

X-Q. 67. But you never ran into one of the Lorillard agents selling Beech-Nut tobacco in the stores; or cigarettes?

A. No, sir.

X-Q. 68. You never knew of any tobacco concern that manufactured food products, did you?

A. No, I haven't.

X-Q. 69. You never knew of a food packing concern that manufactured tobacco, did you?

A. No.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

CERTIFICATE.

State of South Carolina, County of Greenville, ss.

I, W. M. Walters, a Notary Public within and for the state and county aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of William T. Hill and Wyatt P. Jennings were taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, at West Greenville, S. C., and Greenville, S. C., beginning January 24th, 1922; that each of the foregoing witnesses were duly sworn; that the testimony of said witnesses was taken down in shorthand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh, Esq., at the taking of said testimony; that the testimony was taken in West Greenville, S. C., and Greenville, S. C., beginning at 2:25 o'clock, P. M., and ending at 4 o'clock P. M., on January 24th, 1922; that the signature of both witnesses was waived by counsel in the case, as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto; or interested directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special

Examiner and for copies taken, in accordance with the attached bill, amounting to $16.00.

In witness whereof, I hereto set my hand and seal this 26th day of January, A. D. 1922, at Greenville, S. C.

W. M. WALTERS,
Notary Public for South Carolina.

My commission is in force during the pleasure of the Governor.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
} In Equity No. 3056.

DEPOSITION OF ROBERT L. BOWEN.

Deposition taken in behalf of plaintiff before J. W. Mansfield, Notary Public and Court Reporter for the Court of General Sessions, Seventh District of South Carolina, until his recent resignation to devote all of his time to the practice of law, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel, at the residence of R. L. Bowen, No. 302 South Liberty Street, Spartanburg, South Carolina, beginning January 25th, 1922, at 11:40 o'clock A. M.

Present: H. McClure Johnson, of Offield, Poole, Hinton & Scott, attorneys for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh, Whitehead & Hyde, attorneys for P. Lorillard & Company.

ROBERT L. BOWEN, a witness produced in behalf of plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn by me, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

Direct Examination by Mr. Johnson.

Q. 1. Your name is R. L. Bowen; your residence No. 302 South Liberty Street, Spartanburg, South Carolina; your age, 56 years; your occupation, grocer; is that right?

A. Yes, sir.

Q. 2. Under what name were you doing business last fall, and where?

A. R. L. Bowen and Company, 325 South Liberty Street, Spartanburg, S. C. I am now out of business and expect to resume as soon as building is completed now being erected for that purpose.

Q. 3. How long did you engage in the grocery business at 325 South Liberty Street?

A. About two years.

Q. 4. Have you ever handled Beech-Nut Packing Company products?

A. Yes, sir.

Q. 5. How long?

A. Two years.

Q. 6. Did you handle them before you went into business here?

A. Handled them before—a year or so before.

Q. 7. Please name some of the Beech-Nut Packing Company products that you have handled.

A. Beech-Nut peanut butter, Beech-Nut catsup, Beech-Nut jelly, Beech-Nut chewing gum, Beech-Nut candy.

Q. 8. How have they sold for you?

A. Fine.

Q. 9. What does the Beech-Nut label stand for to you?

A. Quality.

Q. 10. How strong is the demand for Beech-Nut Packing Company products from your customers?

A. It is good. If we have not got it, they will go somewhere else and buy it. We can't substitute for it.

Q. 11. Did you keep a general grocery store up to the time you sold out?

A. Yes, sir.

Q. 12. As a part of your general grocery store business, did you keep tobacco and cigarettes?

743

A. Yes, sir.

Q. 13. Did you keep tobacco and cigarettes for sale alongside your groceries?

A. Yes, sir.

Q. 14. Is it a common thing in your part of the country for grocery stores to handle tobacco and cigarettes?

A. Yes, sir.

Q. 15. I show you a package of Beech-Nut cigarettes now in evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen a package of these cigarettes before?

A. Yes, sir.

Q. 16. When did you ever see any of them?

A. The first part of November, 1921.

Q. 17. When you first saw them, who did you think put them out?

A. Beech-Nut Packing Company.

Q. 18. What made you think so?

A. Well, a man came in and held it up just like you, only not so far, not that far away, and I saw Beech-Nut on it and the style of their label.

Q. 19. What was the occasion when you first saw the Beech-Nut cigarettes?

A. I was in the store and a gentleman came in—I was busy at the time, and he walked around. He kept waiting and finally I got a chance to speak to him. He said, "I see you handle Beech-Nut peanut butter, and I want to sell you some Beech-Nut cigarettes."

Q. 20. Then, what occurred between you and him?

A. He tried to sell me some, and I told him that I did not want to put in a new line, I was handling Chesterfields. He could not sell me, and he started to pack up and go away, and I said, "It's funny that the Beech-Nut Packing Company is putting up cigarettes." He said, "Yes," and went on out the door.

Q. 21. Did he have any Beech-Nut cigarettes with him?

A. Yes, sir.

Q. 22. What effect did he have on you? What impression did he leave?

A. He left the impression that the cigarettes were put up by the Beech-Nut Packing Company.

Q. 23. How long did you think that?

A. Until the last of November.

Q. 24. What happened at that time?

A. Mr. Jennings and Mr. Atkinson come in and told me different.

Q. 25. Who are they?

A. They were Beech-Nut Packing Company representatives.

Q. 26. Are you familiar with Beech-Nut Packing Company labels?

A. Yes, sir.

Q. 27. Would you take this label on Beech-Nut cigarettes for one of their labels?

A. Yes, sir.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Mr. Bowen, how long have you been in the grocery business, all told?

A. In this town?

X-Q. 2. Any place.

A. Something like nine years—more than that—ten or eleven years.

X-Q. 3. How long have you been selling tobacco—all during that time?

A. Yes, sir.

X-Q. 4. You have heard of P. Lorillard & Company, the tobacco people, of course?

A. Yes, sir, I have heard of them.

X-Q. 5. You have sold their chewing tobacco in your stores?

A. Yes, sir.

X-Q. 6. Did you ever sell any chewing tobacco like this Beech-Nut scrap (showing witness package of same)?

A. No, sir.

X-Q. 7. I understood that at the time this party tried to sell you some Beech-Nut cigarettes you were engaged in the general grocery business here in Spartanburg?

A. Yes, sir.

X-Q. 8. In that general grocery store I suppose you sold not only canned goods and tobacco, but a great many miscellaneous articles, like brooms and potatoes and meats and one thing another, did you not?

A. Yes, sir.

X-Q. 9. A grocery store is liable to have in it for sale a great many goods not related, that is, a broom is not food, is it?

A. People don't eat brooms.

X-Q. 10. So you sell a great many articles not related to each other?

A. A few—a broom is one.

X-Q. 11. Tobacco is not a food product, is it?

A. No, sir.

X-Q. 12. Like a broom, that is not related to food, is it?

A. No, sir, I would not think so.

X-Q. 13. Now, then, this party who came into your store, he did not say he represented the Beech-Nut Packing Company, did he?

A. I don't know that he said it—just offered the Beech-Nut cigarettes.

X-Q. 14. When was that?

A. That was last November—first of last November.

X-Q. 15. Did he say what his name was?

A. If he did, I don't remember it—I could not say.

X-Q. 16. You don't know whether he represented the Beech-Nut Packing Company or P. Lorillard & Company, for that matter, do you?

A. No, sir.

X-Q. 17. He showed you a package of the Beech-Nut cigarettes, did he not?

A. Yes, sir.

X-Q. 18. Did you really take the trouble to look at it?

A. Yes, sir. I don't think I took it in my hand, though.

X-Q. 19. The name "P. Lorillard Co." is on that package, if you look at it closely. If you take that package and take the trouble to look at it, you will see that the name is on it.

A. Yes, sir, it is on it.

X-Q. 20. You did not see and you don't see the Beech-Nut Packing Company's name on it?

A. No, sir, but one just glancing at it would think it was Beech-Nut Packing Company.

X-Q. 21. But if you look at it, you see the name "P. Lorillard Co."?

A. I am looking at it now.

X-Q. 22. And you see the name "P. Lorillard Co." through the paper there?

A. I see something black. You can't read it that distance.

X-Q. 23. From whom had you been in the practice of buying Beech-Nut goods?

A. Mr. Jennings.

X-Q. 24. Is he here?

A. Sitting here in this room.

X-Q. 25. How long have you been buying goods from Mr. Jennings?

A. Something like two years.

X-Q. 26. You always bought your Beech-Nut goods from Mr. Jennings?

A. Yes, sir.

X-Q. 27. You would naturally think it strange that another party should come in to sell you Beech-Nut goods?

A. Not necessarily.

X-Q. 28. The party who came in to sell you the cigarettes did not say he was the Beech-Nut Packing Company's representative?

A. He offered me Beech-Nut cigarettes.

X-Q. 29. He did not say he was from the Beech-Nut Packing Company?

A. I don't think he said he was from the Beech-Nut Packing Company. He said he saw I was handling Beech-Nut peanut butter, and he wanted to sell me some Beech-Nut cigarettes. He did not say he was from the Beech-Nut Packing Company—he made me think, though, that he was selling me cigarettes put up by them.

X-Q. 30. You did not buy any, did you?

A. I did not buy any from him, but he went off leaving me under that impression.

X-Q. 31. What else did this man have with him besides the cigarettes?

A. He did not show me anything else—when he went out of the store, I just made the remark that it was funny the Beech-Nut people were making cigarettes. He just said, "Yes." He did not explain to me they were made by a different concern. He left the impression on my mind that the Beech-Nut Packing Company were making the cigarettes. He wanted to sell me

Beech-Nut cigarettes, and speaking about the Beech-Nut butter made me think they were made by them.

X-Q. 32. He did not say the Beech-Nut Packing Company were making them?

A. I don't remember what he said about it, but he left the impression on me that the Beech-Nut Packing Company were making the cigarettes.

X-Q. 33. You say he did not show you any credentials or leave any card?

A. No, sir, he did not.

X-Q. 34. Have you ever seen him since?

A. No, sir.

X-Q. 35. Could you describe his appearance?

A. No, sir.

X-Q. 36. You don't know what company he was from at all?

A. No, sir.

X-Q. 37. I understood you to say you were familiar with the Beech-Nut Packing Company label?

A. Yes, sir.

X-Q. 38. Will you describe that label to me, please?

A. It is oval.

X-Q. 39. What kind of oval is it?

A. Oblong.

X-Q. 40. What color?

A. Different colors.

X-Q. 41. You say they have an oval label in different colors?

A. I think most of them are red.

X-Q. 42. Has their label got a picture of a beech-nut on it?

A. I don't remember.

X-Q. 43. Has that red band got any printing on it, do you know?

A. Yes, sir.

X-Q. 44. I show you a specimen label of mints, is that Beech-Nut Packing Company label?

A. Yes, sir. They are different sizes, you understand.

X-Q. 45. This package of cigarettes has not any label like—it is not the oval of the Beech-Nut brand?

A. It is not a red oval just like them.

X-Q. 46. The oval of the Beech-Nut cigarettes which I am showing you has not any printing on it like that on the Beech-Nut mint?

A. No, sir.

X-Q. 47. In this Beech-Nut cigarette label you have two crossed beech-nuts in gold and red, haven't you?

A. Yes, sir.

X-Q. 48. In that Beech-Nut mint label you have a single beech-nut on three green leaves in the center of it?

A. Yes, sir.

X-Q. 49. So those labels are not alike?

A. They are not just alike—they are similar.

X-Q. 50. In handling groceries you have sold lots of goods on which the label was oval, like Armour's Veribest, and other goods?

A. Yes, sir.

X-Q. 51. An oval label is a very common thing on canned goods and other goods, is it not?

A. Yes, sir, it is very common.

X-Q. 52. You never knew of the Beech-Nut Packing Company's putting out any cigarettes, did you?

A. No, sir.

X-Q. 53. You never knew of the Beech-Nut Packing Company's putting out a package of the same shape and general appearance of this cigarette package, did you?

A. No, sir.

X-Q. 54. A cigarette package has an appearance and individuality all its own, has it not?

A. Lots of other packages like it.

X-Q. 55. What is packed like it?

A. I have seen salts put up very much like it.

X-Q. 56. In a loose cup-wrapper like this?

A. You take little raisins, they are put up that way.

X-Q. 57. You would not say a package of raisins looked like this package of cigarettes with the package a different color and different shape and different size —you would not take a package of raisins for a package of cigarettes, would you, wnen you looked at the size of it and the squareness of it?

A. Probably not.

X-Q. 58. If a man came into your store and wanted to buy and asked you for a package of Beech-Nut cigarettes, would you hand him a package of Beech-Nut chewing gum in the place of the cigarettes?

A. No, sir, I would not.

X-Q. 59. That is, a package of cigarettes and a package of chewing gum are different articles?

A. Yes, sir.

X-Q. 60. You call it a different class of goods?

A. Yes, sir.

Deposition closed.

Signature waived.

Transcribed January 26th, 1922, by J. W. Mansfield personally.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

CERTIFICATE.

State of South Carolina, County of Spartanburg, ss.

I, J. W. Mansfield, a Notary Public within and for the state and county aforesaid, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing deposition of Robert L. Bowen was taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, before me, at Spartanburg, South Carolina, on January 25th, 1922; that the foregoing witness was by me duly sworn; that the testimony of said witness was taken down in short-hand by me and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh during the taking of said testimony; that the testimony was taken in Spartanburg, South Carolina, beginning at 11:40 o'clock A. M., and ending at 12 o'clock, noon, of January 25th, 1922; that the signature of the witness was waived by counsel, as indicated on the deposition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies taken in accordance with the attached bill, amounting to $11.

In witness whereof I have hereunto set my hand and official seal this 26th day of January, 1922.

J. W. MANSFIELD,

[SEAL.] Notary Public for South Carolina.

My commission expires at the will of His Excellency, the Governor of South Carolina.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Deposition taken on behalf of the plaintiff, before A. D. McFaddin, a Notary Public for the State of South Carolina, acting as Special Examiner by consent of counsel, pursuant to notice and by agreement of counsel at the Capital Cash and Carry Grocery, 827 Main street, Columbia, S. C., beginning Friday, January 27, 1922, at 10:20 o'clock A. M.

Present: H. McClure Johnson, Esq., of Offield, Poole, Hinton & Scott, for the Beech-Nut Packing Company; R. B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard & Company.

JEFFERSON D. HAYDEN, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, being first duly sworn, in response to interrogatories propounded by Mr. Johnson, deposes as follows:

By Mr. Johnson: Q. 1. Your name is Jefferson D. Hayden?

A. Yes, sir.

Q. 2. You reside at 2017 Sumter street, Columbia, S. C.; your age is 31 years; and your occupation is that of grocer; is that correct?

A. Yes, sir.

Q. 3. Under what name do you do business?

A. Capital Cash and Carry Grocery, 827 Main street.

Q. 4. In what town?

A. Columbia, S. C.

Q. 5. How long have you been doing business there?

A. Since July, 1921.

Q. 6. Have you handled Beech-Nut Packing Company's products?

A. I have.

Q. 7. How long have you handled them?

A. Since I first opened up.

Q. 8. Please name some of the Beech-Nut Packing Company's products that you have handled.

A. Beech-Nut gum, pork and beans, Beech-Nut peanut butter. Those are three that I have handled.

Q. 9. How have they sold for you?

A. One hundred per cent.

Q. 10. What does Beech-Nut Company's label mean to you?

A. It means a great deal—that is, in the line of groceries—quality.

Q. 11. Quality?

A. Yes, sir.

Q. 12. Do you keep a general line of groceries?

A. I do.

Q. 13. Do you sell tobacco and cigarettes along with your groceries?

A. Yes, sir.

Q. 14. Is that common in your part of the country, to sell tobacco and cigarettes along side of groceries in the same store?

A. It is.

Q. 15. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3, and a package of Beech-Nut cigarettes, already in evidence in this case as Plaintiff's Exhibit No. 1. Have you this tobacco and these cigarettes on your shelves for sale?

A. Yes, sir.

Q. 16. Do you display them in the display section of your store, along with the other tobacco and cigarettes that you handle?

A. I do.

Q. 17. Whereabouts in your store with reference to the tobacco and cigarette section do you display for sale the Beech-Nut chewing gum?

A. In the same section, on the bottom shelf, just below the tobacco.

Q. 18. How many shelves is that from the tobacco?

A. One shelf below.

Q. 19. Where do you display for sale some of your other Beech-Nut products?

A. On the same shelf, but about two sections, I should say, to the west on the same shelf—two sections over.

Q. 20. About how many feet?

A. About 8 feet, maybe only 6 or 7 feet.

Q. 21. What is it that you keep there?

A. Beech-Nut peanut butter.

Q. 22. Did you make a practice of keeping Beech-Nut peanut butter in this place?

A. Ever since I opened up—on the same shelf.

Q. 23. When was the first time you ever saw a package of this Beech-Nut tobacco—scrap tobacco?

A. October 18, 1921, when a salesman came in to see me and sold me, and sold me.

Q. 24. When you first saw the package who did you think was putting it out?

A. The Beech-Nut people.

Q. 25. What Beech-Nut people?

A. The same people who were putting out the other Beech-Nut products.

Q. 26. Why did you think that?

A. From the appearance of the package, all looked the same, the label and the name Beech-Nut.

Q. 27. Who was the man who come into your store, the salesman, that day, October 18, 1921?

A. E. L. Larson.

Q. 28. What took place between you and Mr. Larson when he came into your store, October 18, 1921?

A. He came in and introduced himself as Mr. Larson, selling Beech-Nut tobacco, and from the appearance of the package it looked the same as the other Beech-Nut products, and he told me the Beech-Nut was a good seller, and I told him I had been selling the other products all along, and I thought it would be a good seller, and I would try a small quantity of it, and he said, "Well, who would you like for it to come through," and I told him it did not make any difference to me—Byrd-Johnson would do. They were jobbers. I told him he could send me a small quantity. He said he would put in a dozen, and I told him all right. He had a little case with him full of tobacco, full of these packages, and he says, I can leave these packages with you. I told him all right. So I took an order for a dozen packages, and in the meantime I asked him how much it would amount to. He said less than a dollar, so I took an order for a dozen and paid him. He said it would amount to 96 cents, with 2 per cent. discount. I said, "Well, you can just mark the bill paid." In the meantime he gave me this receipt here, marked 1 doz. packages, 10-cent size, which amount to 96 cents, 2 per cent. discount comes to 94 cents, paid to E. L. Larson. I gave him the cash over the counter for it.

Q. 29. What was the effect on you of what Mr. Larson did and said at that time?

A. He left me under the impression that it was the same house that sold the other Beech-Nut products, and that it was a good seller, that it would sell as the other products had been selling, and I understood the tobacco would be good, too.

Q. 30. Who did you think was putting it out as a result of what he said?

A. The same people who were putting out the other Beech-Nut products.

Q. 31. How long did the conversation with Mr. Larson last?

A. Very short. I suppose fifteen or twenty minutes. He was not in there very long, a very short time.

Q. 32. You say he gave you this receipt for your order and your money?

A. He did.

Receipt signed E. L. Larson, identified by this witness, offered in evidence, and marked Plaintiff's Exhibit No. 14.

Q. 33. Please look at this receipt and read the printed name at the top.

A. "P. Lorillard." A part of it is scratched out.

Q. 34. Torn out?

A. Yes, sir. "P. Lorillard" is all I see, looks like "Incorporated" on the end.

Q. 35. Torn out?

A. Torn out (resuming the reading), "119 West 40th Street, New York."

Q. 36. What is the date on it?

A. "October 18, 1921."

Q. 37. Is there any jobber named?

A. Byrd-Johnson.

Q. 38. What address?

A. "Columbia, S. C."

Q. 39. Any shipping instructions?

A. Under name, "Cash and Carry Groceries, shipping point 827 Main. quantity 1 doz., brand Beech-Nut. size, ten cents, price, 96" cents, discount 2 cents, net, "94" cents. Marked "Paid" by "E. L. Larson."

Q. 40. Is that his signature?

A. Yes, sir.

Q. 41. Is there any other indication of the salesman on that order blank?

A. "Order taken by Salesman E. L. Larson," stamped with rubber stamp, I suppose it is.

Q. 42. Did you know what P. Lorillard Company was, whose name was at the top?

A. I did not.

Q. 43. Did that mean anything to you?

A. No, sir.

Q. 44. You did not notice it at the time?

A. I did not.

Q. 45. Was shipment made through the jobbers?

A. No, sir.

Q. 46. How was it delivered to you?

A. Over the counter.

Q. 47. Did you buy that dozen packages of tobacco—of Beech-Nut scrap, believing that you were dealing with the same people that were putting out Beech-Nut butter?

A. I did.

Q. 48. Did you sell any of it to your customers thinking it was put up by the same company that put up Beech-Nut butter?

A. I did.

Q. 49. Can you tell us what you said to some of them?

A. I says, I have a new Beech-Nut product on the market, and it should be a good seller, that it was Beech-Nut, and it ought to be all right. Beech-Nut products were good sellers, and it should be a good product if it were as good as the others were.

Cross-Examination by Mr. Cavanagh.

X-Q. 50. What is your name?

A. Jefferson D. Hayden.

X-Q. 51. Mr. Hayden, you were speaking in your direct examination of having your Beech-Nut chewing gum and other Beech-Nut products near the tobacco shelves.

A. Yes, sir.

X-Q. 52. I notice that you sell brooms in this store, don't you?

A. Yes, sir.

X-Q. 53. And your brooms are up against your sweet potatoes?

A. Yes, sir.

X-Q. 54. And you have got a bunch of bannanas up against your meat and milk chest?

A. Yes, sir.

X-Q. 55. It is simply a question of convenient arrangement?

A. Yes, sir, just like an ordinary line.

X-Q. 56. I notice you have quite a nice stock tobacco products on sale here. I see you sell Climax plug tobacco.

A. Yes, sir.

X-Q. 57. How long have you been selling Cimax plug?

A. I suppose ever since I opened up. I buy in small quantities, a box at a time.

X-Q. 58. How long have you been selling it—in years?

A. I have not been opened up only since July.

X-Q. 59. And you have been selling Climax since July?

A. Yes, sir.

X-Q. 60. I notice you also have Old Virginia cheroots for sale.

A. Yes, sir.

X-Q. 61. How long have you been selling Old Virginia cheroots?

A. Ever since we opened up.

X-Q. 62. Did you or not ever hear about Lorillard?

A. What name is that?

X-Q. 63. Whose name is on Old Virgina cheroots?

A. P. Lorillard Company.

X-Q. 64. What name on the scrap tobacco?

A. P. Lorillard Company.

X-Q. 65. What name on the Climax chewing tobacco?

A. P. Lorillard Company.

X-Q. 66. I notice you also sell Beech-Nut cigarettes.

A. Yes, sir.

X-Q. 67. Whose name is on that Beech-Nut package (showing package)?

A. Lorillard Company, looks like.

X-Q. 68. P. Lorillard Company?

A. Yes, sir.

X-Q. 69. And this little yellow tag or slip that is over the carton of cigarettes, whose name appears on that?

A. Lorillard.

X-Q. 70. So all of those products are Lorillard products?

A. Yes, sir.

X-Q. 71. You don't find the name of Beech-Nut Packing Company on any of this tobacco, do you?

A. No, sir, I don't see it.

X-Q. 72. And this receipt you have produced in evidence, that receipt bears, or did bear, but torn, the name P. Lorillard Company, 119 West 40th street, New York, did it not?

A. Yes, sir.

X-Q. 73. That receipt you say was given by a salesman, Mr. Larson?

A. Yes, sir.

X-Q. 74. And since you received that first dozen packages of Lorillard scrap tobacco you have continued to sell that tobacco?

A. I am selling it now, yes, sir.

X-Q. 75. It is a good selling scrap tobacco, too?

A. Yes, sir.

X-Q. 76. So you have taken repeated orders for that tobacco right straight along?

A. Yes, sir.

X-Q. 77. You haven't the slightest objection to selling that tobacco, whether it was made by Lorillard or anybody else, as long as it sells?

A. I have no objection to selling it, no.

X-Q. 78. From whom had you been in the habit of buying your Beech-Nut products?

A. Food products from Thomas & Howard.

X-Q. 79. Does a Beech-Nut Packing Co. salesman ever call in here?

A. He has been in occasionally.

X-Q. 80. Have you given him orders?

A. I don't know. I think I gave him an order on one occasion, may be a couple of occasions, for some beans, and may be a couple of packages of chewing gum. I sell more chewing gum than anything else. I bought chewing gum from Thomas & Howard.

X-Q. 81. From the jobbers?

A. Yes, sir.

X-Q. 82. You knew the Beech-Nut Packing Company's salesman that used to come in here on his regular route?

A. Just like all the rest who come in regularly.

X-Q. 83. That was not Mr. Larson?

A. No, sir.

X-Q. 84. Larson was a tobacco man?

A. So he said.

X-Q. 85. When he came in here Larson did not tell you that the tobacco was made by the Beech-Nut Packing Company, did he?

A. He did not tell me who made it.

X-Q. 86. But he gave you a receipt of P. Lorillard Company?

A. That is the receipt he gave me.

X-Q. 87. That receipt has no connection whatever with the Beech-Nut Packing Company?

A. It has not, so far as the name on it.

X-Q. 88. As an ordinary careful man, familiar with business, as you are, when that receipt was given to you, if you looked at it you would have seen P. Lorillard, and known it was a P. Lorillard receipt, would you not?

A. If I had observed it carefully.

X-Q. 89. If you had looked at it?

A. I did not look at it. If I had I would not have known whether it was the manufacturer or the jobber.

X-Q. 90. But you would have known that it was a receipt of P. Lorillard Company?

A. I would have known that it was headed P. Lorillard Company, but I would not know him from anybody else. He did not explain whether he was the manufacturer or jobber when I bought this.

X-Q. 91. But he handled the receipt of P. Lorillard Company?

A. That is a receipt of P. Lorillard Company.

X-Q. 92. You say you never heard of P. Lorillard Company before you went into business?

A. I did not.

X-Q. 93. Do you use tobacco?

A. No, sir, in no way, shape or form.

X-Q. 94. You would not have occasion to become acquainted with the merits of the tobacco yourself?

A. No, sir.

X-Q. 95. Likewise the merits of any other tobacco, whether it is Climax, Old Virginia cheroots—individually you paid no attention to that?

A. Looked like all other Beech-Nut products to me. I

did not notice the name. If I had I would not have known whether it was the jobber or anybody else.

X-Q. 96. You don't know anything about the tobacco business?

A. No, sir.

X-Q. 97. You did not know that P. Lorillard was one of the largest tobacco concerns in the world?

A. I did not.

X-Q. 98. You never purchased any goods of the Beech-Nut Packing Company, either food products or chewing gum, that was marked or dressed like this package of Beech-Nut scrap tobacco, with the sunburst and red radiating lines?

A. I never paid any particular attention to the lines. All I went by was the name. That was all I went by. I did not notice the fixings on the packages. A variety of goods ordinarily have different packages.

X-Q. 99. I show you a Beech-Nut bean and bacon label, which is in evidence in this case as Defendant's Cross-Exhibit 8. That is an original Beech-Nut Packing Company's label?

A. Yes, sir.

X-Q. 100. With a wide red band, and the printing on the band like other Beech-Nut goods?

A. Yes, sir.

X-Q. 101. There is no such red band arrangement on that cigarette (exhibiting same)?

A. I would not observe the package so closely. I just go by the name Beech-Nut. That is what I go by.

X-Q. 102. As a matter of fact, I notice you have in your store here some display of Lorillard's Beech-Nut cartons?

A. Yes, sir.

X-Q. 102. And it is quite a large and attractive display?

A. Yes, sir.

X-Q. 103. For example, I notice over your tobacco counter you have these cartons piled up in a pyramid-like form, and these cartons are each about a foot high, a foot to a foot and a half, and that stack of cartons is probably in the neighborhood of 8 feet high, is it not?

A. Yes, I suppose seven and a half or so.

X-Q. 104. In other words, your Beech-Nut scrap tobacco display runs from the top of your shelf to the ceiling, does it not?

A. Yes, sir.

X-Q. 105. And you also have these Lorillard cartons displayed on top of your refrigerator?

A. Yes, sir.

X-Q. 106. One of the things that would strike you, or an ordinary observer in that whole display is that red sunburst?

A. Ordinarily, but I would not pay particular attention to that—just the name.

X-Q. 107. Look at these red and white lines.

A. It is labelled all right.

X-Q. 108. You never saw the Beech-Nut Packing Company's name on Lorillard tobacco, did you?

A. I did not see whether it was Lorillard or not. This young man came in, and I thought it was a Beech-Nut product.

X-Q. 109. You never bought any tobacco from the Beech-Nut Packing Company?

A. I never have bought anything but some beans, peanut butter and chewing gum, and the tobacco was from Lorillard, I offered for sale as a Beech-Nut product.

X-Q. 110. And the tobacco, you did not take the trouble to see who made it?

A. No.

X-Q. 111. If a man came into your store, and he said, I want a package of Beech-Nut chewing gum, would you

hand him a package of this tobacco or cigarettes in place of the chewing gum he asked for?

A. No, sir.

X-Q. 112. You would think he was crazy if he had asked for tobacco if he wanted chewing gum?

A. I would not know.

X-Q. 113. If he had come in and asked for Beech-Nut chewing gum?

A. He would be liable to ask for one or the other.

X-Q. 114. Suppose he had asked for gum?

A. I would hand him gum.

X-Q. 115. If you went into a store yourself and said, I want a package of Beech-Nut chewing gum, and that is what you did want, and they tried to make you accept a package of tobacco or cigarettes, in the place of chewing gum, what would you do?

A. I would object.

X-Q. 116. You would not be confused into taking gum for tobacco?

A. No, I would want gum.

X-Q. 117. They are entirely different kinds of goods?

A. Yes, sir.

X-Q. 118. Different class of goods altogether?

A. Yes, sir.

Redirect Examination by Mr. Johnson.

R-D. Q. 119. To go back to your conversation at the time Mr. Larson went into your store—what was the impression made on you as a result of his conversation and his conduct at the time he was in your store?

A. He left me under the impression that he was putting out a Beech-Nut product made by the Beech-Nut people, and, as I say, these Beech-Nut products were selling fine, and I was under the impression the tobacco would go the same way, and I told him I would try a small

quantity of it. I would not keep much on hand, therefore, I took a dozen packages. I was not able to carry any larger stock, as you notice. I carry a very small stock of any kind of goods.

R-D. Q. 120. And whose product did you think this tobacco was at the time that you made that first purchase from Mr. Larson?

A. I thought it was the Beech-Nut Packing Company's product. I thought it was put out by the Beech-Nut people.

Re-Recross Examination by Mr. Cavanagh.

R-X Q. 121. You did not ask the man if the Beech-Nut Packing Company put it out?

A. I did not have to ask. I went by the name.

R-X Q. 122. The word Beech-Nut, and nothing else?

A. Yes, sir.

R-X Q. 123. That is all that you paid any attention to?

A. Yes, sir.

R-X Q. 124. You did not pay any attention to the name on the package—Lorillard?

A. No, sir.

R-X Q. 125. Nothing else whatever?

A. Just the name is all that I noticed about.

Re-Redirect Examination by Mr. Johnson.

R-D. Q. 126. When you say, only the name you noticed on the package, did you notice the label?

A. The name and the label, yes.

Objected to as leading.

Received subject to objection.

Re-Recross-Examination by Mr. Cavanagh.

R-X Q. 127. This is not a Beech-Nut label is it?

A. It looks like it.

R-X Q. 128. The Beech-Nut and the palm leaf, do they look alike (indicating and pointing)?

A. Since those fine points have been pointed out, they do not look alike.

R-X Q. 129. Here is a Lorillard package of tobacco with the wide red lines—that is not a Beech-Nut Packing Company label?

A. No, it is not, but in general appearance they look alike.

R-X Q. 130. This has a single Beech-Nut with three green leaves in the center?

A. Yes, sir.

R-X Q. 131. And the other has two red beech-nuts on the back?

A. Yes, sir. If you point them out, if you observe very closely, you can tell the difference.

R-X Q. 132. As a matter of fact, you would not say they were alike, would you?

A. They look alike.

R-X Q. 133. Do you mean to tell me that that one (indicating) is like the one with the red band with the printing on it?

A. Look like Beech-Nut.

R-X Q. 134. The word Beech-Nut is what confuses you?

A. As to appearance, they look all the same to me.

R-X Q. 135. The word Beech-Nut?

A. Yes, sir.

R-X Q. 136. Would say that this Beech-Nut package (indicating) looks like that tobacco package?

A. I never noticed that closely.

R-X Q. 137. Any red radiating lines?

A. No, sir.

R-X Q. 138. You never paid any attention to that at all?

A. No, sir.

R-X Q. 139. As a matter of fact, to close up this whole thing, is it not a fact, as you said, it was just the word "Beech-Nut" that you were thinking about?

A. It was Beech-Nut products made by the Beech-Nut people.

R-X Q. 140. That word "Beech-Nut" is what struck you?

A. It is the name.

R-X Q. 141. Just the name Beech-Nut?

A. I was under the impression that it was made by the Beech-Nut people.

R-X Q. 142. And you thought it was all right because of the name Beech-Nut?

A. Sure.

R-X Q. 143. As a matter of fact, that was the only thing you noticed; you did not pay any attention to anything else?

A. Only the name.

Deposition of this witness closed.

The signing of the testimony by this witness expressly waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff,*
vs.
P. Lorillard Company, *Defendant.*
} In Equity No. 3056.

Deposition taken on behalf of the plaintiff before A. D. McFaddin, a notary public for the State of South Carolina, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel at the office of said A. D. McFaddin, Clark Law Building, Washington Street, Columbia, S. C., beginning Friday, January 27, 1922, at 12:30 o'clock P. M.

Present: H. McClure Johnson, Esq., of Offield, Poole, Hinton & Scott, for the Beech-Nut Packing Company; R. B. Cavanagh, Esq., of Meyers, Cavanagh, Whitehead & Hyde, for P. Lorillard Company.

RICHARDSON S. MARKS, a witness produced on behalf of the plaintiff, pursuant to notice and agreement of counsel, being first duly sworn, in response to questions propounded by Mr. Johnson, deposes as follows, to-wit:

By Mr. Johnson: Q. 1. Your name is?
A. Richardson S. Marks.
Q. 2. Your residence?
A. 2734 Wheat Street, Columbia, S. C.
Q. 3. Your age?
A. In my 64th year.
Q. 4. Your occupation?
A. A printer and newspaper editor.
Q. 5. What is your business connection and where?
A. At present I have no regular business. I am a

printer and Tyler for the different Masonic bodies in the city.

Q. 6. What is your business connection in the printing business?

A. I am with the DuPre Printing Company, 1316 Main Street, and have been for about 20 years. On account of labor troubles here we are out.

Q. 7. What newspaper were you connected with?

A. The old Columbia Register.

Q. 8. In what city?

A. Columbia, S. C., for ten years or more. Telephone editor in the office was one of my specialties.

Q. 9. Do you hold office in any societies?

A. I am Tyler for all the Masonic bodies that meet up town, all the Masonic bodies that meet in the city, and a life member of one of them.

Q. 10. Anything else?

A. I have been secretary in Columbia of the typographical union for several years and a member of the volunteer fire department association. The old companies went out of existence, but I was a member until relieved by the city.

Q. 11. Any other societies?

A. Nothing, except that I have been a Pythian for 43 years.

Q. 12. What other connections?

A. I was one of the founders of Arsenal Hill Presbyterian Church.

Q. 13. Do you hold any position with the Shriners?

A. I am Outside Guardian for the Shriners, and have been for fifteen or twenty years. I know nearly every Shriner in the state.

Q. 13*a*. What is the name of the temple here?

A. Omar.

Q. 14. Do you know the products put out by the Beech-Nut Packing Company?

A. Yes, for I have used a good many.

Q. 15. How long?

A. Ever since they came on the market in Columbia as far as I remember, off and on.

Q. 16. About how many years?

A. I don't know, maybe, about ten years, as far as I can remember, and I bought Beech-Nut products on their reputation.

Q. 17. Please name some of the Beech-Nut products you have used.

A. Sliced bacon, pork and beans, their marmalades, and other things that I have bought. I don't remember, household goods ordered by my wife, and I have bought them myself.

Q. 18. What have you thought of them?

A. I bought them on their reputation and warranty for purity, and I have always found them satisfactory.

Q. 19. What does the Beech-Nut Packing Company label mean to you?

A. I considered when I bought anything made by them that it was pure and not adulterated. That is the reason I bought them on account of their reputation for purity.

Q. 20. I show you a package of Beech-Nut cigarettes now in evidence in this case as Plaintiff's Exhibit No. 1. When did you first see or notice any of those cigarettes?

A. Coming into the city from Shandon I noticed the city placarded with Beech-Nut cigarettes.

Q. 21. About when was that?

A. I don't know. Last fall some time. I could not remember just when; and I simply got disgusted as soon as I saw that this concern that I had a great respect for was manufacturing cigarettes.

Q. 22. Where did you see this?

A. On the boards and in show windows.

Q. 23. When you saw them, who did you think was putting them out?

A. The manufacturers of food products.

Q. 24. What company was that?

A. The Beech-Nut Produce Company, or whatever they call themselves. I thought they were manufactured by the same company, whatever company handles them.

Q. 25. Manufactured you thought by the Beech-Nut Packing Company? What made you think that?

A. The name and the label.

Q. 26. What was the effect on you of seeing that cigarettes were being put out by the Beech-Nut Packing Company?

A. I was under the impression that the cigarettes were being put out by the company designated and meeting Mr. Thornton, I knew he was the representative of the Beech-Nut Company, I told him I was very much surprised and disgusted at the Beech-Nut people for manufacturing and putting out something that would ruin people.

Q. 27. That would ruin people?

A. That is what I told him, and I had made up my mind and told my wife I was going to cut it out, as she is as opposed to cigarettes as I am, until Mr. Thornton told me the house he represented were not the manufacturers of that product, and that they were not dealing at all in tobacco.

Q. 28. What did you mean by cutting it out?

A. Not going to buy any more of the stuff, to put a boycott on it. I was disgusted at a concern like that putting cigarettes on the market.

Q. 29. You mean Beech-Nut Packing Company?

A. Beech-Nut Packing Company.

Q. 30. What would you say is your attitude towards those who put out cigarettes?

A. I think they are a menace to the man that uses them, and I have no use for anything like that, which ruins young men and boys. That is my impression about them. Whatever induces boys to smoke, whatever leads them to that habit that is injurious to them I am opposed to.

Q. 31. What is your attitude towards those who put out cigarettes?

A. I will not buy their products; I do not smoke cigarettes, and I will not buy from any one who manufactures cigarettes.

Q. 32. Are there many people of your acquaintance in Columbia that have the same attitude towards the products of those who put out cigarettes?

Mr. Cavanagh: I object. That is hearsay.

Witness: It is not hearsay, because I have asked them. I have spoken to others who are of the same opinion, that they had no use for them.

Cross-Examination by Mr. Cavanagh.

X-Q. 33. Did you ever buy any of those Beech-Nut cigarettes?

A. No, but I bought chewing tobacco.

X-Q. 34. You have never examined the tobacco or the cigarettes?

A. Never have. I have seen them.

X-Q. 35. How often do you buy chewing tobacco?

A. I have bought it for my son, and he asked me for Beech-Nut chewing tobacco.

X-Q. 36. You have bought it for quite a number of years?

A. No, only three or four times when he was sick,

and he would get people who waited on him to buy it for him.

X-Q. 37. You did not buy it for yourself?

A. No, if I used tobacco I would have thought the Beech-Nut people manufactured it.

X-Q. 38. But you would have looked at the package to see who made it, to see what was in the package?

A. If I was using Beech-Nut tobacco I would ask for Beech-Nut because I go by the word Beech-Nut, and thinking it was a guaranty of purity.

X-Q. 39. You would not have taken the trouble to read what was on it?

A. I saw Beech-Nut, and I go by the word Beech-Nut.

X-Q. 40. The name on it?

A. Yes. I went by the word Beech-Nut and the red label. I like to use it on the table because it is pure. I used Beech-Nut products in the eating line, and when I saw they were manufacturing cigarettes—I assumed they were making them until I was informed by Mr. Thornton that they had nothing to do with it. My son told me to get Beech-Nut because he thought it was pure.

Mr. Cavanagh: That part as to what his son thought is objected to.

Witness: I would have bought it on the strength of its purity if I was using it.

X-Q. 41. But you have bought the tobacco products?

A. No, I have no use for it.

X-Q. 42. You have never looked at the package?

A. I see the leaf and the palmetto.

X-Q. 43. You have noticed P. Lorillard Company?

A. No, I have no use for them.

X-Q. 44. You did not look at them close enough to see?

A. I did not.

X-Q. 45. You did not read anything on the package?

A. I saw Beech-Nut, and the shape.

X-Q. 46. That is all you noticed?

A. Yes, and I thought from the package it was manufactured by the Beech-Nut Packing Company.

X-Q. 47. You consider cigarettes in a different class from food products?

A. I certainly do.

X-Q. 48. You think they are in an entirely different class?

A. I do. I think one will kill, and the other will not.

X-Q. 49. If you went into a store and asked a man for a package of Beech-Nut chewing gum, if he handed you a package of Beech-Nut tobacco, would you be confused or deceived into taking the tobacco and those cigarettes in place of the chewing gum that you had asked for?

A. I would know the difference.

X-Q. 50. You would know by the difference?

A. I mean by the difference in the package. I don't know what you are driving at. If I wanted a package of Beech-Nut gum and he wanted to give me cigarettes would I know it was manufactured by the man that manufactured Beech-Nut products?

X-Q. 51. You did not get my question, and I would like for you to pay attention to me. If you went into a store and asked a man for a package of Beech-Nut gum, if he handed you a package of cigarettes, would you be confused into taking the cigarettes when you wanted gum?

A. Certainly not. A man of common sense would not. If I went for cigarettes I would not take gum.

X-Q. 52. You would not take gum?

A. No, I would not.

X-Q. 63. You would know the difference in the class of goods?

A. I would know one was tobacco. I would know that one was harmful and the other was not.

X-Q. 54. One was tobacco?

A. Yes, sir.

X-Q. 55. And the other a food product?

A. Yes, sir.

X-Q. 56. And there would be no confusion, the gum being a food product?

A. Yes, sir.

X-Q. 57. You never knew of this Beech-Nut Packing Company selling tobacco, did you?

A. As far as my knowledge goes I did not until I saw their sign, and I presumed they were and I told Mr. Thornton about it.

X-Q. 58. Then he immediately told you his concern did not make tobacco?

A. Yes, sir.

X-Q. 59. As I understand from your deposition, you are absolutely opposed to the use of cigarettes and do not use them yourself, and you say the manufacture of them and the using of them is not right?

A. Yes, sir, but that would not bias my opinion on any question.

X-Q. 60. It is merely a fact that you do not use them?

A. No.

X-Q. 61. You are opposed to the use of cigarettes?

A. Yes, I am.

X-Q. 62. If a concern was putting out cigarettes and food products at the same time you would not buy food products from that concern?

A. I would not, because cigarettes are a menace to the community, to the boys that are coming up.

X-Q. 63. You think they are in a different class from food products?

A. Certainly. One kills and the other will not. Cigarettes or tobacco will kill some people, while food products, if eaten in moderation, will not. A man can't smoke in moderation, seems like. He will smoke more and more and more.

X-Q. 64. I further understand from your testimony that when you saw these Beech-Nut cigarette signs as you were coming to the city instead of speaking to any one about it you stopped purchasing Beech-Nut products, food products, and without regard to whether they were doing it or not?

A. I made up my mind to stop right off.

X-Q. 65. You made up your mind and acted immediately and boycotted the Beech-Nut men?

A. No, I met him in a store and said, I am disgusted with your house, you are putting out something that is killing people. He said we had nothing to do with that, and I told him I had made up my mind to cut it out. If I had not seen him I would not have bought anything that had Beech-Nut on it.

X-Q. 66. Would you not have taken the trouble to inquire before you cut out the company?

A. No, I would not have taken the trouble because I had no doubt it was nobody but the Beech-Nut people.

X-Q. 67. Did you ever hear of Star hams?

A. Yes, I use them.

X-Q. 68. You have heard of Star soap?

A. Yes, and I don't use it.

X-Q. 69. You have heard of Star chewing tobacco?

A. No, sir.

X-Q. 70. You have heard of Star soap?

A. Yes, sir.

X-Q. 71. You would not immediately quit a man who had been in the habit of selling you Star soap because you heard he was selling Star hams, and you were op-

posed to the use of hams, you would not deprive him of any sales by withdrawing your trade without making any inquiry about the matter?

A. No, I don't think I would.

X-Q. 72. You would not deprive him of his sales to you without first asking him about it just as you did Mr. Thornton?

A. I did not think I had any occasion to do anything like that.

X-Q. 73. But you did, as a matter of fact, tell him?

A. If I thought it was injurious, and I was opposed to it, I thought it was right to tell him.

X-Q. 74. In this very case you did make inquiry?

A. I did not make inquiry. I just twitted him about it. If I had not known Thornton I would have gone on without telling any one.

X-Q. 75. If you had gone on and cut out Beech-Nut without taking the trouble to find out——

A. It did not take any trouble because I had confidence in the word Beech-Nut.

Deposition closed and the signing of testimony expressly waived.

Deposition closed at 1 o'clock P. M.

State of South Carolina, Richland County:

I, A. D. McFaddin, a notary public in and for the county and state aforesaid, acting as Special Examiner, by consent of counsel, do hereby certify that the accompanying depositions of Jefferson D. Hayden and Richardson S. Marks were taken in behalf of the Beech-Nut Packing Company, the plaintiff, pursuant to notice and by agreement of counsel, before me at Columbia, S. C., on January 27, 1922; that the foregoing witnesses were by me duly sworn; and that the testimony of said wit-

nesses was taken down by me in shorthand, and thereafter reduced to typewriting by me; that the opposing party hereto was represented by Richard B. Cavanagh, Esq., during the taking of said testimony; that the said testimony was taken in the City of Columbia, S. C., beginning as to Jefferson D. Hayden, at 10:20 o'clock A. M., and ending at 11 o'clock A. M. on January 27, 1922; and as to Richardson S. Marks, at 12:30 o'clock P. M., and ending at 1 o'clock P. M. on said 27th January, 1922; and that the signatures of said witnesses to their respective testimony was expressly waived as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Master and for copies taken in accordance with the attached bill the sum of Twenty-Three and Fifty Hundredths ($23.50) Dollars.

In witness whereof I have hereunto set my hand and official seal this 27th day of January, 1922.

A. D. McFADDIN,
Notary Public for S. C.

(My commission expires at the pleasure of the Governor of South Carolina.)

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

Deposition taken on behalf of plaintiff, before Edna R. Greer, Notary Public, acting as Special Examiner, by consent of counsel, pursuant to notice and by agreement of counsel, beginning February 9, 1922, at 11:30 A. M.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, on behalf of plaintiff; Richard B. Cavanagh, of Meyers, Cavanagh & Whitehead, on behalf of defendant.

FRANCIS E. BARBOUR, a witness produced on behalf of plaintiff, is resident more than one hundred miles from place of trial. His deposition is taken in New York, by agreement of counsel, and is to be considered as being taken as part of, and with, the Canajoharie depositions, witness being temporarily in New York City. Witness being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Francis E. Barbour; you are 51 years of age; you reside in Canajoharie, N. Y., and you are vice-president of the Beech-Nut Packing Company; is that correct?

A. That is correct.

Q. 2. How long have you been connected with the Beech-Nut Packing Company, plaintiff in this case, and in what capacity?

A. Since January 1, 1910, in the capacity of secretary and latterly vice-president, covering general charge of the management and sales and advertising.

Q. 3. Mr. Barbour, what is the so-called "Beech-Nut policy"?

A. With your permission I will read what we have published in many magazines, newspapers and otherwise as the Beech-Nut policy, and which is as follows:

> "There are discriminating people in every community who want to purchase the best. These are our friends. They have made our business—our reputation. It is on account of them that we have determined never to offer for sale any article under the Beech-Nut label until we are satisfied that it is better than any similar article."

We have published that for several years as our policy advertisement. I might amplify that by saying that our policy is to purchase the very best raw materials available; to manufacture them in clean, wholesome, sunny, bright surroundings, by intelligent help, well paid, who realize what they are making and to distribute our products through our regular channels in a way which will satisfy them and remunerate them for so doing and reach the consuming trade with goods which will give them confidence and satisfaction, for we do not consider our job done until we have satisfied the consuming trade.

Q. 4. Can you state off-hand, the number of products which the Beech-Nut Packing Company has offered to the public?

A. I have not counted them up, but I am satisfied over sixty.

Q. 5. What, if any, particular point have you, and do you emphasize in your sales effort to the trade and public?

A. In our sales and advertising, which is a part of our sales, we emphasize high quality and character of all our products—all the products bearing Beech-Nut name (of which there are a large number, and which we continue to add to from time to time), and we expect that our rep-

utation of the past will help make an easy market for us in the future with whatever new lines we may bring out from time to time.

Q. 6. Can you give me a concrete illustration of what you mean by emphasizing and selling on the Beech-Nut reputation?

A. We have sold, for so many years, on our reputation; in selling the trade not only the individual articles which we make, but also the name of Beech-Nut, its reputation for character and flavor, that when we bring out any new article, the consuming public, retailers and jobbers, are willing to accept any new article we bring out under the name "Beech-Nut" and give us an opportunity to demonstrate to them that it is going to satisfy them—that is, the jobbing trade. They are mighty good to us; when we bring out a new product, they give our boys an order. After they have once tried it, we have got to make it good enough so they will continue to buy it.

Q. 7. How does this general sales effort and general sales policy, which you have described, affect the requirement that Beech-Nut goods be always up to the Beech-Nut standard of quality?

A. Well, we have spent over twenty-five years in building up the present good-will and reputation for character and high quality that it is absolutely obligatory that we make everything we bring out of a high character which will compare favorably with what people have enjoyed in the past, so that when they take any new article we bring out they will feel full assurance that it will match up in character and quality with what has given them satisfaction, under the Beech-Nut name in the past.

Q. 8. What would be the affect on your reputation in business if the Beech-Nut Packing Company should come out—for instance, with some new product and the purchasers buying that product should be completely disappointed in the product?

A. Why, we would jeopardize out entire line if we continued to market anything that would not fulfill what the public are entitled to expect under the Beech-Nut name.

Q. 9. Can you state any illustrative instance which would indicate the degree of care exercised by the Beech-Nut Packing Company to make sure that the products it offers do in fact come up to the Beech-Nut standard of quality?

A. Why, we have a case right now. We have been six or seven years in developing a salted peanut, and we have not mastered the production of salted peanuts to our satisfaction yet. There are a number of salted peanuts on the market, put out under some very well known brands, which have been well advertised and highly exploited, and which are enjoying a very large trade, as we understand it, but none of them, in our estimation, are good enough to bear the Beech-Nut trade-mark. We have not been able to produce a salted peanut yet that would not become rancid in a short time or deteriorate to such an extent that we would not want to put it out under our brand.

Q. 10. Has your company, in the past, come out with new products which are quite different from products which it had previously made? In answering, will you give any particular illustrations of this which occur to you?

A. Up until 1912 we had confined ourselves pretty well to food products. That year we brought out Beech-Nut chewing gum, which met with instant reception, and has enjoyed an increasingly large sale all the time. That is somewhat different from our food line, and in 1919 we brought out beverages—ginger ale, sarsaparilla and root beer, which is merchandise of the same trade, but not a food product, possibly.

Q. 11. What was the reception of Beech-Nut ginger ale by the trade and public?

A. Sold from the start.

Q. 12. And to what do you attribute this popular reception of Beech-Nut ginger ale?

A. To the name "Beech-Nut," its trade-name and the name that is associated with it.

Q. 13. Do you intend and expect to continue to bring out new products from time to time?

A. We do. It is fair for us to presume that we will follow the precedent of the past and intend, from time to time, to bring out new lines as we feel we find something which enjoys a good distribution and represents a profit to us, if manufactured and distributed right. I think we will continue to enlarge our line. I have every reason to believe it.

Q. 14. Has your sales effort and sales policy been intended and designed to prepare the public to accept new products from time to time?

A. I feel so. I think the precedent of the past leads the trade and public to expect new things under the Beech-Nut label at any time. We have sold the name Beech-Nut flavor and quality and advertise it to build up a good-will surrounding the name Beech-Nut, so that whenever the public or anyone else finds "Beech-Nut" on anything, they are entitled to believe it is made by the Beech-Nut Packing Company and up to the quality we have always endeavored to maintain.

Q. 15. Would it be within the natural and ordinary expansion of your business to add cigarettes to your line?

A. Well, in one way it would. We are now calling on the tobacco trade, the grocery trade, the drug trade—all of which handle cigarettes and tobaccos, and from that standpoint it would be most consistent for us to handle

cigarettes. We could merchandise them without any added expense as far as our salesmen are concerned in salaries and traveling expenses. On the other hand, there are a great many people who are buying Beech-Nut products, and women buying most of them, who are opposed to tobacco in any form, which might make us feel we might not want to handle tobacco or cigarettes.

Q. 16. What, if any, importance do you attach to the fact that the trade-mark "Beech-Nut" is the same as the distinctive part of the name of your company?

A. We think it is a very happy thing that the name Beech-Nut is the same for the company as it is for the products. It would be very difficult for us to so closely ally Beech-Nut products with a company of another name than it would to ally them with a company bearing the same trade-name. Moreover, we rather feel that we get the personality of the Beech-Nut people into the goods more closely allied by having the company and name tied up together than we could otherwise get, and if we can maintain quality and character among our personnel that we do among our products, it strengthens the whole situation.

Q. 17. You may state, if you know, what the expression "Beech-Nut quality" means at the present time.

A. It means high standard of all the products which are brought out and merchandised by us—the Beech-Nut Packing Company.

Q. 18. To what extent, if at all, has that expression been popularized among the public by the Beech-Nut Packing Company?

A. The general tone of our advertising is quality, and we have used slogans which support that—if I may use that term—such as "You can't mistake the flavor," which implies that the flavor is delightful, delicious and of high quality.

Q. 19. You have mentioned the slogan, "You can't mistake the flavor." To what extent have you displayed that to the public?

A. Oh, we have used it for years in our magazine advertising and window displays, store signs, billboards—general publicity.

Q. 20. Has that been your main slogan, or one of your main slogans?

A. It has. We have used that, I think, more than any other, and it has been for several years—a number of years; just how long I do not remember. The advertising will support that.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 21. Mr. Barbour, I understand that you have been with the Beech-Nut Packing Company since 1910?

A. January 1, 1910.

X-Q. 22. And you have been there in the capacity of general manager and in charge of salesmen and advertising?

A. I have had general supervision. I have been what you might call assistant general manager until Mr. Lipe's departure from the company, over a year ago, and up to that time assistant general manager, and with general supervision of sales and advertising.

X-Q. 23. In other words, you are one of the principal officials of the company, and familiar with its business and development?

A. Yes, sir.

X-Q. 24. When you went with the Beech-Nut Packing Company in 1910, what goods was it selling; what articles or products was it putting on the market?

A. Bacon, beef, peanut butter, jams, jellies, preserves,

catsup, chili sauce, vinegar; we have added several since that. I think that was all, as I remember now.

X-Q. 25. They were putting out these products in 1910?

A. Yes, sir.

X-Q. 26. Now, I understand you have added certain products since that time?

A. Yes, sir.

X-Q. 27. Can you name what products you have added year by year?

A. We have added chewing gum, compressed tablets, known as mints, ginger ale, caramels; we are just starting to put out marshmallows now.

X-Q. 28. Was the Beech-Nut Packing Company putting out chili sauce when you went with them in 1910?

A. Putting out catsup. I do not think we made chili sauce until we opened our Rochester factory. We were making catsup—that I know.

X-Q. 29. How many people are employed in the Beech-Nut plant or factories?

A. At the present time?

X-Q. 30. Yes.

A. Rounding a thousand.

X-Q. 31. As I understand it, you say in about 1912 you put out chewing gum, and you also stated that it became very popular. Can you give me figures, or if you have not them available at this time, will you give me the figures, showing the yearly sales in dollars and cents of this Beech-Nut gum since 1912?

A. We can do that.

X-Q. 32. I understand you have advertised this Beech-Nut chewing gum quite widely. Is that so?

A. Have advertised it very little, except by sampling.

X-Q. 33. Do you keep any separate account of the amount of money you spend in advertising chewing gum?

A. No. All our advertising is blocked and is pro-ted on the basis of sales.

X-Q. 34. Will you explain to me just what you mean that, Mr. Barbour?

A. We, we feel that all our products, for instance, get e same benefit from any advertising which the Beech-ut Packing Company does, because we advertise the eech-Nut Packing Company and our label. Now, if we dvertise an article—like Beech-Nut peanut butter, we ill say—in one of the women's magazines, like the La-es' Home Journal, of full page and display showing ereon Beech-Nut label, talk quality, embrace our slo-an, enumerate the other products at the foot of the page, e entire line benefits, although the main "ad" is for eanut butter. Now, when it comes to accounting for the oney spent for that "ad" the month that it appears, the st of that "ad" is pro-rated against our sales of all our roducts for that month.

X-Q. 35. So that you have not any figures, or you do ot keep any accounts which would show what the yearly xpenditures you make of advertising chewing gum, do ou?

A. No.

X-Q. 36. And likewise, I presume, that you have no ac-unts or statements, yearly or otherwise, which would ow the extent of advertising of chewing gum—say, in a rtain state, have you?

A. We can tell the amount of money expended in sam-ing, which is direct advertising of chewing gum in any ate, but not magazine advertising, for instance; we can llboard advertising, of which we have done a little.

X-Q. 37. Now, I understand your figures would show, state, for certain products, such as chewing gum, nount of advertising in dollars and cents that you have ne of sampling and billboard advertising?

A. Yes, sir.

X-Q. 38. I further understand that these records would be found at the home office, at Canajoharie, N. Y.?

A. Yes, sir.

X-Q. 39. And I ask you if the opportunity affords in the future, and if it is so deemed necessary, will you produce these figures for me?

A. Will be glad to.

X-Q. 40. Showing advertising in dollars and cents of advertising of various products in various states?

A. Yes, sir, subject to advice of counsel.

X-Q. 41. I understand that about 1919 you brought out beverages, such as ginger ale, sarsaparilla and root beer, and, of course, you continued to put Beech-Nut chewing gum on the market since 1912?

A. Continuously.

X-Q. 42. And both beverages and chewing gum are sold under the Beech-Nut label, are not they?

A. Yes, sir.

X-Q. 43. And that is the label with the red band?

A. Oval red band and the name "Beech-Nut," hyphenated, and representation of the Beech-Nut, regular registered trade-mark and the oval band.

X-Q. 44. Mr. Barbour, does not chewing gum come under the pure food laws?

A. Yes, sir.

X-Q. 45. And beverages likewise, such as ginger ale, root beer and sarsaparilla—they come under the pure food laws?

A. Yes, sir.

X-Q. 46. In your direct examination, you gave some testimony relative to the addition of tobacco products, such as cigarettes to the Beech-Nut line, did you not?

A. I did.

X-Q. 47. Did the Beech-Nut Packing Company ever hold itself out as a manufacturer of tobacco products to the public at large?

A. No.

X-Q. 48. Did you ever know a concern that was manufacturing package or food products that was engaged in the manufacture of tobacco?

A. I do not know of any—cannot think of any at this time.

X-Q. 49. Has your concern ever put any cigarettes on the market?

A. A few, in an experimental way only.

X-Q. 50. And when was that?

A. In 1919.

X-Q. 51. Can you give me the amount of these cigarettes and value of them that you put out?

A. I cannot. I know it was very small.

X-Q. 52. I call your attention to the record of the Beech-Nut Packing Company in United States Patent Office Trade-Mark Opposition 2805, P. Lorillard Co. *vs.* Beech-Nut Packing Co., involving trade-mark "Beech-Nut" for cigarettes, on pages 43 and 44 in the deposition of W. C. Arkell, a witness for the Beech-Nut Packing Company, reference is made to certain cigarettes supplied on invoice from the American Tobacco Co. to Beech-Nut Packing Co., and which cigarettes were shipped to B. Arkell, James R. Offield and a New Jersey Tobacco company. The amount of these as stated in record is 2060, with a total net cash value of $11.85. Do you know is this the order or the amount of cigarettes that your company put out that is referred to there?

A. As far as I know, it is.

X-Q. 53. In other words, as far as you know, that shipment of $11.85 worth of cigarettes was and has been the total effort of the Beech-Nut Packing Company in the tobacco field?

A. The total sales, as far as I know.

X-Q. 54. You have never ordered or installed any to-

bacco or cigarette making machinery at any plant of the Beech-Nut Packing Company, have you?

A. No, sir.

X-Q. 55. You have never purchased any stock of tobacco to be manufactured into cigarettes or other tobacco products?

A. We have purchased only very small lots of tobacco for experimental purposes only.

X-Q. 56. About how much tobacco did you purchase for experimental purposes?

A. I do not imagine more than $50 worth at the outside.

X-Q. 57. Did you ever hire for your plant any expert blender or party familiar with the manufacture of tobacco products?

A. In an experimental way we had the services of a man who was recommended to us as one who had examined many tobaccos and blended them and were familiar with them.

X-Q. 58. Is he still with you?

A. No, sir.

X-Q. 59. And even at that time you did not get any machinery or equipment for going into the tobacco business?

A. No, sir.

X-Q. 60. Mr. Barbour, I call attention to a letter on the letterhead of the Beech-Nut Packing Company, and it is dated 6-11-1915. Was that letter signed by you?

Mr. Hinton: That is objected to as outside the line of direct examination.

Mr. Cavanagh: In order to save any extended statement on record, I will simply say that in this particular letter I intended to call Mr. Barbour's attention to a particular statement which he made, and which is in direct line with this examination.

X-Q. 61. In this letter of June 11, 1915, which you have identified, you make the statement, "While we have never as yet manufactured tobacco, the taking on of such manufacture in the future is by no means impossible or improbable." You made that statement, did you not?

A. Yes, sir.

X-Q. 62. Since 1915 your concern itself has not manufactured or marketed any tobacco products in that seven years' period, has it?

A. We marketed this small lot in 1919.

X-Q. 63. I mean beside that small lot?

A. No, sir.

X-Q. 64. And that small lot was made practically four years after the writing of this letter, was it not?

A. Yes, sir.

X-Q. 65. I also call your attention to a letter dated July 18, 1915. Is that your signature?

A. Yes, sir.

Mr. Hinton: Objection is repeated. This matter is outside the line of direct examination, and it is stipulated that objection may apply to further testimony of this character, without repetition.

Mr. Cavanagh: This witness has testified as to the probability and liability of the Beech-Nut Packing Company going into the tobacco and cigarette business. This correspondence is directly in line with the subject-matter of witness' testimony.

X-Q. 66. I show you letter of 7-2-15 or July 2, 1915. Is that your signature, Mr. Barbour? You wrote that at that time?

A. Yes, sir.

X-Q. 67. I also call your attention to a letter of 7-26-15 or July 26, 1915. Is that your signature?

A. It is.

X-Q. 68. Did you write that letter at that time?

A. I did.

X-Q. 69. I also call your attention to letter dated August 7, 1919, and signature thereto. Did you write that at that time, Mr. Barbour?

A. Yes, sir.

X-Q. 70. I also call your attention to letter dated 8-28-19, or August 28, 1919, and another letter dated October 8, 1919. Is that your signature to those letters?

A. Yes.

X-Q. 71. And you wrote these letters at that time?

A. Yes.

X-Q. 72. These letters were all sent to the Lorillard Company?

A. They were sent to whoever they were addressed to. I did not look at them.

X-Q. 73. I think they were.

Mr. Hinton: Further objection is made to the testimony above and introduction of correspondence on the ground that it is incomplete.

X-Q. 74. Then, as early as 1915, or as early as June 11, 1915, when you wrote the letter of that date, you knew the P. Lorillard Company was putting out a Beech-Nut scrap tobacco, did you not?

Mr. Hinton: This is entirely outside the line of direct examination. Counsel is warned that in pursuing this line he is making the witness his own.

X-Q. 75. What is your answer to that?

A. Yes, sir.

X-Q. 76. As early as 1915 you were referring orders for Beech-Nut tobacco which came to the Beech-Nut Packing Company, to P. Lorillard Company for filling, weren't you?

A. We did. Misdirected mail we naturally forwarded them.

X-Q. 77. You also wrote to your customers who sent in these letters or people who sent these letters and told them Lorillard was making that tobacco, did you not?

A. In many instances.

X-Q. 78. Now you have spoken of the value of your Beech-Nut trade-mark and how it stands with the public as identifying your goods or goods of the Beech-Nut Packing Company, and you have also stated, as the correspondence to which I have directed attention shows, that you knew as early as 1915 that P. Lorillard Company was putting tobacco on the market under the name of Beech-Nut. You took no legal action in 1915 to stop the Lorillard Company from putting out this tobacco?

A. No, sir.

Mr. Hinton: Objection and warning repeated.

X-Q. 79. And no action was taken until the filing of this present suit?

A. Legal action you say?

X-Q. 80. Yes.

Mr. Cavanagh: The letters identified by witness as bearing his signature are at this time marked for identification, it being understood between the parties that the complete correspondence between the parties to the suit will be introduced at a later date. It is stipulated by and between the parties that any further material produced by this witness from the records at Canajoharie may be introduced as part of this deposition and that this witness will be produced for further cross-examination with respect to such additional material at the request of counsel for defendant.

Redirect Examination, Without Waiver of Objections, by Mr. Hinton.

R-D. Q. 1. Mr. Barbour, could you undertake to give from memory a complete list of all of the products put out by the Beech-Nut Packing Company in various years you were with them?

A. No, sir.

R-D. Q. 2. Do you remember, and can you say how much chewing gum was sold by the Beech-Nut Packing Company in the year 1921?

A. Over ten million boxes.

R-D. Q. 3. And how many packages in a box?

A. Twenty packages.

R-D. Q. 4. How many sticks in a package?

A. Five sticks.

R-D. Q. 5. Are these sticks individually wrapped?

A. They are.

R-D. Q. 6. And do they bear on each stick the Beech-Nut trade-mark?

A. They do.

R-D. Q. 7. You have referred to the sampling of chewing gum, for instance. Will you please explain that phrase?

A. We give out to the consuming public, through our salesmen, or through people specially employed for that purpose, free samples of chewing gum, consisting of single sticks, wrapped with the regular wrapper but having in addition thereon, "free samples."

R-D. Q. 8. State if you know whether you have distributed signs and placards advertising Beech-Nut chewing gum?

A. We have.

R-D. Q. 9. Were these for display in retail stores?

A. Yes, sir.

R-D. Q. 10. Do you know to what extent you have done that? In other words, whether it was a good deal, very little, or what?

A. Many thousand signs. Advertising is such a broad thing it is hard to say whether it is little or large, but many thousand.

R-D. Q. 11. And would it be necessary for you to have cigarette making machinery at your plant in order to merchandise Beech-Nut cigarettes?

A. We could get cigarettes made for us by a regular manufacturer, under our label, we to do the distributing.

R-D. Q. 12. Who conducted the negotiations, if there were negotiations, with the Lorillard Company, prior to the beginning of the Patent Office action, which was begun in 1919? I mean who conducted those negotiations on behalf of your company?

A. I wrote the correspondence.

R-D. Q. 13. Do you know whether Mr. Arkell had anything to do with that?

A. He was consulted.

R-D. Q. 14. Were you present at the conference between the officials of the Lorillard Company and the Beech-Nut Packing Company in the summer of 1919?

A. No, sir.

R-D. Q. 15. Do you know whether there was further correspondence between Mr. Arkell and the Lorillard Company?

A. I believe there was. My recollection is there was.

R-D. Q. 16. What was the condition of affairs at the Beech-Nut Packing Company plant during the war? Were you short handed or not?

A. We were disturbed like everybody else, and were short handed and had difficulty in getting all the help

we wanted. Business was difficult in every way—manufacturing and merchandizing.

R-D. Q. 17. Do you consider that the war period was a suitable time within which to undertake litigation?

A. I think it would be a very bad time. Everybody's time was taken up with production matters more than with legal matters at that time.

Redirect examination closed.

Recross-Examination by Mr. Cavanagh.

R-X Q. 1. You brought out new products, though, during the war, did you not?

A. Oh, I am not quite sure on my dates. I am free to say we brought out new flavors of similar products we were making.

R-X Q. 2. What is Jaffee? Did not you bring that out in 1917?

A. Yes, sir.

R-X Q. 3. Is not it a substitute for coffee?

A. It is a meal-time drink. Yes, that is a product which has been on the market for many years.

R-X Q. 4. Oh, you were bringing it out before 1917?

A. No.

Deposition closed.

Signature waived.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity, No. 3056.

State of New York, County of New York, ss:

I, Edna R. Greer, notary public, in and for said county and state, acting as Special Examiner, by consent of counsel, do hereby certify that the foregoing deposition of Francis E. Barbour was taken in behalf of the Beech-Nut Packing Company, plaintiff, pursuant to notice and by agreement of counsel, this deposition being taken by agreement of counsel in New York to suit the convenience of the parties but is to be considered as taken with the Canajoharie depositions; that the deposition was taken at 120 Broadway, February 9, 1922, beginning at 11 A. M., and ending the same day; that the witness was by me duly sworn; that the testimony of said witness was taken down and reduced to typewriting under my supervision, and that the signature of witness was waived by agreement of counsel; that I am not related by blood or marriage to either of the parties hereto, or interested directly or indirectly in the subject-matter involved.

EDNA R. GREER,
Notary Public.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} Equity No. 3056.

Depositions taken in behalf of the plaintiff pursuant to notice and by agreement of counsel by and before Fred M. Geortner, a notary public in and for the County of Montgomery, State of New York, acting as Special Examiner by consent of counsel beginning February 10, 1922, at 11 A. M., ending February 11, 1922, at noon.

Present: Sebastian Hinton, of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh, of Meyers, Cavanagh & Whitehead, for P. Lorillard Co.

It is stipulated that if Stanton Van Wie were called he would testify that he is the advertising manager of the Beech-Nut Packing Company and that the photograph marked by the notary public, Plaintiff's Exhibit No. 15, actually represents a collection of the line of products being manufactured and sold by the Beech-Nut Packing Co., February, 1922. These products being collected by the witness and the photograph taken under his supervision and compared with the original by him.

It is further stipulated that carton marked by notary public, Plaintiff's Exhibit No. 16, is an illustrative portion of the cardboard cartons used by the Beech-Nut Packing Co. to ship products.

It is further stipulated that carton marked by notary public, Plaintiff's Exhibit No. 17, is a cigarette carton heretofore distributed by the defendant.

It is further stipulated that the Imperial Packing

Co. was incorporated February 10, 1891. That the Beech-Nut Packing Co., plaintiff, the successor of the Imperial Packing Co., was incorporated December 29, 1899. Production of certified copies of certificates of incorporation is hereby waived.

It is further stipulated that the publication, Bon Jour, marked by the notary public, Plaintiff's Exhibit No. 18, was published on or about the date appearing therein, viz., Dec. 4th and 5th, 1891, at Canajoharie, N. Y., and is authentic.

By Mr. Hinton: Plaintiff's Exhibits 15, 16, 17 and 18 are offered in evidence.

MRS. EDITH B. KEARNS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Edith B. Kearns. You are of legal age and an assistant to the advertising manager of the Beech-Nut Packing Company, the plaintiff in this case. Is that correct?

A. Yes.

Q. 2. How long have you been in the advertising department of the Beech-Nut Packing Co.?

A. I have been employed in the advertising department of the Beech-Nut Packing Company for eight years. During that time I have had charge of the official records of the advertising department covering publications, magazines, distribution of dealers' advertising.

Q. 3. Can you produce specimen of the Beech-Nut Packing Co.'s advertisements showing the various kinds of advertising, display cards, publications, booklets, etc.?

A. I can produce six books showing samples of our advertising material.

Book No. 1 shows advertising cards for dealers' displays.

Book No. 2, reproduction of paintings in panel form for dealers' display.

Book No. 3, miscellaneous—counter cards, window displays, etc., for the retail dealers' stores.

Book No. 4, small counter cutouts, shelf trims, etc.

Book No. 5, collection of booklets, inserts, folders, etc.

Book No. 6, portfolio of Beech-Nut advertisements appearing in various publications.

Q. 4. I notice that this book No. 6 begins with the year 1916 showing portfolio of advertising beginning January of that year. Does that mean that you were doing no publication advertising prior to January, 1916?

A. It does not. We did an enormous amount of advertising prior to 1916. I have in the office here books showing clippings of ads from all magazines in which we have advertised. The books, however, are so large to handle that I have had them photographed as I was unable to bring the books in the evidence.

Q. 5. This photograph which you have produced shows a number of large scrap books containing what apparently are clippings pasted in these scrap books. Do I understand that each clipping in every one of these scrap books represents an actual advertisement that has been run in some paper or publication?

A. The clippings included in the scrap book were actually taken from magazines.

Mr. Hinton: The photograph produced in evidence by the witness is offered in evidence as Plaintiff's Exhibit No. 19.

Q. 6. I notice that one of the scrap books in this

photograph is marked 1911. Did the Beech-Nut Packing Company according to your best information advertise in newspapers, magazines and other publications prior to 1911?

A. I understand that it did advertise in newspapers, magazines and other publications prior to 1911, but I have not the clippings to show.

Q. 7. In order to avoid a very lengthy discussion with respect to these various publications or advertising material, I will ask you, did you prepare from the official records of the company a tabulated list showing the number of the various signs and booklets in these books which were distributed by the Beech-Nut Packing Co.?

A. I have prepared a tabulated form for each one of these books showing the date each piece was distributed and the number of pieces distributed.

Q. 8. Where did you get this information?

A. From the official records of the company which have been in my charge for over four years.

Mr. Hinton: Please produce that book. Book produced by witness is offered in evidence as Plaintiff's Exhibit No. 20.

Q. 9. Do I understand that you are willing to repeat as part of your testimony, the statements as to the time of distribution, quantity distributed, etc., given in this book?

A. I am willing to repeat the statements made in that book. They were made from the official records and they are correct to the best of my knowledge.

Q. 10. Can you tell me how many pieces of advertising cards included in books Nos. 1-4 have been distributed by the Beech-Nut Packing Co. to be displayed before the public?

A. The advertising pieces shown in books Nos. 1-4 are approximately 2000, or to be exact, 1,990,700.

Q. 11. 2,000?

A. 2,000,000. To be exact 1,990,700.

Q. 12. Do these books Nos. 1-4 include all the display material of this character which has been distributed by the Beech-Nut Packing Co.?

A. It does not. It would be impossible to put in book form all the advertising actually done because we have not the space to show it.

Q. 13. If you included the advertising display material of all kinds illustrated in the books Nos. 1-4 and included that which you have just referred to, how many pieces would you estimate have been distributed?

A. As a conservative figure I would say probably 2,500,000.

Q. 14. Does this estimate include the distribution of booklets included in book No. 5 which you have produced?

A. No, it does not. It includes only dealer advertising in books Nos. 1-4.

Q. 15. It does not include any publication advertising or billboard advertising?

A. It does not.

Q. 16. Now take the billboard advertising. Has the Beech-Nut Packing Co. according to your records and information done extensive billboard advertising?

A. It has done billboard advertising in the form of painted signs, lithographed signs pasted on billboards, which cover approximately the United States.

Q. 17. For instance, how many billboard advertisements is the Beech-Nut Packing Co. running now?

A. You refer to both the painted and lithographed?

Q. 18. Yes.

A. I would say 2500.

Q. 19. Where are these for the most part located?

A. They are distributed along the main thoroughfares and railroads.

Q. 20. What appears on these billboards—is it the name Beech-Nut or the Beech-Nut label?

A. Generally the name Beech-Nut.

Q. 21. Do the billboards advertise single product or a variety of products?

A. A variety of products.

Q. 22. Returning now to the particular style of card illustrated in book No. 1, which you have produced, how are these displayed by the dealer?

A. They are displayed in card frames which are furnished free of charge to them for display purposes.

Q. 23. Have you any idea how long they will remain in the stores?

A. Our salesmen never collect them up. I would say for years.

Q. 24. What has been the chief advertising slogan of the Beech-Nut Packing Co.?

A. You Can't Mistake the Flavor.

Q. 25. Has this been displayed on billboards and other display matter?

A. It has. It shows on the advertising matter on the front page of book No. 3.

Q. 26. Will you state to the best of your knowledge and information and from the best information that you can get from your records, how many times the phrase, "You Can't Mistake the Flavor" has been displayed to the public in connection with the Beech-Nut Packing Co.'s products exclusive of publication advertising?

A. I would say 250,000 times exclusive of publication and magazine advertising.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 27. Will you please tell me just what your duties are in the advertising department?

A. My duties in the advertising department are taking charge of the official records of the advertising department covering advertising in publications, distribution of dealers' advertising, etc.

X-Q. 28. Do you have complete charge of the advertising records?

A. I do have complete charge of the advertising records of the company.

X-Q. 29. Under whose direction were these books shown prepared?

A. I supervised the preparation of the books.

X-Q. 30. You put in these books a specimen of all the advertising of the Beech-Nut Packing Co.?

A. Specimen—yes, but not a sample of each advertising piece which we have.

X-Q. 31. I understand that. To make myself clear—these books contain at least one specimen or one advertisement of each of the products manufactured by the Beech-Nut Packing Co., do they not?

A. To the best of my knowledge.

X-Q. 32. As I understand it, the Beech-Nut Packing Co. makes about seven or eight dozen different kinds of products. Is each one of those products represented in these books?

A. I believe they are.

X-Q. 33. Each illustration shows Beech-Nut label with the red band?

A. Some only show the word Beech-Nut. For instance, where the book is open now only shows Beech-Nut.

X-Q. 34. So the red band Beech-Nut label is not always featured in the advertising?

A. It is not.

X-Q. 35. As I understand it, the Beech-Nut Packing Co. also packs and markets some other brands like the Mohawk and Erie, does it not?

A. I believe so.

X-Q. 36. Do these books show any specimen of the Mohawk and Erie advertising?

A. They advertise only Beech-Nut products.

X-Q. 37. Are not the Mohawk and Erie products of the Beech-Nut Packing Co.?

A. I believe they are recognized as such.

X-Q. 38. Can you produce for me specimen of labels as used on the Mohawk and Erie products?

A. I have no records covering the labels—only advertising.

X-Q. 39. So far as you know the Beech-Nut Packing Co. does not advertise the Mohawk or the Erie brand?

A. I have in my records advertising only covering Beech-Nut products.

X-Q. 40. You mean Beech-Nut products bearing that particular label?

A. Beech-Nut products mean to me only those with Beech-Nut label.

X-Q. 41. At the same time if the Beech-Nut Packing Co. packs a Mohawk brand that would be a Beech-Nut product, would it not?

A. The marketing and packing of products is not under my supervision.

X-Q. 42. You draw a distinction between this red band and the Mohawk and Erie brands?

A. I have no Mohawk and Erie brand labels.

X-Q. 43. You produced here in evidence Plaintiff's Exhibit No. 20, history or statement of the Beech-Nut

advertising material, which appears to start with book No. 1, page 1, and concludes with book No. 6.

A. Yes.

X-Q. 44. Now turning, for example, to page No. 1 of this Exhibit No. 20, I find that it refers to the sliced bacon card issued in 1909 and bears the statement "Quantity distributed 5000 in all states east of the Mississippi." Is there anything in your records to show in what specific states these cards were distributed?

A. There is not, only the fact that our salesmen covered the entire United States and this material was placed in their hands—not the entire 5000 because some of them were posted in the street railways.

X-Q. 45. So you have no means of telling me how many cards were distributed in each state?

A. No, I have no means of telling you how many cards were distributed in each state.

X-Q. 46. To save a long drawn out examination, you have no way of telling from your records, have you, so far as concerns the advertising in these books, you have produced, as to how many you have distributed in each state?

A. I have no means of knowing how many were distributed in each state.

X-Q. 47. You have no means of telling the value of advertising in each state?

A. I have no means of telling the value of advertising in each state.

X-Q. 48. So far as the records go, you may have distributed four thousand cards in one state and may be two thousand in another?

A. That I cannot say.

X-Q. 49. You cannot tell anything about the amount distributed in these states?

A. Not by states.

X-Q. 50. Have you any records to show the value in dollars and cents of the amount of advertising in each state?

A. I have no records showing the value in dollars and cents of the amount of advertising in each state. I have no record of material distributed by states.

X-Q. 51. There is no way of telling whether you spent $5000 in a certain state or 5 cents?

A. There is no way.

X-Q. 52. I notice in these portfolio or books that you produced in evidence, in fact, I think in several, a number of advertisements relating to chewing gum. I want to ask you how long you have been with the Beech-Nut Packing Co.

A. Eight years.

X-Q. 53. That would bring us back to 1914?

A. 1914.

X-Q. 54. Now, since you have been connected with the company, have you any records to show the amount in dollars and cents of the advertising matter of Beech-Nut chewing gum?

A. I have only the records which you have before you of the quantity of material distributed on that particular product.

X-Q. 55. So far as chewing gum is concerned, I presume that same condition exists in regard to this book, "Exhibit No. 20"; that is, it does not show the quantity of advertising matter relative to Beech-Nut chewing gum which has been distributed in the different or separate states?

A. I have no record of advertising distributed by separate states.

X-Q. 56. It is simply a lump statement of advertising?

A. Yes.

X-Q. 57. There is no way of knowing what each state gets and if one state gets more than another?

A. My records are not kept by states.

X-Q. 58. Do you have anything to do with the records showing the amount in dollars and cents expended in various products of the Beech-Nut Packing Co.?

A. I have only to do with the material distributed. I have nothing to do with the financial end of the business.

X-Q. 59. Or whether the records show they expended $1000 or $1,000,000?

A. I would know nothing about it.

X-Q. 60. You spoke of a slogan that the Beech-Nut Packing Co. was using.

A. You Can't Mistake the Flavor.

X-Q. 61. That is the slogan that appears on the first page of book No. 3?

A. That is the slogan the Beech-Nut Packing Co. has used on some advertising material.

X-Q. 62. The Beech-Nut Packing Co. has also used another slogan—"Foods of Finest Flavor"?

A. I believe so.

X-Q. 63. I call your attention to certain pages which I have taken from the Ladies' Home Journal, issues of November, 1920, January, 1921, March, 1921 and May, 1921. Those four pages represent Beech-Nut Packing Company's advertisements, do they not?

A. They do.

X-Q. 64. Each of these pages bears the slogan, "Beech-Nut Foods of Finest Flavor," do they not?

A. Yes.

X-Q. 65. Will you look at these advertisements and see if you can find the slogan, "You Can't Mistake the Flavor"?

A. The slogan, "You Can't Mistake the Flavor" appears on the advertisements shown here.

The four sheets from Ladies' Home Journal above referred to as taken from issues of November, 1920, January, 1921, March, 1921 and May, 1921, are offered in evidence. Notary is requested to mark the same "Defendant's Cross-Exhibit No. 15."

X-Q. 66. I call your attention to the book No. 6. It is entitled "Beech-Nut Packing Co. Portfolio Book No. 6." I notice that this book starts in 1916 and ends 1921. For instance, turning to first page, which has another pamphlet or books attached thereto, how do you fix the date that these were published in 1916?

A. They were made from ads appearing in the magazines, which advertising is handled by our agency in New York.

X-Q. 67. What I mean there are no dates or anything to show that they were published in 1916.

A. I have checked these books with the books showing the clippings of advertisements taken from various publications.

X-Q. 68. These pencil dates in 1916 were placed here by you?

A. I placed them there as I checked them.

X-Q. 69. So to the best of your knowledge and belief they were published in 1916?

A. To my best knowledge and belief they were published in 1916.

X-Q. 70. Same applies to other years?

A. Yes.

X-Q. 71. I notice on the cover sheet of this portfolio book No. 6 a statement showing the Beech-Nut policy. It starts, "There are discriminating people in

every community who want the best." Do you know how you use it?

A. That is a copy we use in our advertising copy. If you go through these you will find it appears in these publications.

X-Q. 72. Not being familiar with the book, will you point it out to me?

A. That is simply an advertisement on the front of the book in getting up the book. (The same was pointed out.)

Cross-examination closed.

Redirect Examination by Mr. Hinton.

R-D. Q. 73. Did you make any effort to compare the price lists of the Beech-Nut Packing Co. and other information showing what each and every product in the various years has been with these books in order to make absolutely sure that there would be an advertisement of each and every Beech-Nut product somewhere in these books?

A. I did not.

R-D. Q. 74. You then did not try to find out whether every Beech-Nut product that was ever put out was advertised in these books?

A. I did not.

By Mr. Hinton: These books produced by witness are offered in evidence as Plaintiff's Exhibits Nos. 21-26 and are so marked by the notary.

Recross-Examination by Mr. Cavanagh.

R-X Q. 75. So far as the illustration of the ads of the Beech-Nut Packing Co., these books may or may not be complete.

A. I have no way of telling whether these books advertise all the Beech-Nut products or not.

Recross-examination closed.

Deposition closed.

MRS. EDITH B. KEARNS.

JOHN S. ELLITHORP, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is John S. Ellithorp. You are fifty-seven years of age; you are the treasurer of the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Co.?

A. Since 1904.

Q. 3. In what capacity?

A. As manager of the peanut butter and conserve department, as treasurer and at one time I had construction of buildings under my charge.

Q. 4. Mr. F. E. Barbour in a deposition given yesterday referred to you as a person in charge of work on salted peanuts. Will you tell us when the Beech-Nut Packing Co. first began to try to develop salted peanuts?

A. As near as I can remember about five years ago. All the salted peanuts that we were able to buy on the market were very poor and we thought we could improve that condition. The peanuts (salted peanuts) sold right here in town made by prominent manufacturers were very poor. We thought we could make them better so that they would be suitable to go out un-

der the Beech-Nut brand. We did a lot of work on them. I did a lot of work myself and Roy Davis did a lot. We had three or four different people working on them, but we have never been able to put out the quality that we wanted to put out under Beech-Nut brand. We are still working on it. In our laboratory here Mr. Mastin has a dozen experiments on the way. None of those are successful so far. I opened a box a few days ago. They were not fit to eat. We have used different kinds of oil, conut, etc., and went so far as to use mineral oil and once in a while we thought we had a satisfactory product. I remember at one time we had twenty different experiments under way. We used different temperatures—360 degrees, 320 degrees and so down, but we never got a first class product.

Q. 5. Have you any memo. or notes in your possession showing the dates of the various experiments?

A. Yes, I have some of them—not all of them, but I think I can dig up some more, at least for the last series two or three years ago. I think Roy Davis may have some—I have not all of them.

Q. 6. I simply want to get the earliest recorded date of the work on salted peanuts.

A. I can give you that all right by looking it up.

Q. 7. Will you please do so before the close of this session?

A. Yes.

Q. 8. Had you in your employ people who were familiar with peanuts and had worked in peanuts before you began this experiment?

A. I think all our men are experienced. We have men who know how to roast, how to cook and who know how to see that the work is done right. I think probably our men know as much about that condition as anybody. I, myself, have bought all the peanuts that

we ever bought and I am thoroughly familiar with the quality, whether they come from Asia, come from Africa or Texas. I have made trips to Texas to look over the business there.

Q. 9. How long have you manufactured peanut butter?

A. Ever since 1905.

Q. 10. Is that one of your leading products?

A. Yes, because we make it good it is popular.

Q. 11. Did you feel when you tried these experiments and have you since felt that it would be profitable to your company to put out salted peanuts?

A. Absolutely. We are in a fine condition to buy peanuts.

Q. 12. Why did you not put out salted peanuts as good, for instance, as those which are now being sold on the market?

A. Because we did not want to put out anything under the Beech-Nut brand that is not first class, because if we put out, for instance, salted peanuts that were not first class, not as good as the Beech-Nut peanut butter, it would hurt the other products. Unfortunately, we have put out some lines of goods which were not as good as a Beech-Nut product should be. We have always called them in. We had one experience that cost us $32,000. We put out a lot of prunes packed in San Jose, Cal. which were not satisfactory and we had to call them in, which we did do. There are some other things which we have started but fell down horribly.

Q. 13. Whenever you have found any product put out under the Beech-Nut label that was not satisfactory, what have you done?

A. We have always taken them off the market and we are glad to do it.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 14. Did I understand you to say that you had charge of the construction department here?

A. Yes, at one time.

X-Q. 15. When you come here in 1904, what buildings did they have here?

A. They had only the brick buildings and wooden buildings—no concrete buildings.

X-Q. 16. How many people did they employ in those days?

A. I was the seventh in the office.

X-Q. 17. How many in the plant?

A. I do not know.

X-Q. 18. You can tell by the books, can't you? I mean approximately.

A. Probably one hundred. That is a guess. I was the seventh in the office. Now there are a hundred in the office.

X-Q. 19. Was peanut butter the only product of which you had charge?

A. No, the conserves. All the conserves, jams, jellies, marmalades, etc.

X-Q. 20. Never manufactured tobacco products?

A. No, sir.

X-Q. 21. Never had anyone under your charge expert in the manufacture of tobacco products?

A. No.

X-Q. 22. Never put any machinery in this factory for the manufacture of tobacco products?

A. No, sir.

X-Q. 23. Did you ever have charge of any products that were put out under Erie or Mohawk brands?

A. No, sir.

X-Q. 24. Do you know the Beech-Nut Packing Co. has such brands?

A. Yes, sir.

X-Q. 25. Would you mind telling me just what those brands are?

A. I do not know as much about this as some of the rest of the people. The fact is, as I understand it in buying meats, I will take for instance beef—I understand it is desirable to buy sets. In buying sets, all the meat is not first quality, therefore all that meat is put in another brand. This is as I understand it, but I am not sure about it.

Mr. Hinton: This is objected to as outside the line of direct examination and it is stipulated that this objection may apply without repetition to similar questions.

X-Q. 26. In this salted peanut experiment—there are salted peanuts on the market that are fairly satisfactory?

A. That are fairly satisfactory, yes, sir.

X-Q. 27. Your experiments have not been able to bring your product to that point?

A. We have made salted peanuts just as good as any on the market, in my judgment.

X-Q. 28. What seems to be the trouble?

A. They are not good enough for us to sell.

X-Q. 29. What do you mean? To sell under the Beech-Nut label?

A. To sell under the Beech-Nut label.

X-Q. 30. Although they might be sold under some other brand?

A. Yes.

Cross-examination closed.

Deposition closed.

JOHN S. ELLITHORP.

STANTON VAN WIE, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Stanton Van Wie. You are twenty-seven years of age. You are resident advertising manager of the Beech-Nut Packing Co. Is that right?

A. Yes.

Q. 2. Is your advertising handled by a New York agency?

A. By New York agency.

Q. 3. How long have you been in your present position?

A. Since August, 1920.

Q. 4. What were you doing before that?

A. In the sales department of the Beech-Nut Packing Company.

Q. 5. How long have you been with the Beech-Nut Packing Company?

A. Barring my time in the army I have been steadily with them since April, 1917.

Q. 6. Would you tell me what the advertising appropriation was for the year 1920?

A. For the year 1920? I have not the figures right here—not for 1920. I imagine it was around $500,000.

Q. 7. For the year 1921?

A. Approximately $550,000.

Q. 8. Do you expect to spend more or less in 1922?

A. More.

Q. 9. Are those figures a fairly close approximation to the actual advertising expenditures?

A. Yes.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 10. I understand that you have had charge of the advertising department since 1920?

A. Yes, August, 1920.

X-Q. 11. You say for the year 1920 you spent about $500,000 in advertising?

A. Yes.

X-Q. 12. Just what was the character of that advertising?

A. It was magazine, newspaper, billboards, outside signs, subway posters, dealers' display material, moving picture slides, illustrations for dealers' displays, and trade papers of course.

X-Q. 13. The advertising expenditures for 1921 you say amounted to about $550,000?

A. Yes.

X-Q. 14. I think you mentioned appropriation but I believe you meant expenditure?

A. That includes everything—departmental expense, overhead, light, etc.; that is, all expenses of this advertising department.

X-Q. 15. So the sums you have given for the years 1920-1921, $500,000 and $550,000 include all overhead expenses?

A. Yes, as far as this advertising department is concerned.

X-Q. 16. It also includes the expenses of distributing the advertising material, maintaining publication advertising, etc., does it not?

A. Yes.

X-Q. 17. The Beech-Nut Packing Co. puts out a large number of products, does it not?

A. Yes.

X-Q. 18. Would your figures show or can you tell

me the exact amount spent in dollars and cents for advertising each product or item marketed by the Beech-Nut Packing Co.?

A. No, sir.

X-Q. 19. Your records of figures would not show any such statement of appropriation for each specific line?

A. No, it would be impossible.

X-Q. 20. Likewise could you tell me or would your records show the amount in dollars and cents expended in advertising in each of the various states of the United States?

A. No, sir.

X-Q. 21. Then you have no records which would indicate, for example, what amount was spent in advertising Beech-Nut products in New York State or Illinois?

A. No, sir. If I might give an example, we advertise in New York City theatre programs, New York City being a metropolitan center, is visited by people from all over the United States. We feel from an advertising standpoint that the theater has an influence in the sale of the products all over the United States even though a product is advertised in New York City alone.

X-Q. 22. So far as your records show, you could not give by states the amount of advertising done in any particular state?

A. No, sir.

X-Q. 23. Take, for example, chewing gum. Have you any figures which would show in dollars and cents the amount of advertising that you did in the year 1920 over 1921?

A. In dollars and cents on chewing gum during 1920 over 1921? No, sir.

X-Q. 24. No way to tell the United States as a whole?

A. No way, because there is no way to prorate that advertising to apply to Beech-Nut chewing gum specifically.

X-Q. 25. The advertising account simply goes to the whole business?

A. It cannot help but be that way. When we advertise Beech-Nut it affects more or less every product on the list.

X-Q. 26. For example, you do not have one man in charge of what might be called advertising gum?

A. You refer to advertising sales? No, sir.

X-Q. 27. It all comes under general advertising head?

A. Yes, as far as advertising is concerned.

X-Q. 28. So these figures you have given for the years 1920-1921, $500,000 and $550,000 would not represent the amount actually handed over to newspapers or magazine people or to the advertising men who actually put these goods out?

A. It would include all kinds of advertising.

X-Q. 29. And all your overhead expense at Canajoharie?

A. Yes, but that is very slight when compared to the whole.

X-Q. 30. How many employees have you in your department here under your supervision?

A. Eleven or twelve I believe.

X-Q. 31. That includes the clerical help?

A. Yes.

X-Q. 32. You say that your advertising, so far as outside advertising, is handled by an advertising agency in New York?

A. As far as magazine, newspaper advertising, etc. are concerned.

X-Q. 33. What concern?

A. H. K. McCann Co.

X-Q. 34. What is their address?

A. 61 Broadway, New York City.

X-Q. 35. I understand it is the practice of your company in putting out advertisements to include a list of all the products.

A. In a majority of ads.

X-Q. 36. For example, call your attention to certain sheets from the Ladies' Home Journal which were introduced in evidence and marked as "Defendant's Cross-Exhibit No. 15." I note that on these pages you have a list of products running from bacon at the top to chewing gum on the bottom, that is, you mean various items collected in one advertisement, is it not?

A. Yes.

X-Q. 37. Although as shown by these sheets from the Ladies' Home Journal certain items in a particular advertisement might be emphasized. For example, November, 1920, issue features Beech-Nut sliced bacon. That advertisement also embraces other products of the Beech-Nut Packing Co. That is the practice you usually follow, is it not?

A. Yes.

X-Q. 38. To sum up, there is no way of telling from your records as to precisely what amount is spent in advertising on any one particular article?

A. No way of really telling.

X-Q. 39. Is your publication advertising of local or national character?

A. National.

Redirect Examination by Mr. Hinton.

R-D. Q. 40. You have been asked about the advertising of the Beech-Nut chewing gum. You have referred to publication advertising and also to certain display material such as included in these illustrative

books, Plaintiff's Exhibits Nos. 21-26. Is there any other display material that has been more widely distributed advertising Beech-Nut chewing gum?

A. There is a display box in which the gum is shipped.

R-D. Q. 41. Can you produce one of these display boxes?

A. I can and do.

R-D. Q. 42. Is this the display box in which the gum is always shipped to the dealers?

A. Yes.

R-D. Q. 43. This box has a cover containing a picture of Beech-Nut label. Within the cover hinged to the box is a flap containing on one side a Beech-Nut label in gold and red and blue and a gold border. On the other side there is a gold border and small placard. How is that flap intended to be displayed or used?

A. It is supposed to stand upright, to be seen by the customer.

R-D. Q. 44. Is that the only advantage?

A. It is to the dealer's advantage to be displayed that way.

R-D. Q. 45. How many of these boxes were distributed by the Beech-Nut Packing Co. to dealers last year?

A. My understanding is that there were ten million distributed in the year 1921.

That is all.

Recross-Examination by Mr. Cavanagh.

R-X Q. 46. You say there were ten million of these boxes of chewing gum distributed in 1921?

A. That is my understanding.

R-X Q. 47. What is the value in dollars and cents?

A. I do not know. That does not come under the advertising department.

R-X Q. 48. How do you know ten thousand were distributed?

A. From the sales records.

R-X Q. 49. It is merely hearsay?

A. A stock record sheet comes to my hands showing the number of boxes distributed and in that way I know how many boxes are distributed.

R-X Q. 50. There is no way of telling the value of the gum distributed?

A. I have no way of telling.

R-X Q. 51. You say that the products of the Beech-Nut Packing Co. are nationally advertised?

A. Yes.

R-X Q. 52. What do you mean, throughout the United States?

A. Throughout the United States.

R-X Q. 53. That is all the products of the Beech-Nut Packing Co.?

A. Yes.

R-X Q. 54. Since you have been in charge of the advertising department, have you nationally advertised tobacco?

A. Not to my knowledge.

R-X Q. 55. You have never nationally advertised Beech-Nut tobacco products?

A. Not to my knowledge.

Recross-examination closed.

Deposition closed.

STANTON VAN WIE.

By Mr. Hinton: The gum display box produced by the witness is offered in evidence as Plaintiff's Exhibit No. 27.

MARSHALL DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Marshall Davis. You are forty-five years old. You reside in Canajoharie, N. Y., and are foreman of the meat department of the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Company or its predecessor, the Imperial Packing Company?

A. I have been with them since 1891. I was here when the company was incorporated.

Q. 3. Under what name did the Imperial Packing Co. sell its products.

A. Beech-Nut.

Q. 4. When did they begin to do that?

A. Right off the reel.

Q. 5. Mr. Davis, could you describe the very earliest labels that were used by the Imperial Packing Co.?

A. I think I could.

Q. 6. Can you tell just what some of them were?

A. One of them was a ham label, another was a lard label and another was a cap label. The jar had the Beech-Nut design blown in.

Q. 7. Those were the earliest that you think of?

A. Yes.

Q. 8. If you were to be shown the early labels, could you identify them?

A. Yes.

Mr. Hinton: Board is shown on which appear labels.

Q. 9. I show you a board entitled "Illustrative Collection—Beech-Nut Labels Displayed to the Public, 1891-1921, which is marked for identification "Plaintiff's Exhibit No. 28." Please look at the labels or reproduction of labels which appear on this board in the upper left-hand region thereof and point out which ones you remember having been used.

A. I remember all of them. The first column to the left is a ham label, the second is a cap label which we put on the top of the jars. I remember the Fard Dates label, that is the billhead we used. The remaining labels under 1900-1905 column I remember. The beef labels in blue and one in yellow—I remember them all.

Q. 10. What about the labels in the second row under 1895-1900?

A. That is one of the cap labels we put on top of the jars.

Q. 11. Do you remember this label?

A. Yes, I used to put them on.

Q. 12. You are familiar with the remaining labels on the board?

A. Yes, all of them.

Q. 13. Will you look them over and see if there are any that you do not remember?

A. I know them all.

Q. 14. I understand you recognize all those labels?

A. I remember all of them.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 15. I now call your attention to the ham label under the column 1891-1895 bearing the label of the Imperial Packing Co. That label does not show any oval on it, does it?

A. No, but the oval label has always been used by the company.

X-Q. 16. So far as the labels of the Imperial Packing Company are concerned, I understand that you have shown on this board just exactly three of them, two under column of 1891-1895 and one under 1895-1900. Those are all the Imperial Packing Company's labels, are they not?

A. Yes.

X-Q. 17. They do not show the red oval label?

A. They do not show on those labels but we have always shown the oval.

X-Q. 18. How long was the Imperial Packing Co. in existence?

A. I could not tell you. I remember that it was incorporated in 1891, but we were in business two or three years ahead of that. I was with the company.

X-Q. 19. What goods were they engaged in making?

A. Beech-Nut hams, bacon and lard.

X-Q. 20. They were making food products?

A. Yes.

X-Q. 21. As shown by this column "1900-1905," the Beech-Nut Packing Co. had come into existence. It put out dates, sliced bacon, peanut butter, sliced beef; is that right?

A. Yes. I could not give the exact date before that. We started with bacon in glass, then beef and so on.

X-Q. 22. Those were all food products during that year?

A. Yes.

X-Q. 23. Could you say whether or not this represented all the lines or brands on different goods that were put out by the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co.?

A. Yes, I could say that all these labels represent

the goods but I could not say when these were put out.

X-Q. 24. You never knew the Beech-Nut Packing Co. put out cigarettes?

A. No.

X-Q. 25. You never knew them to put out cigarette products?

A. No.

X-Q. 26. When you first came with the Imperial Packing Co., how many men did they employ?

A. I was the first one. We cured our hams in a cellar and took them back of the barn and smoked them in a barrel. Then we had a smoke house a story and a half high. Before the fire we had moved into the Soles building. There was a clam stand down stairs—they sold booze, cider and had a bar. We had one room upstairs and started with three men. I was a boy cleaning out the office, carrying out the waste paper, etc., and going to school. From that time on it has grown to where it is now.

X-Q. 27. When the Imperial Packing Co. put out hams under the name Beech-Nut, did they not have some sort of a circular brand that was put on with a branding iron?

A. They always had a branding iron.

X-Q. 28. That was a circular brand?

A. I cannot recall that. I remember we used to brand the hams. We first heated the branding iron on a coal stove and then we used a gas or oil stove, I do not remember if it was circular but it always had Beech-Nut on it.

X-Q. 29. You could not recall if it was circular or not?

A. No.

Examination closed.

MARSHALL DAVIS.

WEBSTER DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Webster Davis. Your age is thirty-seven. You are foreman of the ginger ale plant of the Beech-Nut Packing Co.

A. That is correct.

Q. 2. When did you come with the Beech-Nut Packing Co.?

A. In 1896.

Q. 3. What name was this company or its predecessor, the Imperial Packing Company, then using on its goods?

A. They were using Beech-Nut.

Q. 4. Can you describe some of the early labels used by the company or its predecessor up to 1896?

A. I can.

Q. 5. Kindly name some of the labels.

A. We had a ham label with Beech-Nut on it. We had a Beech-Nut lard label, about 3½" x 9"; we also had a label which went on the strip of bacon. We had a jar with the emblem beechnut blown in the glass.

Q. 6. Would you recognize these early labels that were used in 1896 or prior thereto if you saw them?

A. Yes.

Q. 7. I now show you a collection of labels and ask you how many of these labels you can definitely identify and know we used. I direct your attention to the upper column "Illustrative Collection—Beech-Nut Labels Displayed to the Public, 1891-1921," and ask you how many, if any, of those in the first three vertical columns you can identify and remember.

A. I can remember the top label in the first vertical column, "Sweet Beech-Nut Ham," Imperial Packing Co. Also the lard label with the beechnut emblem in the corner.

Q. 8. You remember the cap label that went on the top of the jar?

A. I do, I handled them. I have also put the label on the Beech-Nut bacon jar. That is the second one in the third column. I also remember the label Fard Dates and the trade-mark blown in the glass. I recognize the Beech-Nut sliced beef labels—I remember all of them.

Q. 9. Have you an old jar which you know was used in those early days?

A. I have.

Q. 10. The old glass jar you have produced has a device blown in the side, has it not?

A. Yes. This jar had a beechnut blown in the glass. The jar had a recess or circle where the label was put on. It was hard job to get the labels right in the center of the recess.

Q. 11. Do you remember a fire the Beech-Nut Packing Co. had?

A. I certainly do.

Q. 12. What was burned?

A. The smokehouse.

Q. 13. When was this fire?

A. I do not remember.

Q. 14. Was the whole plant destroyed?

A. The whole plant was not destroyed. The office was not destroyed.

Q. 15. Was this fire prior to 1900?

A. It was prior to 1900. There is also a label which we used on Mollie's Jam. I think it was in blue and had an oval label.

Q. 16. Have you been able to find some of those labels?

A. I could not find one. I threw some labels away.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 17. You say you came with the Imperial Packing Co. in 1896?

A. Yes.

X-Q. 18. How many people were working here then?

A. I think eight or nine. We branded our hams before they were smoked. Now we brand them after we smoke them.

X-Q. 19. How many hams did you brand?

A. I should judge eight or nine hundred or one thousand a day. Business was very small. We worked half time and sawed wood in the winter time.

X-Q. 20. Was the business local, just around here?

A. No, we shipped to New York and that section, New York State.

X-Q. 21. How many fires did they have here to your recollection?

A. Only one fire to my recollection.

X-Q. 22. You have been here from 1896 up to the present time?

A. Yes.

X-Q. 23. The only thing destroyed in that fire was part of the smokehouse and the ice house?

A. Yes. The greatest damage was to the smokehouse.

X-Q. 24. How large was the smokehouse?

A. About forty feet long and I should judge fourteen feet wide. We had five houses, three stories high. We had a place for the fire and the other buildings we used for making the goods.

X-Q. 25. It was a wooden building?

A. Yes.

X-Q. 26. Sort of a shed?

A. It was an old building.

X-Q. 27. That was the only fire you ever had around here?

A. That is the only fire.

X-Q. 28. You have been here since 1896?

A. Yes.

X-Q. 29. You say you are familiar with all these labels?

A. Yes.

X-Q. 30. You are familiar with all the labels the Beech-Nut Packing Co. has put out?

A. I am.

X-Q. 31. Have you ever known of the Beech-Nut Packing Co. putting out tobacco?

A. No, sir.

Cross-examination closed.

Deposition closed.

WEBSTER DAVIS.

COLONEL DAVIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Colonel Davis. You are forty-seven years old and you reside at Canajoharie, N. Y.; is that correct?

A. Yes.

Q. 2. Are you connected with the Beech-Nut Packing Co., and if so, how long have you been connected with it?

A. Thirty years.

Q. 3. When did you come with the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co.?

A. In 1891.

Q. 4. What name did the Imperial Packing Co., the predecessor of the Beech-Nut Packing Co., put on its goods in those days?

A. Beech-Nut.

Q. 5. Would you be able to recognize the old labels used by the Imperial Packing Co. if they were shown to you now?

A. Yes.

Q. 6. Do you remember a fire at the plant of the Beech-Nut Packing Co.?

A. Yes.

Q. 7. What was destroyed?

A. Practically everything that we owned.

Q. 8. Your brother, Webster Davis, appeared to think that nothing much, except the smokehouse, was destroyed.

A. Practically everything was destroyed except the engine room.

Q. 9. In what building was the office and the smokehouse?

A. It was all together in one building, the smokehouse and office and the ice house with the exception of the engine room which was on the other side.

Q. 10. I show you a board marked for identification "Plaintiff's Exhibit No. 28" and direct your attention to the labels illustrated or displayed in the upper left-hand region of this board. Will you please state how many labels you recognize and know to be used by the company?

A. I recognize the ham and lard and the cap label which was put on the top of the jars. I recognize all

the others. Beech-Nut trade-mark was blown in the glass jar. The rest of the labels I remember.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 11. You came with the Imperial Packing Co. in 1891?

A. 1891.

X-Q. 12. You have been with the Imperial Packing Co. or its successors, the Beech-Nut Packing Co., up to the present date?

A. Yes.

X-Q. 13. What do you do around here?

A. General superintendent of the plant.

X-Q. 14. You spoke of a fire. When was it?

A. The fire was in February, 1903. I am sure it was in February.

X-Q. 15. How many buildings was this plant composed of at that time?

A. It was composed of one building. The office, and as I remember it, we had ten smokehouses, we did our manufacturing in that building. We also had an ice house. The only thing that did not burn was the engine room and that was away from the main building couple hundred feet.

X-Q. 16. The concern in 1903 was known as the Beech-Nut Packing Company?

A. Yes.

X-Q. 17. How many men were employed here at the time of that fire?

A. That is a pretty hard thing to say. I could not answer that.

X-Q. 18. Approximately?

A. I could not say—I do not remember.

X-Q. 19. Were the buildings that were destroyed wooden buildings?

A. Yes.

X-Q. 20. Something like sheds?

A. They were all old buildings that the company had bought from other people, with the exception of the smokehouses which we built ourselves. They were all wooden buildings.

X-Q. 21. Was the office in the wooden building?

A. Yes. The smokehouses were directly back. They were all connected.

X-Q. 22. It was a very small plant in 1903?

A. Yes.

X-Q. 23. In those years their main products were such food products as ham, lard, sliced bacon and dates?

A. Yes.

X-Q. 24. From 1891 to about the time of that fire the main building was used in curing the hams and bacon?

A. Yes.

X-Q. 25. The hams were branded with an iron brand, it was a circular brand with Beech-Nut in the middle?

A. Yes.

X-Q. 26. Are you familiar with the labels that are shown on this chart?

A. Yes, I remember them all.

X-Q. 27. As superintendent you are familiar with the products as put out by the Beech-Nut Packing Co.?

A. Yes.

X-Q. 28. You never knew that the Beech-Nut Packing Co. put out any Beech-Nut cigarettes under any label?

A. No, sir.

X-Q. 29. You never knew that they put out tobacco

products in those thirty years, always thought they put out food products?

A. Yes.

X-Q. 30. That glass jar that has been brought in the case, what was that glass jar used for?

A. We used that for bacon and beef.

X-Q. 31. It was never used by the Imperial Packing Co.?

A. I am not sure about that, but I think it was—1899.

X-Q. 32. Still this design which was blown in this jar is supposed to be represented by the design in the third column of this chart under the figures or years "1900-1905"; is not that right?

A. That is the way it reads, but I think it was used before that.

X-Q. 33. The Imperial Packing Co. had gone out of existence by 1900 (1899 I think it was), so either that chart is wrong or your recollection as to the date it was used is wrong.

A. I do not remember it offhand.

X-Q. 34. Then the chart must be wrong right there. If the chart is wrong in one particular label, the chart might be wrong in more instances.

A. Yes.

X-Q. 35. We have one example of its being wrong?

A. Yes.

X-Q. 36. As a matter of fact it would be pretty hard to use any procedure to know just what years the labels were used?

A. It would.

Redirect Examination by Mr. Hinton.

R-D. Q. 37. This jar about which you have testified contains a device similar to the device shown in the

third column of the exhibit board. I show you another jar marked "Patented Oct. 23rd, 1900," and containing a similar device blown in the glass; this jar being an open mouth or square neck jar, similar to the jar shown on the billhead, third column. Do you recognize this jar?

A. Yes.

R-D. Q. 38. One of these two jars, both of which contain the same device in the glass, has a restricted neck and the other a wide neck. Which of these two jars was used first?

A. The restricted neck jar was used first.

R-D. Q. 39. What appears on the bottom of the jar which you said was used in 1900?

A. Patented July 11, 1893, I. P. Co.

R-D. Q. 40. What does "IPCo." stand for?

A. Imperial Packing Co.

R-D. Q. 41. This jar so marked was used before the jar with the wide mouth?

A. Quite a while.

R-D. Q. 42. Do you know when this old restricted neck jar was found?

A. I do not know.

R-D. Q. 43. Do you know if it was before or after this exhibit board was made?

A. I do not know.

Recross-Examination by Mr. Cavanagh.

R-X Q. 44. As a matter of fact between the jars and the board we are all balled up.

A. Yes.

Reredirect Examination by Mr. Hinton.

R-D. Q. 45. I do not see how we are so balled up. Is there any vagueness in your mind as to which of these two jars was used first?

A. I could take the stand that the restricted jar was used first.

R-D. Q. 46. That jar has "I. P. Co." on the bottom and the jar with the open mouth was used after that?

A. It was used after the restricted neck jar. This jar with the restricted neck was hard to pack and that is the reason they discontinued using it, and changed to the straight-sided jar.

By Mr. Hinton: The jar with the restricted neck is produced and offered in evidence as Plaintiff's Exhibit No. 29 (Imperial Packing Co.'s jar).

The open neck jar of 1900 is offered in evidence as Plaintiff's Exhibit No. 30.

Deposition closed.

COLONEL DAVIS.

CHRISTINA CARSWELL, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Christina Carswell. You are of legal age. You reside at Canajoharie, N. Y. You are employed by the Beech-Nut Packing Co.; is that correct?

A. Yes.

Q. 2. What are your duties here?

A. Statistical manager.

Q. 3. Have you charge of the sales records and other records of the Beech-Nut Packing Co.?

A. Yes, sir.

Q. 4. Have you from the official sales records of the Beech-Nut Packing Co. compiled figures showing the number of Beech-Nut labels upon goods sold by the Beech-Nut Packing Co. which have been purchased by the public?

A. I have.

Q. 5. For what years?

A. From 1903 to 1921, inclusive.

Q. 6. Can you and will you produce a table showing total number of labels purchased on and with goods by the public for each year beginning 1903 and ending 1921?

A. I can and do.

The table produced by the witness is incorporated herein in the record.

TOTAL NUMBER OF BEECH-NUT LABELS BEFORE THE PUBLIC FROM 1903 TO 1921, INCLUSIVE, SHOWING THE TOTAL NUMBER AT THE END OF EACH YEAR STARTING 1903.

Year.	*Number of Labels.*
Ending 1903	1,837,891
" 1904	5,346,563
" 1905	10,964,830
" 1906	18,778,191
" 1907	25,742,398
" 1908	32,662,653
" 1909	41,987,617
" 1910	54,550,452
" 1911	87,010,061
" 1912	203,878,036
" 1913	581,711,537
" 1914	1,222,559,117
" 1915	2,026,989,344
" 1916	2,938,869,631
" 1917	3,877,934,085
" 1918	4,331,084,050
" 1919	5,326,808,020
" 1920	6,089,691,968
" 1921	7,421,562,658

Q. 7. Were the figures in this table taken from the official records of the Beech-Nut Packing Co., used in its regular course of business?

A. They were except one year.

Q. 8. What year was that?

A. Half of the year 1910 and 1911.

Q. 9. Why did you not take those figures from the official records?

A. Because we cannot find the actual sales records for that period on all the products—we can for the jar goods but not the bulk goods.

Q. 10. What did you do for the figures for that time?

A. For the latter half of 1910 I simply doubled the first half of 1910, which is a very conservative record as our sales were increasing right along. For 1911 I took the latter two months and quadrupled these, which is a very conservative record, much lower than the actual sales were.

Q. 11. Can you and will you, if requested by the opposing counsel, produce and explain to him any and all the official records from which those figures were derived?

A. I can.

Q. 12. How much of a job would it be to collect and handle all the books that these figures were taken from?

A. It would be some job. It takes a big truck to lug them around.

Q. 13. Does this tabulation of the number of labels include any except the Beech-Nut labels?

A. It does not.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 14. I notice that this list or table which you compiled is entitled "Total Number of Beech-Nut Labels Before the Public from 1903 to 1921, Inclusive, Showing the Total Number at the End of Each Year Starting 1903." Just what do you mean, "Total Number of Beech-Nut Labels Before the Public"?

A. They are actual sales.

X-Q. 15. Do these figures which you term "Before the Public" include goods on the shelves of merchants, goods returned, samples and things of that sort?

A. They include samples and, of course, naturally would include goods on the shelves.

X-Q. 16. And would include returned goods which have been sent out and returned?

A. Yes.

X-Q. 17. So far as the purchasing public is concerned, there is no way of telling what goods reach the public or the number of goods returned in any particular year?

A. Returned goods are infinitesimal.

X-Q. 18. That does not answer my question. I asked if there is any way of telling what goods reach the public or the amount returned for any particular year.

A. Goods on the shelves are before the public. There is no way of telling about returned goods.

X-Q. 19. Can you tell from this table that you have given or from your knowledge that there was actually sold in 1921 seven billion?

A. That is accumulative total.

X-Q. 20. Then as I understand this table—I have probably a misconception of it—the figures, for instance, opposite 1921 which reads, *7,421,562,658*, that includes all the labels that were put on Beech-Nut goods

not for the year 1921 alone but for all the years since 1903 or for a period of nineteen years; is that right?

A. Not the labels which were put on Beech-Nut goods but the labels which were put on Beech-Nut goods and actually sold.

X-Q. 21. But it includes the whole period of nineteen years?

A. Yes.

X-Q. 22. Then you have no table showing the number of items or goods sold in each year?

A. Yes, I can give you that.

X-Q. 23. I understand that you are in charge of the sales records of the Beech-Nut Packing Co.?

A. Yes.

X-Q. 24. Can you give me from your sales records the value in dollars and cents all the goods sold and delivered by the Beech-Nut Packing Co. under the Beech-Nut label since 1903?

A. Yes.

X-Q. 25. For each year?

A. Yes.

X-Q. 26. Will you compile such a list?

A. I will.

X-Q. 27. Can you give me the value in dollars and cents for each year of each particular item sold; for example, the amount of chewing gum sold in the year 1921 and its value in dollars and cents?

A. Yes.

Mr. Hinton: We have no objection to supplying counsel with any relative information, but as to whether or not we want to give him a complete tabulation of statistical sales of every item that the Beech-Nut Packing Co. has put out in dollars and cents since the beginning is a matter which must receive very careful consideration. Of course,

this information would be of the utmost use to a competitor. While not refusing the information at the present time, we must not be understood as promising to do this without further consideration.

Mr. Cavanagh: The counsel for P. Lorillard Co. is very glad that Mr. Hinton makes this statement. We have heard so much about this case, about the wonderful business in chewing gum and what not that this plaintiff has been doing and of the terrible damage that has been inflicted upon it by the Lorillard Co. in its tobacco business—this has particular relation to chewing gum, the counsel now insists that matters have come to a show down and that this plaintiff is called upon to produce an accurate, verified and sworn tables showing not only the total value of the business done in dollars and cents and paid to the Beech-Nut Packing Co. for each year since its inception, but counsel wants to know and demands the information as to the total value of the business done in each item for each state of the United States, if this information is on the books. The counsel also desires to have furnished a statement of the selling price of each package commodity put out by the Beech-Nut Packing Co.; that is, the market price at which it goes to the dealer or jobber in order that we may arrive at some conclusion as to the value of the business which the Beech-Nut Packing Co. alleges is being injured by the sale of tobacco by this defendant.

Mr. Hinton: This is a most extraordinary demand. If I understand it, we are to spend, undoubtedly, several weeks in order to supply counsel with not only the figures including the total

business of the Beech-Nut Packing Co., but the figures showing for each year the sales of every particular product the Beech-Nut Packing Co. made. And not only that, the sales of each particular product from the inception of the business in every one of the forty-eight states in the Union. If counsel regards this as part of his case, there are proper ways to get the information, but I certainly will not put into my case any such elaborate detail figures, even assuming that it would be possible in the face of the testimony given yesterday to compile the sales by states from the inception of the business. Obviously, this is a task that would take weeks and weeks in tabulating. As to the volume of chewing gum business, we would be very glad to give counsel the sales of chewing gum during each year if he wants it.

Mr. Cavanagh: Counsel for the defendant has called for certain data and now insists upon the production of same in connection with the examination of this witness. If it cannot be supplied under a period of certain weeks' time, the counsel is willing to wait for the preparation of this data. The plaintiff should have thought of the trouble it would cause when he filed this suit. As this information is important in view of the claims made by the plaintiff and in view of the isolated tables and figures which are produced, the counsel must insist upon this being supplied.

Mr. Hinton: We will get nowhere in arguing this matter here. Of course, it can always be referred to the court for instructions.

Mr. Cavanagh: The counsel for the defendant has asked for certain data. He intends to see that this request to furnish the data is complied with.

Mr. Hinton: I will supply the chewing gum figures if you want them. I will supply the figures relative to the annual business of the company. I have no intention whatsoever of supplying the sales of each particular item, which are approximately one hundred items, for a period of nineteen or twenty years, subdividing the sales of these items into particular states unless instructed to do so by the court. This is entirely irrelevant. If you need this as part of your case and it is proper to get it, you can always get it.

Mr. Cavanagh: In view of the attitude assumed by the counsel for the plaintiff any and all testimony given in this case relative to the alleged sales or extent of sales, or extent of business done by the Beech-Nut Packing Co. since its early inception, and particularly all tables and other statistical data relative thereto is now objected to as being incomplete, as not accurately showing the true state of affairs, and at the proper time motion will be made to the court to strike from the records all testimony and all data, statistical and otherwise, relative to the question of alleged extent of business done by the Beech-Nut Packing Co.

Mr. Hinton: The witness is instructed to supply Mr. Cavanagh with the chewing gum sales and the annual business of the Beech-Nut Packing Co. in dollars and cents, if she can ascertain the figures, to be produced at a later session.

Counsel for the parties had a conference about further figures to be supplied by plaintiff in effort to reach agreement.

X-Q. 28. Do I understand that this list "Total Number of Labels Before the Public," includes simply the

Beech-Nut labels with the red band, like the one shown on this chewing gum box?

A. Yes.

X-Q. 29. You have charge of the statistical records of the company, have you not?

A. Yes.

X-Q. 30. Do you keep records of the labeled goods like the Holly brand, a label I show you here, and the Erie brand like the label I also show you? Are the records kept separately?

A. Entirely separate.

X-Q. 31. What other brands do you keep records of? Have you a Mohawk brand?

A. Holly and Erie.

X-Q. 32. Are there any other brands that you have outside of Holly and Erie and Mohawk?

A. We have Holly and Erie. We do not have a Mohawk brand now. That is an old brand.

X-Q. 33. Those are the only other brands that you are using?

A. Yes.

X-Q. 34. Have you compiled any table showing the yearly sales of the Erie and Holly brands?

A. I have not.

X-Q. 35. Will you compile for me such a table?

A. I can if it is necessary.

X-Q. 36. I mean the yearly business in dollars and cents done in those two brands.

A. If it is necessary I can do it.

By Mr. Cavanagh: Counsel for the defendant offers in evidence three labels—the Erie brand which was fastened on one sheet and marked as single exhibit, Defendant's Cross-Exhibit No. 16, Plaintiff's Erie Brand Label. Likewise the Holly brand label was now offered in evidence and

marked Defendant's Cross-Exhibit No. 17, Plaintiff's Holly Brand Label.

Further examination of this witness is suspended pending reaching a conclusion as to the data to be furnished by the witness to defendant.

By Mr. Hinton: Witness will be produced again for examination by defendant in the event that it is necessary to have such an examination in connection with any further figures to be supplied the defendant by the witness.

Cross-examination closed.

Deposition closed.

CHRISTINA CARSWELL.

EARL A. NELLIS, a witness produced on behalf of the plaintiff, pursuant to notice and by agreement of counsel, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes as follows:

Q. 1. Your name is Earl A. Nellis. Your age is forty-three. You are manager of sales for the Beech-Nut Packing Co., plaintiff in this case; is that correct?

A. Yes.

Q. 2. How long have you been with the Beech-Nut Packing Co.?

A. Since 1906.

Q. 3. Has the Beech-Nut Packing Co. since that time extended its line to include new products?

A. Yes, a number of new products.

Q. 4. Have these new products been similar to or different to the products already produced?

A. In many instances quite different.

Q. 5. Will you give me an illustration?

A. Beech-Nut gum I think would be the most pronounced one.

Q. 6. Under what label have all these various goods been put out—I refer to first quality goods?

A. Beech-Nut in every instance.

Q. 7. Is that the regular Beech-Nut label such as appears on its chewing gum box?

A. Yes, the regular oval label.

Q. 8. Are you sufficiently familiar with the labels used by the Beech-Nut Packing Co., since your connection with the company, to identify without question every label which has been used by them if you were shown those labels?

A. Yes, since I have been with the company.

Q. 9. Have you examined the exhibit board marked "Beech-Nut Labels Displayed to the Public, 1891-1921" being Plaintiff's Exhibit No. 28? If so, will you state whether or not you recognize each and every one on that board?

A. I recognize them all since I have been connected with the company.

Q. 10. Are there any on the board that have been used since 1906 that you have any doubt about?

A. No.

Q. 11. With reference to the labels on the board indicated to have been used prior to 1906, did you ever see any of those labels and marks?

A. I have seen some of them on returned goods.

Q. 12. Which ones have you seen?

A. The one that would be called the "squat" jar and the label that went on top of the jar. I remember them all except the two on the extreme left—the lard and the one just above it.

Q. 13. Has each and every item which the Beech-Nut Packing Co. has manufactured been included in the regular sales or on the price lists of the Beech-Nut Packing Co.?

A. In practically every instance. Now and then experimental products would not be put on the price lists.

Q. 14. Did you ever carry your chocolate bars on your price lists?

A. No.

Q. 15. Did you ever carry your extract on your price lists?

A. No.

Q. 16. How about your canned tomatoes in big cans?

A. No. Sold on restricted territory.

Q. 17. Then it is not always true that the articles that you manufacture and pack are included in your price lists?

A. No, sir.

Q. 18. Since you have been with the Beech-Nut Packing Co., in what territory have the goods been sold?

A. Throughout the world. All over the United States—practically every country in the world.

Q. 19. How many salesmen have you now regularly employed?

A. I could not give you exact number, but I would say 225.

Q. 20. Have you sales offices outside of Canajoharie?

A. Yes, in a few places.

Q. 21. Have you a sales office in New York?

A. Yes.

Q. 22. Have you a sales office in Chicago, Ills.?

A. Yes.

Q. 23. In Boston?

A. Yes.

Q. 24 Other cities?

A. Some of the other cities.

Q. 25. How was Beech-Nut chewing gum received when it first came out?

A. Very favorably.

Q. 26. You know how many boxes of chewing gum were sold last year?

A. Better than ten million boxes in 1921 or as I like to put it better than a billion sticks.

Q. 27. Why do you refer to the individual sticks?

A. Each stick is a complete package. It has its wrapper and label. The label to my mind has a great deal of advertising value—you can see them on the streets almost anywhere you walk.

Q. 28. Can you state how many boxes of Beech-Nut chewing gum were sold since you came out with chewing gum?

A. It is better than fifty million boxes.

Q. 29. Can you identify what you mean by box?

A. It is the container holding twenty of the 5-stick packages.

Q. 30. Is it this box—Plaintiff's Exhibit No. 27?

A. Yes.

Q. 31. What does the retailer do with this box when he gets it?

A. It is displayed. The flap is gotten up for that purpose.

Q. 32. What was the going price for chewing gum at the time you came out with this product?

A. My memory is the price was 60 cents. We came out with 70 cent price. I remember when we came out with the 10 cent advance over the popular prices a number of our salesmen said it could not be done, that we would not make a success of it because of the higher prices.

Q. 33. What has been the situation on your chewing gum for the past few years—has there been a demand for it?

A. Yes. Time and time again we have instructed our salesmen to discontinue accepting or soliciting or-

ders for chewing gum. We confined ourselves to mail orders and the mail orders we prorated them as to production.

Q. 34. You have cited Beech-Nut gum as an example of your company making products quite different than food products. Can you give me another example?

A. Ginger ale is entirely foreign.

Q. 35. When did you come out with beverages?

A. 1919.

Q. 36. That was your first beverage?

A. Yes.

Q. 37. What happened in connection with the sale of Beech-Nut ginger ale?

A. It was very favorably received. We had to put on a night shift and then we could not keep up with the demand. I recall we had a remarkable demonstration in Boston, Cliquot's home town (Cliquot is made just outside the city, I believe). We sold forty cars.

Q. 38. Was that the first year?

A. That was the first year.

Q. 39. To what do you attribute the favorable reception of gum and beverages?

A. It is unquestionably the Beech-Nut name and the reputation the other products have established. Beech-Nut label does the trick with introductory orders.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 40. When was the last time you reduced the price on chewing gum?

A. The first of the year I believe it was.

X-Q. 41. 1922?

A. Yes.

X-Q. 42. You had cut the price of it in the market before last summer, had you not?

A. We had a reduction prior to that, but I cannot give you the date.

X-Q. 43. So although not being able to keep up with the demand for chewing gum and only taking mail orders and telling your salesmen not to solicit orders, you cut the price at different times?

A. The price was cut at the time we believed that our production was coming up to a point where we could take more business through the night shift, etc.

X-Q. 44. The question of what Wrigley or what the other concerns sell their goods for does not make any difference?

A. We try to make our own prices.

X-Q. 45. So you do not compete with the other chewing gum manufacturers?

A. We have to compete to a more or less extent but we have tried to sell Beech-Nut products on their own base.

X-Q. 46. I understand that you are the sales manager of the Beech-Nut Packing Co.?

A. Manager of sales, yes.

X-Q. 47. Without reference to any records but a general estimate, what does the business of the Beech-Nut Packing Co. amount to in the year?

A. I do not know if the management would care to have me give that information. It must come from some of the officials of the company.

X-Q. 48. You say you have about 225 salesmen?

A. Yes.

X-Q. 49. Do you know how many people are employed by the Beech-Nut Packing Co.?

A. No.

X-Q. 50. You were speaking of the various products

and brands of the Beech-Nut Packing Co. sold under your direction. I show you Defendant's Cross-Exhibit No. 16, Erie Brand Label and Defendant's Cross-Exhibit No. 17, Holly Brand Label. You sell those goods under those brands, do you not?

A. We have sold under both brands. We are not selling Holly we have discontinued that brand.

X-Q. 51. I think you mean Mohawk.

A. You are right, Mohawk.

X-Q. 52. Will you tell me just what these brands represent in the line of your goods, that is seconds?

A. The Erie brand represents a by-product as the result of manufacturing of the better grades. The Holly brand beef represents a second cut of beef; in other words, the Beech-Nut brand is held to be the very best of product.

X-Q. 53. These two brands which are sold by the Beech-Nut Packing Co. represent a cheaper grade of material or beef than Beech-Nut brand?

A. Yes.

X-Q. 54. You said Beech-Nut Packing Co. from time to time brought out different products under the Beech-Nut first grade or red band label. Those products brought out under that label are food products, are they not?

A. Yes and no. We are putting out some tooth paste now and that would not come under the head of food products.

X-Q. 55. When did you start to put out tooth paste; it must have been very, very recently, was it not?

A. Yes.

X-Q. 56. The labels on that board downstairs you referred to, those were all food products, are they not, so that the business of the Beech-Nut Packing Co. is really the packing and marketing of food products?

A. For the most part.

X-Q. 57. In your sales department you never sold any Beech-Nut cigarettes under the Beech-Nut label?

A. I could not say as to that.

X-Q. 58. You never heard of the Beech-Nut Packing Co. putting out Beech-Nut tobacco products?

A. I remember it was considered at one time. I could not say if it was Beech-Nut cigarettes or not.

X-Q. 59. You never gave your salesmen instructions to sell Beech-Nut tobacco products?

A. In general, no.

X-Q. 60. You have never known the Beech-Nut Packing Co. to put out on the market Beech-Nut tobacco?

A. Possibly there has been some put out in a very limited way. I am not sure about that one way or the other.

X-Q. 61. As far as the record in this case goes we have been only able to find, and I think it is admitted that a few orders, that one order of $11.85 of cigarettes was sold and your department today is not making any attempt to sell Beech-Nut cigarettes under Beech-Nut label. Tobacco products are an entirely different kind of products from food products, are they not?

A. You cannot eat them.

X-Q. 62. You do not know of a man being in the food packing line and being in the tobacco line?

A. I do not know as to that. I never gave it a thought.

X-Q. 63. As a matter of fact you never really knew of anyone manufacturing food products and tobacco at the same time?

A. I do not recall any just now.

X-Q. 64. You cannot eat tobacco. You cannot smoke chewing gum either, can you?

A. I never heard of anyone smoking it.

X-Q. 65. You would not put a wad of gum in a pipe and smoke it, would you?

A. No.

X-Q. 66. These Holly and Erie brands are sold under your supervision?

A. Yes.

X-Q. 67. They are sold to the grocer just the same as the other Beech-Nut products are?

A. Yes.

X-Q. 68. They are sold in the open market?

A. Yes.

X-Q. 69. So if you wanted some Erie brand or the Holly brand you could probably buy it in the open market?

A. Yes.

X-Q. 70. Your gum and ginger ale have come under the Pure Food Act, do they not?

A. Under pure food regulation, yes.

X-Q. 71. You manufacture them in conformity with those regulations?

A. Yes.

Redirect Examination by Mr. Hinton.

R-D. Q. 72. Do you eat chewing gum?

A. I chew it.

R-D. Q. 73. Could it be said to be a food product?

A. No.

Recross-Examination by Mr. Cavanagh.

R-X Q. 74. Do you swallow the saliva with the sugar that is mixed with the gum?

A. When you chew it.

R-X Q. 75. Chewing gum is good for digestion?

A. That is the old theory. It is supposed to be in some instances.

R-X Q. 76. Some people consider it so?

A. Yes.

R-X Q. 77. Chewing gum is used by children and other people that you would not give tobacco to?

A. Yes.

R-X Q. 78. It is in the nature of a confection?

A. It comes under that head.

R-X Q. 79. You certainly would not take chewing tobacco for chewing gum?

A. If I wanted to chew one I would not take the other, no.

R-X Q. 80. You would not take a package of chewing gum for a package of tobacco?

A. No, but people might who used both. They might take one or the other.

R-X Q. 81. Do you mean to say that people in normal possession of their wits if they went into a store and asked for a package of chewing gum and the dealer handed them a package of cigarettes that they would take the cigarettes when they wanted chewing gum?

A. If that party were a user of both cigarettes and gum he might purchase the cigarettes if he could not get the gum. He might buy the cigarettes on the strength of the label.

R-X Q. 82. Suppose he went into a store and wanted a package of chewing gum, do you think that a normal man could be deceived into buying a package of cigarettes?

A. If he did not want anything but gum he would insist.

R-X Q. 83. Do you think he was normal if he took the cigarettes?

A. Yes.

R-X Q. 84. If you had a little girl eight years old and gave her a nickel to buy a package of gum. She

went into a store and asked for a package of gum and she came back with a package of cigarettes, would you not feel like taking hold of that man's hair for deceiving her?

A. I suppose so.

Recross-examination closed.

Deposition closed.

EARL A. NELLIS.

Stipulated by and between the parties through their respective counsel that Plaintiff's Exhibit No. 28, being the board marked "Beech-Nut Labels Displayed Before the Public, 1891-1921," and which is hereby offered in evidence, is displayed thereon the various labels used by the Imperial Packing Co. and the Beech-Nut Packing Co., its successors, arranged chronologically in accordance with the years in which the various products were put out as indicated by the sales records, orders for labels, memoranda and other official records of the company, subject to this exception, that the said board does not show certain other brands which have been put upon the market by the Beech-Nut Packing Co. or its predecessor, the Imperial Packing Co., such, for example, as Erie brand, exemplified by Defendant's Cross-Exhibit No. 16, and Holly brand as exemplified by Defendant's Cross-Exhibit No. 17, and Mohawk brand of which there is no label in evidence at this time. Subject to this exception the board may be received in evidence as containing a display of labels used by the Beech-Nut Packing Co., subject to correction of errors if any appear.

It is stipulated that Julia Hilke, if called, would testify as follows:

"I am of legal age and a resident of Canajoharie,

N. Y. In 1891 I worked for the Imperial Packing Co., the predecessor of the Beech-Nut Packing Co. I left the Imperial Packing Co. in 1891 when my nephew, John Hilke, was born (this being in 1891), in order to help take care of him as a baby. During the time I was working for the Imperial Packing Co. I took home with me a box which I now produce. This box has been in my possession ever since."

The box is now produced in evidence as Plaintiff's Exhibit No. 31.

It is stipulated that owing to shortness of time remaining for plaintiff to close its *prima facie* depositions, the plaintiff shall, notwithstanding the expiration of that time, have reasonable time in which to have original depositions properly gathered up, executed and filed in court.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company. } Equity No. 3056.

State of New York, County of Montgomery, ss:

I, Fred M. Geortner, a Notary Public, in and for the County of Montgomery, State of New York, do hereby certify that the foregoing depositions of Mrs. Edith B. Kearns, John S. Ellithrop, Stanton Van Wie, Marshall Davis, Webster Davis, Colonel Davis, Christina Carswell, Earl A. Nellis were taken on behalf of the Beech-Nut Packing Company, plaintiff, pursuant to agreement and by consent of counsel, before me, at Canajoharie, County of Montgomery and State of New York, beginning February 10, 1922, at 11 o'clock A. M. and ending February 11, 1922 at Noon; that each of the witnesses was by me duly sworn before testifying; that the testimonies of each witness was taken down in short hand under my supervision and reduced to typewriting under my supervision; that the foregoing pages contain a true and accurate transcript of the stenographic notes; that each deposition was read and signed by the witness except where the signatures of the witnesses are waived as appears on the deposition; that I am not connected by blood or marriage with either of the said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Canajoharie, County of Montgomery, State of New York, this 22nd day of February, 1922.

FRED M. GEORTNER,
Notary Public.

[SEAL.]

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} Equity No. 3056.

Stipulation.

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of papers which bear the signature of counsel for both parties hereto and which are marked respectively:

"Plaintiff's Exhibit No. 12 A-12"
"Plaintiff's Exhibit No. 12 A-13"
"Plaintiff's Exhibit No. 12 A-14"
"Plaintiff's Exhibit No. 12 A-15"
"Plaintiff's Exhibit No. 12 A-16"
"Plaintiff's Exhibit No. 12 A-17"

may be offered and received in evidence in this case and may be added to Plaintiff's Exhibit No. 12 (A to A-11) already in evidence by stipulation in this case, so that Exhibit will now be Plaintiff's Exhibit No. 12 (A to A-17) being a book containing forty-three sheets.

It is stipulated that these papers consist of the following subject-matter:

Plaintiff's Exhibits Nos. 12 A-12 and 12 A-13 are original letters received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-14 is an envelope with a photostatic copy of the check that came inclosed in it, received by the Beech-Nut Packing Company in due course of business through the mail, and it is stipulated that this is a correct photostatic copy of the check that came in this envelope, and that this envelope containing said check was delivered to and received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-15 is an original letter received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-16 and 12 A-17 are respectively, an original letter and an inclosure therein received by the Beech-Nut Packing Company in due course of business.

It is stipulated that each of the letters and documents of plaintiff's exhibits, No. 12 A-12, 12 A-13, 12 A-15, 12 A-16, and 12 A-17, was received in the ordinary and due course of business, is genuine and authentic, and was signed by the person whose name appears thereon, subject to the following:

Defendant is herewith supplied with photographic copies of each of the exhibits herein referred to for investigation thereof, and defendant reserves the right at any time before sixty days, in advance of the trial, to challenge the authenticity and genuineness of any of the foregoing exhibits, and plaintiff in that event agrees to produce where obtainable the persons who signed the same, and subject them to examination by defendant, if so requested to do, or to prove the signatures by other testimony, failing which to withdraw the exhibit.

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevance.

Plaintiff calls upon defendant to admit the authenticity and genuineness of each of the foregoing exhibits, under the provisions of Equity Rule 58.

OFFIELD, POOLE, HINTON & SCOTT,
By SEBASTIAN HINTON,
Attorneys for Plaintiff.
RICHARD B. CAVANAGH,
Attorney for Defendant.

April 5, 1922.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} Equity No. 3056.

Stipulation.

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of posters and signs marked "Plaintiff's Exhibit No. 32," consists of posters and signs made by or for the defendant and generally distributed by defendant and its agents throughout all or a large part of the United States for advertising purposes, and placed by defendant and its agents, or distributed to be placed on display before the public in stores selling tobacco, on buildings, fences, billboards and other places where such signs are customarily displayed.

For purpose of identification, these posters and signs have each affixed thereto a label containing the title of the case and the inscription, "Stipulated Lorillard Sign," signed by counsel for the parties; and said identification is sufficient to identify each of said posters and signs as one made by or for defendant and distributed by defendant according to this stipulation.

OFFIELD, POOLE, HINTON & SCOTT,
By SEBASTIAN HINTON,
Attorneys for Plaintiff.
RICHARD B. CAVANAGH,
Attorney for Defendant.

April 5, 1922.

IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Stipulation.

It is stipulated by and between the parties hereto, through their respective counsel, that the scrap book marked "Plaintiff's Exhibit No. 33" in this case, signed by both counsel, contains a collection of the labels used on brands of tobacco heretofore and now sold by defendant.

The aforesaid labels have each been marked with a stamp as follows:

"Beech-Nut v. Lorillard, Pl. Ex. 33."

and the aforesaid stamp, together with the signature of counsel to the scrap book, is a sufficient identification of the labels, subject to correction if error appears.

Each of the aforesaid labels may be offered in evidence by plaintiff without further testimony covering the same.

OFFIELD, POOLE, HINTON & SCOTT,
By SEBASTIAN HINTON,
Attorneys for Beech-Nut Packing Company.
RICHARD B. CAVANAGH,
Attorney for P. Lorillard Co.

April 10, 1922.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
} In Equity No. 3056.

It is stipulated by and between the parties hereto, through their respective counsel, that the attached copy of the testimony of George B. Roach and Bryan O. Foster for plaintiff and the Examiner's certificates thereto, taken at Pembroke, Kentucky, January 16 and 17, 1922, before S. F. Davis, a notary public and court reporter, acting as Special Examiner by consent of counsel, being a carbon copy of the original containing corrections agreed to by counsel for the parties, may be received and filed in this case with full force and effect of the original transcript duly filed by the Examiner, before whom the evidence was taken.

The reason for the substitution of the attached carbon copy of the original is as follows:

When the testimony was taken and transcribed, copies thereof were sent to both counsel by the Examiner, the original being retained in the possession of the Examiner. Counsel for the parties thereafter agreed to corrections in the transcript, as embodied in the attached carbon, and the Examiner was instructed to make said corrections and file the original testimony.

After making the corrections, but prior to filing the original transcript, S. F. Davis, the Examiner, died, and diligent search of his office and belongings has failed to disclose said original transcript.

OFFIELD, POOLE, HINTON & SCOTT,
Attorneys for Plaintiff.
RICHARD B. CAVANAGH,
Attorney and Counsel for Defendant.

June 8, 1922.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Stipulation As To Record of Sales of Plaintiff, Beech-Nut Packing Company, for the Years 1903-1921, Inclusive.

It is hereby stipulated by and between the parties hereto, through their respective counsel, that the "Table of Sales Statistics" of the Beech-Nut Packing Company, the plaintiff herein, for the years 1903 to 1921 (inclusive), and hereinbelow set forth, was furnished to the defendant by the plaintiff on April 10, 1922. Plaintiff further stipulates that this table was prepared or transcribed by plaintiff from its regular books or records, and that the amounts or figures given in dollars and cents for each year are true and accurate.

TABLE OF SALES STATISTICS, BEECH-NUT PACKING COMPANY, 1903-1921.

Furnished R. B. Cavanagh, Counsel for P. Lorillard Co., by Sebastian Hinton, Counsel, Beech-Nut Packing Co., April 10th, 1922.

	Total Sales.	*Reg. Line.*	*Gum.*	*Comp. Tab. Misc. Conf. Bev.*
1903	$ 563,764.37	$ 563,764.37	$	$
1904	832,906.10	832,906.10		
1905	1,000,986.83	1,000,986.83		
1906	1,267,877.81	1,267,877.81		
1907	1,293,059.92	1,293,059.92		
1908	1,408,481.33	1,408,481.33		
1909	1,950,534.60	1,950,534.60		
1910	2,555,315.85	2,555,315.85		
1911	2,838,384.99	2,819,441.56	18,943.43	
1912	3,179,337.79	2,778,822.00	400,515.79	
1913	4,112,592.99	2,681,110.07	1,431,482.92	
1914	4,966,337.76	2,484,854.93	2,480,023.48	1,459.35
1915	5,703,945.39	2,258,356.76	3,288,521.35	157,067.28
1916	6,598,385.15	2,681,685.97	3,632,127.15	284,572.03
1917	7,363,678.56	3,407,467.30	3,594,864.53	361,346.73
1918	6,754,967.21	4,502,462.68	1,853,038.28	399,466.25
1919	8,979,586.35	5,378,607.40	2,233,860.24	1,367,118.71
1920	11,138,226.51	5,435,324.37	3,955,902.00	1,747,000.14
1921	12,109,573.68	4,618,207.28	6,281,945.41	1,209,420.99

Plaintiff further stipulates that in said "Table of Sales Statistics" in the column bearing the caption, "Total Sales," appear true and accurate figures in dollars and cents of the total sales of all goods sold and delivered by the Beech-Nut Packing Company, yearly, from 1903 to 1921 (inclusive). The remaining three columns of the chart, bearing the captions, "Reg. Line," "Gum" and "Comp. Tab. Misc. Conf. Bev.," indicate how the total figures or amounts shown in the "Total Sales" column are divided amongst various items of plaintiff's sales business. For example, in the year of 1921 the total sales were $12,109,573.68, this sum or amount being made up or composed of $4,618,-207.28, sales in Regular Line; $6,281,945.41, sales in Gum; and $1,209,420.99, sales in Compound Tablets, Miscellaneous Confectionery and Beverages, etc. It is further stipulated that the figures or sums herein given also include goods which have been returned by dealers in course of business. This item (returned goods) amounted to .0043 of the total in the year 1920, and was the highest it has ever been in that year.

Plaintiff, upon request of defendant, explains the falling off in total business in 1918, and of the gum business 1918-1919, as follows:

The reasons for the falling off in sales of gum 1918-1919 (which caused the falling off in the total sales in 1918, shown by the figures) were as follows:

1. Plaintiff was unable to secure prime chicle in these years in sufficient quantities to meet the demand for its gum.

2. Plaintiff was restricted by the Government in the quantity of sugar it could obtain.

During the greater portion of 1918-1919, plaintiff was allotting gum shipments on the basis of one-half to one-

third of the amount ordered and turning away a large amount of business in gum, etc. Gum production did not meet the demand until well along in 1921.

It is further stipulated by the parties that the furnishing of this "Table of Sales Statistics" by the plaintiff to the defendant may be considered as a compliance with the requests of defendant's counsel for data along this line made during the examination of Christina Carswell, statistical manager of plaintiff, and the production of said Christina Carswell and the witness Francis E. Barbour for further examination as to statistics of the business of the plaintiff is waived.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Plaintiff.

MEYERS, CAVANAGH & WHITEHEAD,
RICHARD B. CAVANAGH,
Counsel for Defendant.

Dated May 27, 1922.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Stipulation Re Record.

It is hereby stipulated, by and between the parties hereto, that the record in the United States Patent Office opposition proceeding, entitled P. Lorillard Company *vs.* Beech-Nut Packing Company—Trade-Mark Opposition No. 2805—comprising the testimony, stipulations and exhibits of the parties, may be, and the same is hereby incorporated in the present suit, as a part of the record hereof, and shall have the same force and effect as if originally contained herein.

It is further stipulated that either party may use in this case uncertified copies of any and all official decisions rendered in said opposition proceeding, with the same force and effect as if duly certified.

It is further stipulated that copies of the records of the parties in said opposition proceeding, as printed for the Patent Office, may be used herein, without reprinting.

OFFIELD, POOLE, HINTON & SCOTT,
By SEBASTIAN HINTON,
Counsel for Beech-Nut Packing Co.
RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

Dated:
Canajoharie, N. Y.,
February 11, 1922.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Stipulation.

It is hereby stipulated by and between the parties, through counsel, that the following is a list of defendant's exhibits and cross-exhibits either introduced, or marked for identification, or referred to, during the taking of both plaintiff's and defendant's depositions herein, and that each and every of said exhibits may be and is hereby formally offered in evidence and marked as indicated in the following list, if such exhibits have not already been formally offered in evidence during the taking of the depositions.

Defendant's Cross-Exhibit No. 1—Beech-Nut Scrap Tobacco—Plaintiff's Rec., p. 35.

Defendant's Cross-Exhibit No. 2—Beech-Nut Chewing Gum—Plaintiff's Rec., p. 37.

Defendant's Cross-Exhibit No. 3—Sheet bearing Beech-Nut Packing Company's label (chewing gum flap) Plaintiff's Rec., p. 47.

Defendant's Cross-Exhibit No. 4—Carton Beech-Nut cigarettes—Plaintiff's Rec., p. 86.

Defendant's Cross-Exhibit No. 5 — Advertisement Beech-Nut Cigarette, Boston Herald of August 18, 1921 —Plaintiff's Rec., p. 138.

Defendant's Cross-Exhibit No. 6—Beech-Nut Mints—Plaintiff's Rec., p. 145.

Defendant's Cross-Exhibit No. 7—Beech-Nut peanut butter—Plaintiff's Rec., p. 301.

Defendant's Cross-Exhibit No. 8—Beech-Nut bacon label—Plaintiff's Rec., p. 430.

Defendant's Cross-Exhibit No. 9—Open carton Beech-Nut cigarettes—Plaintiff's Rec., p. 518.

Defendant's Exhibit No. 10 (A, B and C) Lorillard order blanks—Defendant's Rec., Vol. I, p. 479.

Defendant's Exhibit No. 11—West Haven Drug Store Display—Defendant's Rec., Vol. II, p. 1213.

(No Defendant's Exhibits Nos. 12, 13 or 14.)

Defendant's Cross-Exhibit No. 15—Four advertisements of Beech-Nut Food Products from Ladies' Home Journal—Plaintiff's Rec., p. 811.

Defendant's Cross-Exhibit No. 16—Beech-Nut Packing Co.'s Erie Brand label—Plaintiff's Rec., p. 846.

Defendant's Cross-Exhibit No. 17—Beech-Nut Packing Co.'s Holly Brand label—Plaintiff's Rec., p. 847.

OFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Beech-Nut Packing Co.
RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

Dated:
NEW YORK CITY,
October 25th, 1923.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Amendment to Bill of Complaint.

Now comes Beech-Nut Packing Company, the plaintiff in the above-entitled cause and amends its bill of complaint as follows:

In paragraph 6, strike out the last word "with" of the eighth line and the first two words, "out exception," of the ninth line and the fifth, sixth and seventh words, "all of the," of the ninth line; and insert the word "which" after the third word, "goods," of the tenth line.

BEECH-NUT PACKING COMPANY,
By OFFIELD, BULKLEY, POOLE & SCOTT,
H. MCCLURE JOHNSON,
Its Solicitors.

It is hereby agreed that the foregoing amendment to the bill of complaint may be filed in this suit and defendant hereby waives further answer.

OFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Plaintiff.

R. B. CAVANAGH,
Counsel for Defendant.

Oct. 29, 1923.

UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Stipulation.

It is stipulated by and between the parties hereto, through their respective counsel, that the collection of papers, which bear the signature of counsel for both parties hereto and which are marked respectively:

Plaintiff's Exhibit No. 12 A-18;
" " " 12 A-19;
" " " 12 A-20;
" " " 12 A-21;
" " " 12 A-22;
" " " 12 A-23;
" " " 12 A-24;

May be offered and received in evidence in this case and may be added to Plaintiff's Exhibit No. 12 (A to A-17), already in evidence by stipulation in this case, so that said exhibit will now be Plaintiff's Exhibit No. 12 (A to A-24) being a book containing fifty sheets.

It is stipulated that these papers consist of the following subject-matter:

Plaintiff's Exhibits Nos. 12 A-18, 12 A-20 and 12 A-22 are original letters received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibits Nos. 12 A-19 and 12 A-21 are original post-cards received by the Beech-Nut Packing Company in due course of business.

Plaintiff's Exhibit No. 12 A-23 is a photostatic copy of letter and envelope received by the Beech-Nut Pack-

ing Company in due course of business, of which the originals were returned to the writer thereof; and it is stipulated that this is a correct photostatic copy of same.

Plaintiff's Exhibit No. 12 A-24 is an original letter with its envelope received by the Beech-Nut Packing Company in due course of business.

It is stipulated that each of the letters and post-cards of Plaintiff's Exhibits Nos. 12 A-18, 12 A-19, 12 A-20, 12 A-21, 12 A-22 and 12 A-24, was received in the ordinary and due course of business, is genuine and authentic, and was signed by the person whose name appears thereon, subject to the following:

Defendant reserves the right to object to the foregoing exhibits on the ground of materiality and relevancy.

OFFIELD, BULKLEY, POOLE & SCOTT,
Attorneys for Plaintiff.

RICHARD B. CAVANAGH,
Attorney for Defendant.

Dated:
NEW YORK CITY,
October 29th, 1923.

Vol. II

131

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

273
6

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

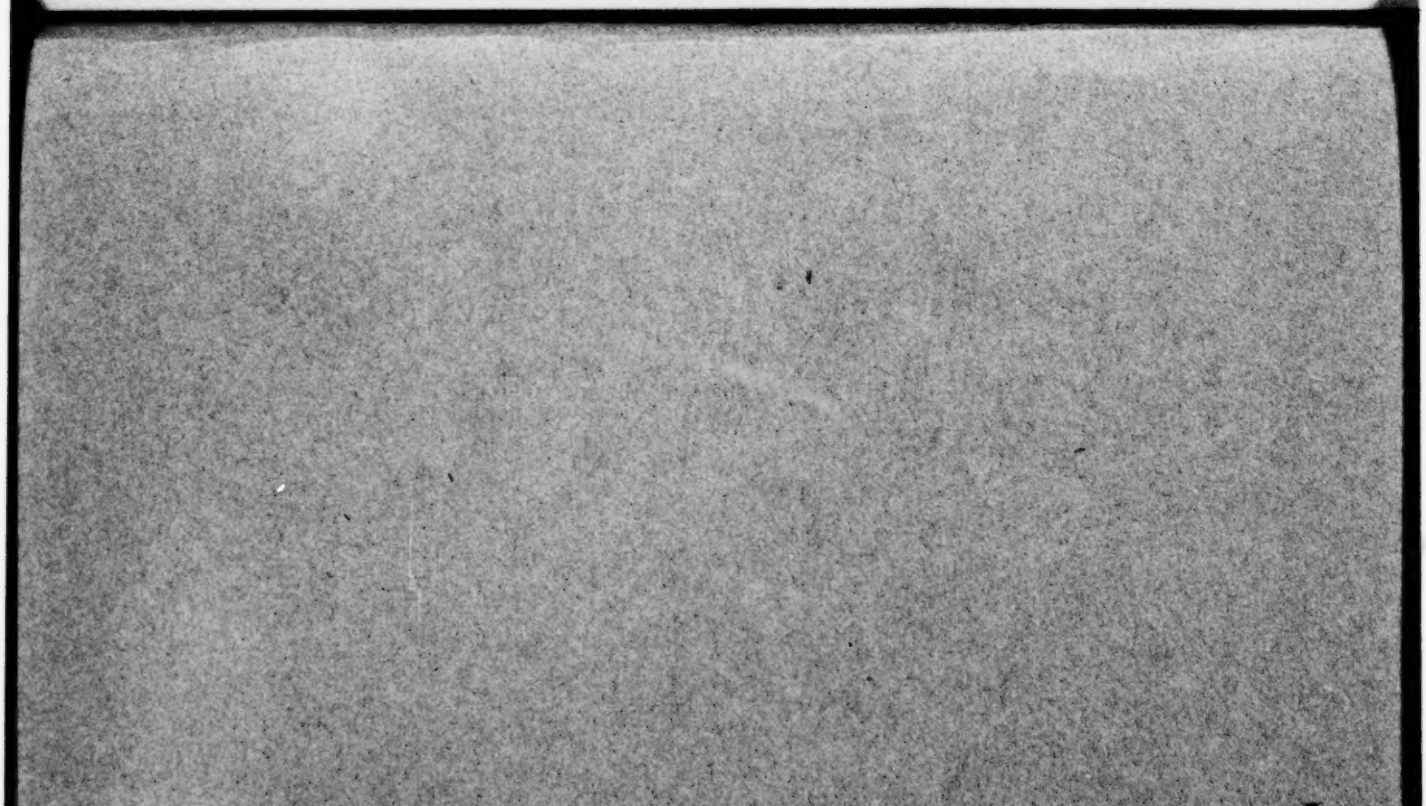
P. LORILLARD COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1926

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)



(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

VOLUME II

INDEX

	Page
Stipulation re answer	878
Answer	879
Amendment to answer	896
Order setting time for taking depositions	900
Affidavit of Sebastion Hinton and Richard B. Cavanagh	902
Stipulation re depositions	904
Stipulation re record	906
Stipulation re plaintiff's record of sales, 1903 to 1921	907
Statement of evidence	911
Testimony of Ferdinand Bieringer	911
Haskell Sharf	937
Eleazer Lebewohl	954
L. G. Cauto	968
Harry Klein	984

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

26967

	Page
Testimony of Benjamin Hurvitz	1007
John A. Ratto	1026
Max Dublin	1035
Harry Stone	1056
Benjamin Lescovitz	1063
Hugh F. Wallace	1069
George O. Adams	1077
George C. Smith	1079
Aaron Ansel	1085
George Dougall	1089
Martin O. Connors	1096
Timothy James Dumas	1100
Philip H. Moran	1106
John J. Lecolst	1111
Thomas E. Blake (stipulated)	1114
Edward Adelman	1115
John T. Powers	1124
Dennis T. O'Callahan	1128
Thomas J. Maguire	1132
Peter Peters	1138
Louis Scheipers	1143
Aram Gulian	1148
Reporter's certificate	1153
Testimony of Samuel S. Broadbent	1155
Henry Freeman	1160
Andrew J. Wright	1164
Herbert R. Hooper	1174
William W. Provost	1182
Joseph Equi	1187
Ferdinand Rigali, Jr	1192
Gordon Michaels (stipulated)	1197
Samuel Rackmales	1201
Morris J. Goodman	1208
Carl W. Jacobson	1214
Theodore Havelman	1221
Elmer C. Kaiss	1227
Joseph H. Nelson	1232
J. T. Woodall	1243
Albert F. Schueler (stipulated)	1248
William D. Lilly (stipulated)	1249
Sol Levin (stipulated)	1250
W. Friedman (stipulated)	1251
William Waschler	1254
Samuel B. Welsh	1260
Benjamin Newman	1268
Harry S. Syik	1275
David Ornstern	1283
Edward G. Hoch	1288
Fred J. Hahn	1296
Franklin P. Stern	1300

		Page
Testimony of	Louis Gray	1309
	Harry A. Linn	1315
	Daniel H. Harbot	1321
	Joseph Cohen	1326
	M. Podolnic (stipulated)	1333
	William Sobel (stipulated)	1334
	Walter I. Davidson (stipulated)	1335
	William Goldstein	1338
	Charles Tuckwell	1414
	Michael Spheeris	1429
	John W. Smith	1440
	Maurice J. Schimmel	1447
	Daniel Paicopoulos	1458
	Albert Marks	1470
	Frank Hopewell	1502
	Benjamin A. Mosher	1523
	I. J. Lindenbaum	1537
	John Glasspiegel	1550
	Fred W. Kemp (stipulated)	1566
	Robert A. Kiefer (stipulated)	1568
	Rudie Kortbein (stipulated)	1569
	J. E. Bernheimer (stipulated)	1571
	Ray P. Fleming (stipulated)	1574
	Ray Van Rosmalen (stipulated)	1575
	A. G. Vaclavic (stipulated)	1577
	E. F. Petersen (stipulated)	1580
	R. Zechel (stipulated)	1582
	H. A. Levenhagen (stipulated)	1583
	Jerome Meyer (stipulated)	1585
	Robert Lill (stipulated)	1587
	A. McEveney (stipulated)	1589
Stipulation re testimony		1591
Testimony of	Wade H. Brown	1592
	Jacob Gay, Jr.	1622
	Frank C. Degan	1633
	Philip Ludwig Burgeson	1646

IN THE

United States District Court

DISTRICT OF NEW JERSEY.

BEECH-NUT PACKING COMPANY,
Plaintiff,

vs.

P. LORILLARD COMPANY,
Defendant.

In Equity No. 3056.

2

Stipulation re Answer.

It is hereby stipulated by and between the parties to the above entitled cause, through Counsel, that the defendant shall have to and including August 15th, 1921, to answer or otherwise plead to the Bill of Complaint filed herein.

3

OFFIELD, POOLE & HINTON,
Counsel for Plaintiff.

R. B. CAVANAGH,
Counsel for Defendant.

Dated: New York City, June 24th, 1921.

IN THE DISTRICT COURT OF THE UNITED STATES, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

Answer.

(Filed August 13, 1921.)

The answer of P. Lorillard Company, Defendant, to the Bill of Complaint of Beech-Nut Packing Company, Plaintiff.

1. This defendant admits the incorporation of the parties hereto as alleged in Paragraph 1 of the bill of complaint.

2. This defendant does not know and is not informed save by said bill of complaint whether or not, as alleged in Paragraph 2 of said bill of complaint, the plaintiff's alleged predecessor, Imperial Packing Company, inaugurated its business prior to 1892, or thereabouts, and adopted and used the alleged trade mark "BEECH-NUT" and a trade mark or distinctive badge, comprising the collocation of the alleged trade mark "BEECH-NUT" with other distinctive and conspicuous features; described in said Paragraph 2 of the bill of complaint, and alleged to be presented by the specimen labels attached to said bill as Exhibit No. 1, and leaves plaintiff to strict proof thereof.

3. This defendant, while admitting that the word "BEECH-NUT" was adopted as part of the corporate name of the plaintiff, in the year of 1899 or thereabouts, and while further admitting, on information and belief, that the said plaintiff is a successor in business of the Imperial Packing Company, a New York corporation, denies each and every other allegation contained in Paragraph 3 of

the bill of complaint, and particularly that the trade and 7
public have recognized and accepted the label, Exhibit No. 1, as not only the trade mark by which the desired manufacturer of this or that goods may be identified, but also and more particularly as the distinctive autograph or personal signature of the plaintiff.

4. This defendant admits, on information and belief, the allegations contained in Paragraph 4 of the bill of complaint as to the plaintiff being the successor in business of the Imperial Packing Company.

5. This defendant is not informed, and does not know, save by said bill of complaint, whether or not, as alleged in Paragraph 5 of said bill of complaint, that the Im- 8
perial Packing Company, shortly after 1891 began a rapid extension of the items of its manufacture; that the plaintiff from the time of its acquisition of its business has persistently and rapidly continued the alleged extension; that the business of the plaintiff has increased with great rapidity; that plaintiff's alleged trade mark, trade name and distinctive badge and autograph were familiar to and highly regarded by the public and on sale largely, in stores dealing in packaged consumable products such as general stores, grocery stores, drug stores, tobacco stores, news stands and the like; that plaintiff's business aggregated many million dollars every year, and 9
comprehended a very large number of packaged products of widely varying character, including those enumerated in Paragraph 5 of the bill of complaint; that plaintiff has since added many new products to its line, and has always expected and now expects and intends, in the rapid expansion of its business, to continue so to do, all without reference to specific similarity or differences between various items alleged to be included in plaintiff's line, and leaves plaintiff to strict proof thereof. This defendant further denies that plaintiff's goods and those of its predecessor have always been identified by the alleged

10 trade mark, trade name, badge and autograph shown by Exhibit No. 1 of the bill of complaint.

6. This defendant does not know and is not informed save by Paragraph 6 of the bill of complaint, whether or not plaintiff's business has for many years heretofore been in a large measure dependent upon the standing in the mind of the public of the alleged trade mark "BEECH-NUT" and the alleged trade name, badge and autograph shown by Exhibit No. 1 of the bill of complaint; or whether or not the plaintiff has expended more than two millions of dollars in advertising, or whether or not said advertising has been of the character set forth in said
11 Paragraph 6 of the bill of complaint, or whether or not such advertising has always featured the alleged trade mark or trade name "BEECH-NUT" and the alleged badge or autograph shown by Exhibit No. 1, and leaves plaintiff to strict proof thereof; and further answering said Paragraph 6 of the bill of complaint, this defendant denies that the alleged mark or symbol, illustrated by Exhibit No. 1, aforesaid, except for variations in size, name of particular product and other immaterial variations, has been displayed conspicuously by plaintiff without exception upon all of the widely varying kind of packaged consumable goods plaintiff has from time to time put upon
12 the market; and further denies that such goods of the plaintiff, as are alleged to be marked with the symbol or mark illustrated by the said Exhibit No. 1 have any particular high standard of excellence, or any standard defined or indicated by said symbol or mark.

7. This defendant denies each and every allegation contained in Paragraph 7 of the bill of complaint, and particularly that plaintiff's alleged trade mark or symbol (Exhibit 1) enjoys any particular high regard with the trade and public of the United States, or that plaintiff's products so marked enjoy any particular regard or superior standing with the public, in comparison with the goods or products of others engaged in handling or

marketing the same line of commodities as this plaintiff. 13

8. This defendant admits the registration in the United States Patent Office, by the plaintiff, of the alleged trade mark No. 89,613, registered December 31, 1912, but denies that said trade mark was registered in due form of law, and denies each and every other allegation contained in Paragraph 8 of the said bill of complaint.

9. This defendant, in answer to Paragraph 9 of the bill of complaint denies that it has, within the District of New Jersey, or anywhere else, infringed upon plaintiff's alleged trade mark, appropriated plaintiff's alleged trade name or forged plaintiff's alleged autograph; or 14
been guilty of unfair competition in trade against the plaintiff, in connection with this or any other matter; and the defendant denies that it has infringed, at any time in the past, or is now infringing or intends in the future, within the District of New Jersey, or anywhere else, to infringe upon any rights of the plaintiff, trade mark or otherwise, or to compete unfairly in business with said plaintiff. And defendant further denies that it has ever contrived to injure, or intends to injure the plaintiff or has contrived to cramp, or intends to cramp the legitimate expansion of plaintiff's business, or has contrived to divert or intends to divert from the plaintiff 15
any profits, gains and advantages which should legitimately accrue to the plaintiff, or that it has damaged or intends to damage plaintiff in any manner whatsoever, and therefore this defendant specifically and particularly denies each and every allegation of Paragraph 9 of the bill of complaint.

10. This defendant, answering Paragraph 10 of the bill of complaint, admits that it has made and sold and is selling within the District of New Jersey and elsewhere throughout the United States a product known as "BEECH-NUT SCRAP TOBACCO", as it had and has the good and perfect right to do; but this defendant denies that its

"BEECH-NUT SCRAP TOBACCO" is a cheap or inferior tobacco, but on the contrary avers and maintains that its product is and was of a superior nature and in great demand by the tobacco-using public, and that its superiority and reputation is and was such that the sale of this brand of tobacco of the defendant has amounted and amounts to many millions of pounds per annum with a valuation running into millions of dollars, and defendant further maintains, upon information and belief, that particularly within recent years it business in dollars and cents in this brand of "BEECH-NUT SCRAP TOBACCO" has exceeded and now exceeds by millions of dollars, the total business of the plaintiff, Beech-Nut Packing Company. and defendant further answering said Paragraph 10 of the bill of complaint admits that it uses and has used upon its "BEECH-NUT SCRAP TOBACCO" a label, a specimen of which is affixed to the bill of complaint as Exhibit No. 2, but denies that said label in any manner simulates or imitates the label Exhibit No. 1 of the plaintiff, or any other label of plaintiff, or that confusion has been or will be created in the trade and the public; or that the trade and public have generally believed that defendant's BEECH-NUT SCRAP TOBACCO is an extension of plaintiff's line and a product made by the plaintiff. And defendant further answering said Paragraph 10 of the bill of complaint denies that in putting up and selling or marketing its BEECH-NUT SCRAP TOBACCO under the label or dress shown by Exhibit No. 2 of the bill of complaint, it has been or is guilty of trade mark infringement or of unfair competition in trade against the plaintiff, or has promoted or caused or is promoting or causing confusion in the trade, or has realized or is realizing any illegitimate profits to the loss, damage and injury of the plaintiff; and defendant denies that in its sales effort with respect to its BEECH-NUT SCRAP TOBACCO it has infringed upon or is infringing any trade mark rights of the plaintiff, or indulged or is indulging in unfair competition

against the plaintiff, either within the District of New Jersey, or anyhere else. 19

10a. On the contrary defendant avers and maintains that ever since the winter of 1896-1897, or prior thereto, the word "BEECH-NUT" has been used as a trade mark for Tobacco Products, and particularly scrap tobacco usable for both smoking and chewing, exclusively by this defendant and its predecessors in business, to wit: the Harry Weissinger Tobacco Company; the Continental Tobacco Company and the Luhrman & Wilbern Tobacco Company, and that defendant's title to said trade mark "BEECH-NUT" for tobacco was derived through due and proper assignments, from said predecessors, as from said assignments here in Court ready to be produced will more fully and at large appear; that said trade mark "BEECH-NUT" for said tobacco products has never been abandoned, either by applicant or its predecessors, or any of them, that defendant's exclusive right to and ownership of the trade mark "BEECH-NUT" for tobacco is and has been recognized by the trade, and by the public in general; that defendant's business since its inception and establishment, about the year of 1760 is and always has been directed to the manufacture and sale of tobacco products; and that defendant is not, and never has been engaged in selling goods, commodities or products of the same class as those which have heretofore been put up and sold in the open market by plaintiff; and that the containers in which defendant's Beech-Nut Scrap Tobacco is and has been packaged and sold bear and have borne the word "Lorillard's" or some similar expression, prominently printed or displayed thereon, thereby indicating to the trade and public the true origin and source of such tobacco product. And defendant further avers and maintains that its success in the sale of its tobacco products under defendant's trade mark "BEECH-NUT" for such tobacco products is and has been in no way, shape, form or manner due to any alleged rights or rep- 20 21

22 utation of the plaintiff, or plaintiff's products, or to any efforts which have been made by the plaintiff in the marketing of its products, but is and has been due to defendant's high reputation with the trade and the tobacco-using public, the superiority of defendant's products, and the scope and strength of defendant's manufacturing and selling organization and the efforts exerted in their respective field by the various departments of defendant's organization.

11. Defendant denies each and every allegation contained in Paragraph 11 of the bill of complaint, and particularly that the plaintiff has been or will be damaged
23 by any act or acts of this defendant in or arising out of the manufacture and marketing of its, defendant's tobacco products, under defendant's trade mark "BEECH-NUT" for such tobacco products.

12. This defendant, answering paragraph 12 of the bill of complaint admits that it is now advertising, and has heretofore advertised its Beech-Nut tobacco products or brands, just as it advertises its numerous other brands, but denies that this advertising has been and is likely to be generally or in any degree whatsoever attributed to plaintiff; or that defendant's advertising forces upon the attention of the public what purports to be the fact that
24 plaintiff is manufacturing cheap chewing tobacco, or any tobacco; or that defendant's advertising is or ever has been likely to counteract and destroy the good will and reputation of the plaintiff; and defendant therefore denies each and every allegation in said Paragraph 12 of the bill of complaint.

13. Defendant denies each and every allegation of Paragraph 13 of the bill of complaint, and particularly that it intends or threatens to place upon the market cigarettes under the trade mark "BEECH-NUT" and packaged in containers such as shown in Exhibit No. 3, of the bill of complaint, although defendant avers and maintains that it has the good and perfect right to place upon

the market cigarettes packaged in containers like said 25
Exhibit No. 3 should it see fit to do so; and further denies that said container shown by said Exhibit No. 3 is or contains a simulation or imitation of any package, label, or other alleged property of this plaintiff, and denies that any acts of this defendant in connection with the cigarette package shown by Exhibit No. 3 of the bill of complaint would constitute threatened trade mark infringement or threatened unfair competition in trade toward the plaintiff.

14. This defendant denies each and every allegation of Paragraph 14 of the bill of complaint, and particularly that plaintiff has any exclusive right to the word "Quality" as associated with packaged commodities or products, and especially with tobacco products, or to the words or term "BEECH-NUT QUALITY," and denies that the public recognizes or has ever recognized any such alleged right or rights of the plaintiff, or such alleged right or rights in connection with plaintiff's goods. 26

15. Defendant denies each and every allegation contained in Paragraph 15 of the bill of complaint, so far as relate to any alleged effort on the part of this defendant to convert to its own uses the alleged good will and reputation of the plaintiff, and so far as concerns any effort to promote the belief, on the part of the public, that defendant's cigarettes are merely an addition to plaintiff's line of goods which have appeared before the public, and so far as concerns defendant being guilty of threatened unfair competition in trade with the plaintiff and of illegitimately preparing to appropriate the good will of plaintiff's business to promote the sale of its, defendant's goods. Defendant further answering Paragraph 15 of the bill of complaint admits that a number of years ago, to wit: about 1916, it ordered and received a large number of cigarette wrappers, like Exhibit No. 3 27

of the bill of complaint, and that said cigarette wrappers had appearing there on the inscription "Cigarettes of BEECH-NUT Quality have never before been offered to the public", and that this fact was known to plaintiff at the time or shortly after such wrappers were received by the defendant, but defendant avers that defendant has never sold on the market, cigarettes packaged in containers like that illustrated by Exhibit No. 3 of the bill, nor does it intend to do so, but on the contrary has discarded the wrapper or container like Exhibit 3, of its own volition, and has adopted and used for its Beech-Nut cigarettes the container or wrapper illustrated by Exhibit No. 5 of the bill of complaint. Defendant further avers and maintains that the use of a cigarette package, wrapper or container, like Exhibit No. 3 would in no way or manner invade or infringe upon any right of this plaintiff.

16. Defendant, answering Paragraph 16 of the bill of complaint, admits that it has sold and offered for sale and is now selling and offering for sale in commerce among the several States large quantities of cigarettes put up in containers or packages as exhibited in Exhibit No. 5 of the bill of complaint, and has advertised said cigarettes extensively, but denies that it has done so, or is doing so, for the purpose of promoting confusion in the trade or of converting to its own uses any good will of the plaintiff; denies that its wrappers or packages or containers as shown by said Exhibit No. 5 are an imitation of plaintiff's alleged trade mark, trade name or so-called autograph; denies that its advertising is or ever has been of a misleading character; denies that said cigarettes have been or will be purchased by persons of the purchasing public or of ordinary intelligence, in the belief that such cigarettes were of plaintiff's manufacture; and denies that any acts and doings of the defendant in connection with its manufacture and marketing of its BEECH-NUT cigarettes constitute or ever has con-

stituted trade mark or trade name infringement or un- 31
fair competition in trade, against plaintiff, or worked, or is working any injury whatsoever to the plaintiff.

17. Defendant, answering Paragraph 17 of the bill of complaint, denies that packaged tobacco and cigarettes are both within legitimate fields of expansion of plaintiff's business, but on the contrary avers and maintains that defendant is the owner of, and has the exclusive right to market tobacco products, such as packaged tobacco and cigarettes under the trade mark "BEECH-NUT", and that the plaintiff has no right whatsoever to the name "BEECH-NUT" as a trade mark for tobacco products, and that any purpose and intent or effort on 32
the part of plaintiff to expand its business and to appear upon the market with a tobacco product, under the trade mark "BEECH-NUT", is, and would constitute an infringement of defendant's rights in the premises. Defendant therefore denies each and every allegation of Paragraph 17 of said bill of complaint.

18. Defendant, answering Paragraph 18 of the bill of complaint, denies that by its acts and doings it has gained large profits, or any profits, due, in whole or in part to any invasion, conversion or exploitation of plaintiff's alleged good will, or to any infringement or use of any of plaintiff's alleged trade marks, trade names or 33
autographs; and denies that defendant has been or is guilty of any unfair competition, and denies that it has made any profits which belong to the plaintiff, or that any damage whatsoever has been done to plaintiff in any manner whatsoever by reason of any act or acts of this defendant in connection with the manufacturing and marketing of its Beech-Nut tobacco products, or in any other connection or relation whatsoever.

19. This defendant further answering says, that this plaintiff, by reason of acquiescence, laches and estoppel in the premises is not entitled to the relief prayed for in its bill of complaint, or to any relief whatsoever

against this defendant, and in support hereof defendant says, on information and belief, that for a number of years past, to wit: since about 1897, this plaintiff has been well aware, and has had full knowledge of the fact that the defendant, and its predecessors, was and were manufacturing and selling scrap tobacco under its, the defendant's and its predecessors, trade mark "BEECH-NUT" for tobacco products, and that defendant put up tobacco products in packages bearing the label such as is exemplified by Exhibit No. 2 of the bill of complaint; that the plaintiff, has not only throughout the years, ever since 1897, by its acts, acquiesced in defendant's rights in the premises, but has recognized and acknowledged defendant's right as to the trade mark "BEECH-NUT" for tobacco products by informing defendant of infringing acts of other parties in using the word "BEECH-NUT" for tobacco products and that such acts infringed the exclusive rights of defendant, and has suggested and requested that this defendant take such steps as might be deemed necessary or advisable to terminate such infringement by such other parties in connection with the use of the defendant's trade mark "BEECH-NUT" for tobacco products; and this defendant further says that it has, at divers times, with the full knowledge of the plaintiff taken action which has resulted in the cessation of infringement by other parties of the defendant's trade mark "BEECH-NUT" for tobacco products. Furthermore, in connection with plaintiff's acquiescence, laches and estoppel in the premises, this defendant further says that at, or about the time defendant was contemplating putting its BEECH-NUT cigarette upon the market, and had ordered and received cigarette wrappers bearing the label such as is shown by Exhibit No. 3 with the bill of complaint, this plaintiff, obtained possession of one or more of defendant's cigarette wrappers like said Exhibit No. 3, and took exception to certain detail features of such cigarette wrapper, such as the expres-

sion "Cigarettes of BEECH-NUT Quality have never before been offered to the public", and this plaintiff, in writing, under date of August 7th, 1919, of its, plaintiff's own volition, made the following proposal or suggestion to defendant as acceptible to plaintiff, to wit: 37

> "In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your cigarettes; in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product." 38

That defendant, relying upon plaintiff's acquiescence in defendant's said right to "BEECH-NUT" as a trademark for tobacco products and upon plaintiff's laches in asserting and enforcing its now alleged rights, went to great trouble and expense and invested and expended large sums of money in and about said trade mark for tobacco products and for the purpose of advertising the same and identifying it with defendant's tobacco products and the high quality thereof, and creating an organization for the sale of the same, and that defendant upon the faith of plaintiff's said acquiescence and laches has thus built up a high reputation for the tobacco products sold under its said trade mark and created a large demand therefor, and established a valuable organization for the sale thereof, all of which it would be deprived of at great loss and injury if the prayers of the bill of complaint should be granted. 39

Defendant, therefore, says that this plaintiff by reason of the foregoing, and divers other acts in the premises is estopped, by its acquiescence in defendant's doings

and its laches in asserting or enforcing its now alleged rights, and defendant's reliance upon said acquiescence and laches, from receiving, and is not entitled to, the relief prayed for in said bill of complaint, or any relief whatsoever in the premises against this defendant.

WHEREFORE, this defendant, P. Lorillard Company, having fully answered to the bill of complaint, denies that the plaintiff is entitled to the relief or any part thereof demanded, or to any relief whatsoever, and prays to be hence dismissed with its reasonable charges in this behalf most wrongfully sustained.

AND THIS DEFENDANT AS COUNTERCLAIM AGAINST THIS PLAINTIFF SHOWS UNTO THIS HONORABLE COURT:

20. That defendant is, as hereinbefore set forth in this answer the owner of the trade mark "BEECH-NUT" for tobacco products of all kinds, including cigarettes, and that for many years prior to the acts of plaintiff hereinafter complained of, this defendant, and its predecessors in business, had, and has manufactured and marketed tobacco products under the trade mark "BEECH-NUT", in vast quantities, and of a value running into millions of dollars, and that the value of the subject matter, defendant's trade mark "BEECH-NUT", in controversy, is in excess of five thousand dollars. That the trade and the public in general, and particularly the tobacco trade, and the tobacco-using public, recognized the trade mark "BEECH-NUT" for tobacco products to be that of the defendant. That by reason of the long experience and great care of defendant in its tobacco business, and the superior quality and character of its tobacco products, and particularly its tobacco products sold under its trade mark "BEECH-NUT", such Beech-Nut tobacco products of the defendant have become widely known in the community and throughout the various States of the United States and have commanded

and still command an extensive sale throughout the various States of the United States, and have been a source of great profit to this defendant. 43

This defendant states that, notwithstanding the long and quiet use and enjoyment by the defendant and its predecessors of the said trade mark "BEECH-NUT" for tobacco products, the plaintiff, well knowing the premises, and with the preconceived intention to injure the defendant and with the purpose to defraud it, and with the purpose to deprive this defendant of the benefits and profits resulting from the great reputation acquired by its Beech-Nut tobacco products and with the intent to acquire for itself the benefits and profits of defendant's reputation, and with the intent to assist others to palm off on the public tobacco products, particularly cigarettes, under the name "BEECH-NUT", not manufactured or sold by the defendant, and in willful disregard of defendant's rights in the premises, has recently, but prior to the filing of the bill of complaint, and this answer, to wit: since about June or July, 1919, manufactured or caused to be manufactured, and has endeavored to sell, within the District of New Jersey, and elsewhere in the United States, and now threatens to sell, as defendant is informed and believes, within the District of New Jersey, and elsewhere, an inferior grade of cigarettes under the trade mark "BEECH-NUT", with the intent to deceive and defraud the public, to injure the reputation of defendant, particularly in connection with its Beech-Nut tobacco products, such as scrap tobacco and cigarettes, and to reap and receive for its, plaintiff's own benefit the profits and gains lawfully due defendant, all of which unlawful acts of the plaintiff are an infringement, and threatened infringement of defendant's rights in the premises, and particularly defendant's trade mark "BEECH-NUT" as applied to tobacco products. 44 45

21. Defendant further says, on information and belief, that in pursuannce of its unlawful policy of infringement,

46 and of threatened infringement of defendant's rights in the premises, this plaintiff with full knowledge of the fact that defendant had for many years manufactured and marketed tobacco products under defendant's trade mark "BEECH-NUT", the said plaintiff, in or about June or July, 1919, manufactured and shipped, or caused to be manufactured and shipped an inferior grade of cigarettes packaged in ordinary, cheap white boxes having the word "BEECH-NUT" printed in black letters on the face thereof, and also bearing in plain black letters the name of plaintiff, and that the cigarettes so packaged were shipped into the District of New Jersey, and at-
47 tempted to be sold therein; that these cigarettes packaged as aforesaid did not bear plaintiff's alleged label, or a substantial likeness thereof, (Exhibit No. 1, of the bill of complaint) but such cigarettes packaged as aforesaid presented such a cheap, unattractive appearance, that, if permitted to be sold would and will operate to the injury and damage of defendant's reputation, particularly with relation to its Beech-Nut tobacco products.

That in further pursuance of its unlawful policy aforesaid this plaintilff, with full knowledge of defendant's prior adoption and use of the word "BEECH-NUT" as a trade mark for tobacco products, and its exclusive right
48 thereto, and, as defendant now states on information and belief, for the purpose of injuring and harrassing the defendant in its business of manufacturing and selling Beech-Nut tobacco products, this plaintiff filed in the United States Patent Office, on or about June 25th, 1919, an application for the registration of the trade mark "BEECH-NUT", for Cigarettes, in the Class of Tobacco Products; that said defendant, in order to preserve its rights in the premises, and to prevent the registration of said trade mark by the plaintiff, filed opposition proceedings in the United States Patent Office against plaintiff's application for registration of this trade mark for tobacco products; that thereafter plaintiff filed an an-

swer to defendant's notice of opposition in the United States Patent Office; testimony was taken by the parties, all as will appear from the record of this trade mark opposition in the United States Patent Office, entitled—P. Lorillard Company v. Beech-Nut Packing Company, No. 2805. 49

22. Defendant further says that the foregoing acts, threats and intention of the plaintiff in disregard and defiance of defendant rights in the premises have the effect to and will encourage and induce others to interfere with defendant's trade mark "BEECH-NUT" for tobacco products and to disregard defendant's rights therein, and will furthermore result in irreparable damage, injury and loss to defendant. 50

AND, forasmuch as the defendant can have no adequate relief except in this Court, it is prayed that your Honor grant to the defendant a writ of injunction, as well provisional as permanent, issuing out of and under the seal of this Honorable Court, commanding, enjoining and restraining the said plaintiff, its officers, servants, agents, attorneys and workmen, and each and every of them, from infringing upon or theatening to infringe upon, and from making or selling, or causing to be made or sold tobacco products, in violation of defendant's trade mark "BEECH-NUT" for such products. 51

P. LORILLARD COMPANY,
by BENJAMIN L. BELT,
Vice-President

TREACY & MILTON,
Solicitors for Defendant,
15 Exchange Place, Jersey City, N. J.
LIVINGSTON GIFFORD,
J. GRANVILLE MEYERS,
RICHARD B. CAVANAGH,
R. F. WHITEHEAD,
Of Counsel.

52

State of New York, }
County of New York. } ss.:

BENJAMIN L. BELT, being first duly sworn, deposes and says, that he is Vice-President of P. Lorillard Company, the defendant in the within entitled action; and the person who signed the foregoing answer on behalf of defendant; that he has read the foregoing answer and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes said answer to be true.

53

BENJAMIN L. BELT.

Subscribed to and sworn before me this 11th day of August, 1921.

S. E. SPENCE,
Notary Public.

(Seal)

54

55

IN THE DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.

In Equity
No. 3056.

56

Amendment to Answer.

And now comes P. Lorillard Company, the defendant in the above-entitled cause and amends its answer to plaintiff's Bill of Complaint by inserting the following paragraph after Paragraph 19 of the original answer, and just before defendant's Prayer beginning with the words, "WHEREFORE, this defendant, P. Lorillard Company,":

19a. Defendant further says that in the trade mark opposition proceedings in the United States Patent Office, entitled P. Lorillard Company vs. Beech-Nut Packing Company, No. 2805, and wherein the present defendant, P. Lorillard Company opposed the registration of the trade mark "BEECH-NUT" for tobacco, by the Beech-Nut Packing Company, the plaintiff herein, and which opposition proceedings are more fully referred to and set forth in Paragraph 21 of the Counterclaim of the original answer, and following the taking and filing of testimony with exhibits on the part of both parties to said Patent Office Opposition proceedings, and in due course, a final hearing was had in said Opposition proceedings before the Honorable Examiner of Trade Mark

57

58 Interferences in the United States Patent Office, upon full pleadings and proofs and presentation by complete oral arguments by Counsel for both parties, and that thereafter, to wit, on or about the 8th day of October, 1921, the said Honorable Examiner of Trade Mark Interferences rendered his decision in a lengthy written opinion, sustaining the opposition of P. Lorillard Company to the registration of the word "BEECH-NUT" as a trade mark for Tobacco Products by Beech-Nut Packing Company, and holding that inasmuch as Tobacco Products were goods of different descriptive properties from food products and chewing gum, and as P. Lorillard
59 Company, the present defendant, had adopted and used said trade mark "BEECH-NUT" for Tobacco Products prior to any adoption and use of said trade mark for Tobacco Products by the Beech-Nut Packing Company, the present plaintiff, the said Beech-Nut Packing Company was not entitled to said trade mark for Tobacco Products.

That thereafter, in said Patent Office Opposition proceedings, an appeal was taken by Applicant, the present plaintiff, Beech-Nut Packing Company, from this adverse decision of the Honorable Examiner of Trade Mark Interferences, to the Honorable Commissioner of Pat-
60 ents, and full hearing was had upon the complete appeal record, and briefs were filed, and lengthy oral argument had by Counsel for both parties, and that thereafter, in due course, to wit, on or about the 18th day of January, 1922, the Honorable Commissioner of Patents rendered his decision affirming the decision of the Honorable Examiner of Trade Mark Interferences, and holding that the Applicant, the present plaintiff, Beech-Nut Packing Company, was not entitled to the registration of the trade mark "BEECH-NUT" for Tobacco Products.

That following this decision of the Honorable Commissioner of Patents, affirming the decision of the Hon-

orable Examiner of Trade Mark Interferences, the Beech-Nut Packing Company, the Applicant and present plaintiff, failed to avail itself of its right of appeal to the Court of Appeals of the District of Columbia, and failed to so appeal, and that the adjudication of the Patent Office became final as between the parties as to the subject matter involved, and the failure on the part of the present plaintiff to appeal said Opposition proceedings as aforesaid, is, and does constitute, an acknowledgment of such final adjudication, and plaintiff is estopped in this and any other similar proceedings from claiming and from obtaining any relief whatsoever against this defendant, P. Lorillard Company, in the premises. 61 62

P. LORILLARD COMPANY,

(Signed) By BENJAMIN L. BELT,
Vice-President.

(Signed) MEYERS & CAVANAGH,
Solicitor for Defendant.

63

64

It is hereby agreed that the foregoing amendment to the answer may be filed in this suit.

(Signed) OFFIELD, BULKLEY, POOLE & SCOTT,
By H. McCLURE JOHNSON,
Counsel for Plaintiff.

(Signed) MEYERS & CAVANAGH,
By RICHARD B. CAVANAGH,
Counsel for Defendant.

65

66

73

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Order appertioning times for taking depositions and omitting case from calendar until completion of depositions. 74

On the joint motion of Sebastian Hinton, Esq., Counsel for Plaintiff, and Richard B. Cavanagh, Esq., Counsel for defendant, and upon consideration of the joint affidavit of the said Sebasian Hinton, Esq. and Richard B. Cavanagh, Esq., it is ordered as follows:

1. That the plaintiff herein have until February 15, 1922 wherein to complete the taking of prima facie depositions in its behalf, unless this time be further extended by stipulation or order of Court;

75

2. That the defendant herein have ninety (90) days after the completion of plaintiff's prima facie depositions, wherein to take depositions in its, defendant's behalf, unless this time be further extended by stipulation or order of Court;

3. That the plaintiff have twenty (20) days after the completion of the taking of defendant's depositions, for the taking of such rebuttal depositions, as it, the plaintiff, may desire, unless this time be further extended by stipulation or order of Court;

76 4. That this case shall not be placed upon the January, 1922 Term Calendar of this Court.

(Sgd) J. L. BODINE,
United States District Judge,
District of New Jersey.

Dated: December 13th, 1921.

(Endorsement on cover) "Filed Dec. 13, 1921 at 9 o'clock A. M., George T. Cranmer, Clerk."

77

78

79

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Joint affidavit of Sebastian Hinton, Esq., of Counsel for plaintiff and Richard B. Cavanagh, Esq., of Counsel for defendant. 80

State of New York, }
County of New York, } ss.:

SEBASTIAN HINTON and RICHARD B. CAVANAGH, both being duly sworn, depose and say, that they are respectively of counsel for plaintiff and defendant in this case.

DEPONENTS both further say that the Answer in this case was filed on or about August 13, 1921;

That the case is a large and important trade mark case and is such as to necessitate the taking of numerous depositions throughout the United States.

81

Plaintiff beginning August 16, 1921, has taken by deposition the testimony of considerably more than one hundred (100) witnesses in various towns and cities in Massachusetts, Connecticut, Illinois, Wisconsin and Ohio. The character of the case, however, is such that in spite of the numerous depositions taken, and the diligence exercised by the plaintiff, the said plaintiff has not as yet been able to complete the taking of all prima facie depositions at the date of the making of this joint affidavit and deems it advisable to take other depositions at such remote places as Oklahoma, South Carolina, etc.

82 Upon the completion of the taking of plaintiff's prima facie depositions, defendant desires and intends to take numerous depositions in support of its case, said depositions being of witnesses residing more than one hundred (100) miles from place of trial, or in various parts of the country, and as necessary in the taking of such depositions it is expected it will consume several months, but the taking of the depositions on the part of the defendant, and the completion of defendant's prima facie depositions will be speeded to the utmost under the circumstances.

Affiants, counsel for both parties, appreciating the im-
83 portance of the case and the enormous amount of work necessarily involved in the taking of the depositions, have, therefore, respectfully joined in the accompanying motion relative to times for taking depositions, and for omitting the case from the January, 1922 term of this Court.

SEBASTIAN HINTON,
Counsel for Plaintiff,
RICHARD B. CAVANAGH,
Counsel for Defendant.

Subscribed and sworn to before me this 9th day of December, 1921.

84

AGATHA F. BRESLIN,
Notary Public, Bronx County.
County Clerk's No. 55,
Certificate filed in N. Y. County,
Clerk's No. 205,
Term expires March 30, 1923.

(Seal)

85

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Company, Defendant.
} In Equity No. 2056.

Stipulation re depositions.

86

It is hereby stipulated and agreed by and between the parties to the above-entitled cause, as follows:

(1) That the defendant herein, P. Lorillard Company, shall have to and including August 22nd, 1923, wherein to complete the taking of depositions, de bene esse, or under the Statutes, in its behalf, unless this time be further extended by stipulation or order obtained from the Court.

(2) That after the completion of the time set for the taking of defendant's depositions as above set forth, plaintiff shall have to and including September 1st, 1923, within which to notify defendant of plaintiff's purpose to take rebuttal depositions, de bene esse, or under the Statutes, that is, out of Court, and should plaintiff desire to take such rebuttal depositions it shall have a reasonable time within which to do so, to be agreed between the parties. In case plaintiff elects not to take rebuttal depositions, or in case plaintiff completes the taking of such rebuttal depositions by September 15, 1923, the cause may be

87

88 placed upon the September 1923 calendar of the Court.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Beech-Nut Packing Co.

RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

Dated: New York City, N. Y., June 15th, 1923.

IT IS SO ORDERED:

(Sgd.) J. L. BODINE,
89 United States District Judge.

90

91

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Stipulation re Record.

92

It is hereby stipulated, by and between the parties hereto, that the record in the United States Patent Office Opposition proceeding, entitled P. Lorillard Company vs. Beech-Nut Packing Company,—Trade Mark Opposition No. 2805,—comprising the testimony, stipulations and exhibits of the parties, may be, and the same is hereby incorporated in the present suit, as a part of the record hereof, and shall have the same force and effect as if originally contained herein.

It is further stipulated that either party may use in this case uncertified copies of any and all official decisions rendered in said opposition proceeding, with the same 93
force and effect as if duly certified.

It is further stipulated that copies of the records of the parties in said opposition proceeding, as printed for the Patent Office, may be used herein, without re-printing.

OFFIELD, POOLE, HINTON & SCOTT,
By SEBASTIAN HINTON,
Counsel for Beech-Nut Packing Co.

RICHARD B. CAVANAGH,
Counsel for P. Lorillard Company.

Dated: Canajoharie, New York, February 11, 1922.

94

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Company,
Defendant } In Equity No. 3056.

Stipulation.

As to record of sales of plaintiff—Beech-Nut
95 **Packing Company—for the years 1903-1921, inclusive.**

It is hereby stipulated by and between the parties hereto, through their respective counsel, that the "Table of Sales Statistics" of the Beech-Nut Packing Company, the Plaintiff herein, for the years 1903 to 1921 (inclusive) and hereinbelow set forth, was furnished to the defendant by the plaintiff on April 10, 1922. Plaintiff further stipulates that this table was prepared or transcribed by Plaintiff from its regular books or records, and that the amounts or figures given in dollars and cents for each year are true and accurate.

96

TABLE OF SALES STATISTICS.

BEECH-NUT PACKING COMPANY,

1903-1921.

Furnished
R. B. CAVANAGH,
Counsel for P. Lorillard Co.
by
SEBASTIAN HINTON,
Counsel, Beech-Nut Packing Co.,
April 10th, 1922.

	Total Sales	Reg. Line	Gum	Comp. Tab. Misc. Conf. Bev.
1903-	$ 563,764.37	$ 563,764.37	$	$
1904-	832,906.10	832,906.10		
1905-	1,000,986.83	1,000,986.83		
1906-	1,267,877.81	1,267,877.81		
1907-	1,293,059.92	1,293,059.92		
1908-	1,408,481.33	1,408,481.33		
1909-	1,950,534.60	1,950,934.60		
1910-	2,555,315.85	2,555,315.85		
1911-	2,838,384.99	2,819,441.56	18,943.43	
1912-	3,179,337.79	2,778,822.00	400,515.79	
1913-	4,112,592.99	2,681,110.07	1,431,482.92	
1914-	4,966,337.76	2,484,854.93	2,480,023.48	1,459.35
1915-	5,703,945.39	2,258,356.76	3,288,521.35	157,067.28
1916-	6,598,385.15	2,681,685.97	3,632,127.15	284,572.03
1917-	7,363,678.56	3,407,467.30	3,594,864.53	361,346.73
1918-	6,754,967.21	4,502,462.68	1,853,038.28	399,466.25
1919-	8,979,586.35	5,378,607.40	2,233,860.24	1,367,118.71
1920-	11,138,226.51	5,435,324.37	3,955,902.00	1,747,000.14
1921-	12,109,573.68	4,618,207.28	6,281,945.41	1,209,420.99

Plaintiff further stipulates that in said "Table of Sales Statistics" in the column bearing the caption, "Total Sales" appear true and accurate figures in dollars and cents of the total sales of all goods sold and delivered by the Beech-Nut Packing Company, yearly, from 1903 to 1921 (inclusive). The remaining three columns of the chart, bearing the captions, "Reg. Line", "Gum" and "Comp. Tab. Misc. Conf. Bev.", indicate how the total figures or amounts shown in the "Total Sales" column are divided amongst various items of Plaintiff's sales business. For example, in the year of 1921 the total sales were $12,109,573.68, this sum or amount being made up or composed of $4,618,207.28, sales in Regular Line;

100 $6,281,945.41, sales in Gum; and $1,209,420.99, sales in Compound Tablets, Miscellaneous Confectionery and Beverages, etc. It is further stipulated that the figures or sums herein given also include goods which have been returned by dealers in course of business. This item (returned goods) amounted to .0043 of the total in the year 1920 and was the highest it has ever been in that year.

Plaintiff, upon request of Defendant, explains the falling off in total business in 1918, and of the Gum business 1918-1919 as follows:

The reasons for the falling off in sales of Gum 1918-
101 1919 (which caused the falling off in the total sales in 1918, shown by the figures) were as follows:

1. Plaintiff was unable to secure prime chicle in these years in sufficient quantities to meet the demand for its gum.

2. Plaintiff was restricted by the Government in the quantity of sugar it could obtain.

During the greater portion of 1918-1919 Plaintiff was allotting gum shipments on the basis of one-half to one-third of the amount ordered and turning away a large amount of business in gum, etc. Gum
102 production did not meet the demand until well along in 1921.

It is further stipulated by the parties that the furnishing of this "Table of Sales Statistics" by the Plaintiff to the Defendant may be considered as a compliance with requests of Defendant's counsel for data along this line made during the examination of Christina Carswell, statistical manager of Plaintiff, and the production of said Christina Carswell and the witness Francis E. Barbour for further ex-

amination as to statistics of the business of the Plain- 103
tiff is waived.

OFFIELD, POOLE, HINTON & SCOTT,
Counsel for Plaintiff.

MEYERS, CAVANAGH & WHITEHEAD,
RICHARD B. CAVANAGH,
Counsel for Defendant.

Dated: May 27, 1922.

104

105

106

DISTRICT COURT OF THE UNITED STATES,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company
In Equity No. 3056.

DEPOSITIONS taken in behalf of P. Lorillard Co., defendant, pursuant to notice and by agreement of counsel, before Daniel T. O'Connell, a notary public within and
107 for the County of Suffolk, Commonwealth of Massachusetts, acting as special examiner by consent of counsel, at the office of said Daniel T. O'Connell, Room 401, Exchange Building, 53 State Street, Boston, Massachusetts; also at Lynn, Salem and Lawrence, Massachusetts, beginning the 8th day of August, A. D., 1922, at 10 o'clock, a. m.

Present:

SEBASTIAN HINTON, of OFFIELD, POOLE, SCOTT & HINTON,
Counsel for the Beech-Nut Packing Company.

108 RICHARD B. CAVANAGH, of MEYERS, CAVANAGH & WHITEHEAD;
Counsel for P. Lorillard Co.

FERDINAND BIERINGER, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. (By Mr. Cavanagh.) What is your name, age, residence and occupation?

A. My name is Ferdinand Bieringer.

Q. 2. Age; how old are you? 109

A. I am 40.

Q. 3. Residence?

A. Brighton, 1697 Commonwealth Avenue.

Q. 4. And Occupation?

A. Tobacconist and cigar maker,—well, cigar maker to start with, and tobacconist afterwards.

Q. 5. How long have you been in the cigar business?

A. Ever since I was in this country; that is, about 25 years.

Q. 6. Where is your present place of business located?

A. 123-125 Court Street, but I am also with Bieringer-Hanauer Company, and some other companies. That is 110 a big concern, Bieringer-Hanauer Company.

Q. 7. Is this store on Court Street located in the business or residential section of the city?

A. Business section.

Q. 8. What kind of goods do you handle in that store?

A. Well, we carry a general line of everything; American Tobacco Company's goods; Lorillard tobaccos,—everything that people demand.

Q. 9. Do you sell anything else besides tobacco products?

A. Well, we sell, gum, a little gum; that is about everything in the candy line,—that is gum is about the 111 only thing we handle.

Q. 10. What Lorillard brands or products do you sell?

A. We carry about the general line that sells in New England. Of course they make a good many different brands that sell elsewhere, but we sell New England demands.

Q. 11. Will you name some of the brands of P. Lorillard Company tobacco that you sell?

A. Mechanic's Delight; Planet; Neptune; Good Smoke; Union Leader; Stag; Just Suits in all forms; Sensation Tobacco.

112 Q. 12. What cigarette brands of Lorillard's do you carry?

A. We carry Moguls; Murads; Egyptian Dieties; Helmars; Turkish Trophies, and Beech-Nut cigarettes, naturally.

Q. 13. Do you also carry Beech-Nut Scrap Tobacco?

A. We do; yes; in a package like that one there (referring to a package of Beech-Nut Scrap Tobacco.)

Q. 14. What chewing gum brands do you carry?

A. Juicy Fruit; Wrigley's Spearmint, and Double Mint; and Beech-Nut,—that is about all we carry.

Q. 15. Who, if you know, makes the Beech-Nut cigar-
113 ette and the Beech-Nut Scrap Tobacco,—that is, who is the manufacturer?

A. P. Lorillard Co.

Q. 16. And who, if you know, is the manufacturer of the Beech-Nut Chewing Gum?

A. The Beech-Nut Packing Company.

Q. 17. State whether or not you were ever confused or under the impression that the Beech-Nut cigarette, such as the package I show you, or the Beech-Nut Scrap tobacco, a package of which I also show you, and both of which are in this case as exhibits, were ever made by the Beech-Nut Packing Company,—were you ever con-
114 fused as to who manufactured them?

A. I never was confused in my handling it. It is a different package, different altogether, entirely different. The Beech-Nut Packing Company and the name Lorillard is not confusing.

Q. 18. What manufacturer's name is on that package of cigarettes?

A. P. Lorillard Co.

Q. 19. What manufacturer's name appears on the Scrap tobacco?

A. P. Lorillard Company.

Q. 20. I show you a box of Beech-Nut Chewing Gum.

Whose name appears on that package as the manufac- 115
turer?

A. Well, it is Beech-Nut Packing Company.

Q. 21. Do you handle any other products of the Beech-Nut Packing Company?

A. No, that is all.

Q. 22. How long have you been buying and selling the Beech-Nut cigarettes.

A. Well, it must be, I should think about two years ago, two years or two years and a half. The cigarettes, you mean?

Q. 23. Yes.

A. Two years and a half,—since they were out. I 116
don't know exactly the time they were first out, but I was one of the first ones to have them.

Q. 24. How long have you been handling this Beech-Nut Scrap tobacco?

A. Oh, I handled that for a long time, I couldn't tell you; I guess it is 5 years. I handled Beech-Nut a long time, years ago, I couldn't exactly tell you.

Q. 25. Did you ever buy any Beech-Nut cigarette or Beech-Nut Scrap tobacco believing they were made by the Beech-Nut Packing Company?

A. No.

Q. 26. Did you ever sell any Beech-Nut cigarettes or 117
Beech-Nut Scrap tobacco as the product of the Beech-Nut Packing Company?

Mr. Hinton: Objected to as indefinite and as calling for a conclusion of the witness.

A. No.

Q. 27. State whether or not you ever heard of the Beech-Nut Packing Company putting out any tobacco products?

A. No.

118 Q. 28. State whether or not you ever knew or heard of the Lorillard Company putting out any chewing gum, or food products?

A. I never knew or heard of it.

Q. 29. State whether or not you ever heard any comment, or inquiries from customers or other people which would indicate that they thought the Beech-Nut Packing Company, the manufacturers of the chewing gum, were also the manufacturers of the Beech-Nut cigarette and the Beech-Nut Scrap tobacco?

Mr. Hinton: Objected to as calling for a mere con-
119 clusion of the witness.

A. No; they simply asked for what they wanted, and they didn't care who it is made by.

Mr. Hinton: Objected to as a mere opinion of the witness without the slightest foundation.

Q. 30. Then I understand your answer to be that you never had anybody ask about it?

A. No.

Q. 31. State whether or not you ever had any cus-
120 tomer, in making a purchase, ask you for Beech-Nut cigarettes or Beech-Nut Scrap tobacco made by the Beech-Nut Packing Company?

A. No.

Q. 32. State whether or not you ever had any conversation with any representative of the Beech-Nut Packing Company in connection with the present case, and, if so, state it in your own words?

A. There was a man there about a year ago,—of course he didn't give me his name,—and he was inquiring about how the Beech-Nut cigarettes were selling, and afterwards he told me that he was interested in the Beech-Nut gum, and asked me if I thought that the Beech-

Nut gum is made by them that put out the Beech-Nut 121
cigarette. I told him by all means no, and also I should think if the cigarette is out, it ought to help the sale of Beech-Nut gum, and that that company should pay P. Lorillard so much for using it on the cigarette. That is what I told that man, so he was not there very long, and he walked out.

Q. 33. How long ago was this?

A. That was about a year ago, I can't remember the exact time, but it was about a year ago.

Q. 34. Where did this talk take place?

A. 123-125 Court Street.

Q. 35. What is the reputation of the P. Lorillard Co. 122
in the tobacco business, if you know?

A. Well, the best cigarette manufacturers,—they make the best cigarettes and tobacco; they are the oldest concern, and they have no other than the best cigarette and tobacco manufactured all over the country.

Q. 36. State whether or not you ever saw, bought or sold a package of Beech-Nut cigarettes which did not have the name "P. Lorillard Co." on it?

A. The package is always the same; they make it just the same as they ever did with "P. Lorillard Co." on it.

Q. 37. And it is just the same as the package with "P. Lorillard Co." on it in your hand? 123

A. Yes; and they advertise in the paper always P. Lorillard Co.

Q. 38. State whether or not you ever bought or sold or saw a package of the Lorillard Company that did not have on the package, "P. Lorillard Co."

A. It is the same upon this here now. There was never any change.

Q. 39. State whether or not you would have any difficulty in distinguishing the appearance of the packages, or wrappers, of the Beech-Nut cigarette and the Beech-Nut tobacco from Beech-Nut chewing gum box and package?

124 A. No. I can't see how anybody can make a mistake. Of course it is a different sort of package and label, a different sign. If a man comes in and asks for a package of gum, he wants gum, and he won't go out of the store until he gets the gum; and if he wants cigarettes, he won't go out until he gets the cigarettes. So I don't think there is any confusion there.

Q. 40. What would be your opinion of a customer that came into your store and wanted a package of Beech-Nut chewing gum, and took a package of cigarettes, or a package of Scrap tobacco in place of the gum?

A. I don't see how he could do that. If he wants gum,
125 he wants gum. It has no relation, one with the other. I don't see how a man could make such a mistake. If I go into a store and I want a certain thing, I am going to buy just what I want. Of course there is a difference in them, one is confectionery and the other is tobacco.

Q. 41. In what manner, if you know, does the P. Lorillard Co. advertise its Beech-Nut cigarettes and Scrap tobacco, and to what extent?

A. Well, they advertise mostly in magazines and newspapers; the Beech-Nut cigarettes are advertised in newspapers mostly, and also in some magazines.

Q. 42. Have you seen such advertisements of P. Lor-
126 illard Co. of such products?

A. Yes; they have their name on every package that they put out.

Q. 43. Do you have any difficulty in reading the name "P. Lorillard Co." through the glazed tissue paper on the cigarettes,—the cigarette packages?

A. No. It is a thin paper put on to keep out the air; it is silk paper and you can see the name,—you can see the name P. Lorillard Co. and also on here (indicating Scrap tobacco package.)

Q. 44. Would you have any difficulty in reading the name on the package through a window glass from the street?

A. No; I could see it plainly. 127

Q. 45. State whether or not you ever handled or sold any product of the Beech-Nut Packing Company, the gum manufacturers, which resembled in color and appearance this package of Lorillard cigarettes or this package of Lorillard Scrap tobacco?

A. No; the only thing I handle is the gum.

Q. 46. Can you state whether or not it is common practice in business to mark goods with the word "Quality", or similar expressions, indicating quality?

A. Yes, they sometimes put on "Quality" "Blend," etc.

Q. 47. Referring to this exhibit package of Beech- 128
Nut cigarettes of P. Lorillard Co., where the words "Perfect Quality" appear upon the panel on one side, whose name is used in conjunction with that expression?

A. P. Lorillard Co. They do that to tell you who it is made by, and things like that; it is a natural way of advertising and telling what is inside.

Q. 48. State whether or not you regard tobacco products, such as cigarettes or Scrap tobacco, to be of the same, or of a different class of goods from confectionery, food products and beverages?

A. There is a difference, yes.

Q. 49. Do you regard them as a different class of mer- 129
chandise?

A. A different class of merchandise altogether. One has nothing to do with the other.

Q. 50. How long have you known of the P. Lorillard Co., the tobacco manufacturers?

A. Myself, 25 years.

Q. 51. What class of customers do you handle, and about how many a day in your store?

A. The middle class, and, well, we handle on an average about 600 or 700 customers a day.

Q. 52. And, as I understand your testimony, you never had any of these customers or any of your cus-

130 tomers make any comments or remarks which would lead you to believe that they thought the Beech-Nut cigarette or the Beech-Nut Scrap tobacco, like these exhibit packages, were made by the Beech-Nut Packing Company, did you?

A. No.

Q. 53. When you had this conversation with the man who said he was from the Beech-Nut Packing Company, state whether or not he asked you if there would be any confusion, or you had any customers that were confused in regard to it?

A. He didn't ask me any more questions after I told
131 him that he should pay Lorillard Company a certain sum for using their names on the cigarette, so he walked out.

Q. 54. Why did you tell him that?

A. Because I thought it was a good thing for them; it is a good thing for the Beech-Nut Packing Company for someone else to use the same thing on cigarettes; it advertises the brand and makes their product sell so much quicker. Of course one has nothing to do with the other. That is the way I figure it out, and of course that is my belief. Of course Lorillard Company, they could make it any brand; if they would use some name
132 other than Beech-Nut, they would get along just the same, they would sell that brand just the same, because their tobacco is known, and they could sell it under any brand.

Mr. Cavanagh: I think that is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) Mr. Bieringer, you have a store at 125 Court Street, Boston?

A. Yes.

X-Q. 2. And you are also in the Bieringer-Hanauer Co.? 133

A. Yes, sir.

X-Q. 3. What does Bieringer-Hanauer do?

A. They are manufacturers' agents; they are selling agents.

X-Q. 4. Of tobacco products.

A. Yes, sir.

X-Q. 5. Do they put any private brand on tobacco and cigars?

A. Private brands, no; sometimes we do, but as a rule they are general brands.

X-Q. 6. Do you have them manufactured by tobacco manufacturers? 134

A. Yes, sir.

X-Q. 7. And supplied to you with their label on them?

A. Yes, sir.

X-Q. 8. Now, you sell the Beech-Nut gum?

A. We do.

X-Q. 9. You don't sell much of that?

A. Well, we sell fair, not much, not so much as other gum.

X-Q. 10. Did you ever make a display in your window of Beech-Nut gum?

A. We did.

X-Q. 11. Did you ever make a display in your window of Beech-Nut cigarettes? 135

A. Yes, sir.

X-Q. 12. And Beech-Nut Scrap tobacco?

A. Yes, sir.

X-Q. 13. When was that?

A. At the beginning. when the Beech-Nut cigarette came out, It was my idea; I made a display in the window, and put in everything in the brand of Beech-Nut; I put it in the window just to make a display, that is all; it was an idea of my own. If I had had more brands, I would have put in more; I made a regular Beech-Nut

136 display. I never believe in putting only one item in the window, I always like to put in many different items, because it brings me business. The more items you have in a window, the more business you get. This is my own idea.

X-Q. 15. Then you subsequently took the Beech-Nut gum out of the window, did you not?

A. No; I didn't take it out of the window; I left it in there.

X-Q. 16. Didn't you shortly after you put that display of Beech-Nut gum, and Beech-Nut cigarettes and Beech-Nut scrap tobacco in your window, remove the gum?

137 A. Well, sometimes we take out the tobacco; we might have taken it out, because sometimes we are short of gum and we take it out of the window, but for no other reason.

X-Q. 17. I am asking for the fact?

A. I don't remember taking any of the stuff out of the window.

X-Q. 18. Of course that was about a year ago, wasn't it?

A. Yes.

X-Q. 19. I wish you would study that over in your mind for a minute and see if you can't remember whether

138 a Lorillard man came around to your place of business and asked you to take that gum out of the window?

A. He might have, I wouldn't say. He might have come in and the clerk might have taken it out.

X-Q. 20. Wait a minute. Will you try and think of it.

A. I left the cigarettes and the gum in there, I think, until I cleaned out the window again.

X-Q. 21. That is your present recollection of it?

A. Yes, sir.

X-Q. 22. Did you tell me last spring, Mr. Bieringer,—do you remember meeting me last spring?

A. Yes.

X-Q. 23. Did you tell me then that you had the gum

and the cigarettes and the scrap tobacco in the window? 139

A. Yes, sir.

X-Q.24. And that you took the gum out; do you remember that now?

A. It might be, I am not sure.

X-Q. 25. And do you remember that you told me that the Lorillard man came around and told you that there was going to be some trouble?

A. Well, that might be; I suppose I got some letter from them, probably telling one of the clerks to take it out.

X-Q. 26. Weren't you told that while that trouble was going on you better take the gum out? 140

A. They might have, I am not sure.

X-Q. 27. Now, Mr. Bieringer, you say you put this Beech-Nut set of brands in the window together,—

A. Yes.

X-Q. 28. —in order to make a regular Beech-Nut display?

A. Yes.

X-Q. 29. And if you had had any other Beech-Nut products, for instance, the mint and hard candies, you would have put them all in there, all in one window, in one of your windows?

A. All in one of the windows. 141

X-Q. 30. In other words you would feature the Beech-Nut line. Beech-Nut cigarettes and Beech-Nut scrap tobacco and Beech-Nut gum, and the purpose and idea you had in mind doing that was something like this,—

Mr. Cavanagh: Ask him what the purpose was, and don't dictate to him.

Mr. Hinton: I am entitled to ask leading questions.

Mr. Cavanagh: But you are not entitled to dictate to the witness.

Mr. Hinton: This interference with the cross examination is strenuously objected to.

142 X-Q. 31. Will you explain to me, Mr. Bieringer, what your real idea was in putting that line of Beech-Nut stuff in the window?

A. It was just an idea of my own, to make a Beech-Nut display. I don't know anything about the insides of the concern. I just put it in on my own idea, that is all. In fact, I made that window display on my own ideas; I was not asked to do it, I just done it myself.

X-Q. 32. Yes, but why did you have all the Beech-Nut stuff in the window?

A. Just the idea to have a Beech-Nut display. If I had had more Beech-Nut brands, I would have put them
143 in. The more you put in of the different kinds, the more business you get. Some people don't smoke cigarettes, some people chew tobacco, and some chew gum, and if they saw it all in the window they would come in and buy it, whatever they wanted.

X-Q. 34. Is that the idea?

A. If he wants gum he buys gum, and if he wants cigarettes he buys cigarettes.

X-Q. 35. Yes, I appreciate that perfectly, but if a man had established a liking for Beech-Nut gum and then he wanted cigarettes, and he saw them displayed in that way in your window, he would be apt to give the cigarettes a
144 trial, would he not?

A. Not always. Every man may possibly like, not the cigarette, but a different cigarette, and they are not going to buy what they don't want. Not everybody buys Beech-Nut cigarettes. Lots buy other cigarettes. But a person looks in the window and perhaps he buys Beech-Nut cigarettes, and perhaps he buys some other brand.

Mr. Hinton: Objected to as evasive and argumentative.

X-Q. 36. Mr. Bieringer, now you have testified in your direct examination twice that you told a Beech-Nut

representative that the Beech-Nut Company ought to pay the Lorillard Company for putting its name on the cigarettes. 145

A. I really believe so, because the Beech-Nut gum is benefiting by it.

X-Q. 37. The Beech-Nut gum is benefiting by having the cigarettes on the market?

A. By having that Beech-Nut name, yes.

X-Q. 38. You have found that they are sufficiently connected together so that the advertising of one helps the advertising of the other?

A. It is my belief that so long as it is a good article, a good merchandise,—and P. Lorillard Co. only puts out good merchandise, and it is no disgrace to the Beech-Nut gum, you see, because it is a very good thing, and the more brands of different kinds of merchandise, the better. Of course I don't figure candy and gum the same, it is a different merchandise, so you see I think it helps the Beech-Nut goods; tobacco, it is different goods. Gum is gum and candy is candy, and cigarettes are cigarettes, and then goods all together help each other. 146

X-Q. 39. Going back to the point on which we were talking, I understand that you find that the advertising and sale of Beech-Nut cigarettes reacts on the gum, helps the gum?

A. It helps the gum; yes. 147

X-Q. 40. They are sufficiently connected together so one has an effect on the other?

A. That is, having that name in your mind all the time, "Beech-Nut" the more you see that in your mind, the more popular it gets, and it is very easy to think of it; and Lorillard makes good merchandise, as everybody knows. Lorillard stands for quality all the time,—your money back, if you want it. They always stand by their goods that they put out.

X-Q. 41. And because the cigarettes are good merchandise, as you say, it helps the gum?

148 A. Yes; if it was poor merchandise I would say different, I would say it spoils their name of Beech-Nut.

X-Q. 42. And hurts the sale of the gum?

A. It might hurt the sale, probably, but when they put out good merchandise, it helps.

X-Q. 43. Yes, I think I understand your meaning, Mr. Bieringer. Now, that was somewhat the theory that you had in mind, Mr. Bieringer, when you made this display window of Beech-Nut items, when you put the different Beech-Nut items in the window, that they helped each other?

A. Yes, that they helped each other. Of course any-
149 thing I put in the window, it sells. I never take one item and make a display of it, because it is expensive for the store. Everybody smokes cigarettes, and if a man smokes cigarettes, of course I want him to smoke cigars, and when something is put in the window to interest everybody who goes by, they are very apt to step in and buy something.

X-Q. 44. And it is a very nice and effective thing to do, to put all those items bearing that name of "Beech-Nut" in together, as you have said?

A. Well, it was my idea exclusively, nobody elses.

X-Q. 45. Now, after talking with me for a few minutes
150 about this, Mr. Bieringer, and having recollected the situation enough at least to know that it was your idea exclusively, I wish you would try to remember again whether you did not take that Beech-Nut gum out of the window because you were told by a Lorillard man that there was some trouble brewing, and until that was over you had better take the gum out of the window?

A. It might have been; it might have been one of my clerks took it out, but, as a rule I don't take out anything out of the window until we clean the window out. I think I left it in there for a week or more. But if they had asked me, I had just as soon do it. Nobody is looking for

any trouble. We are putting gum right along in the window; we are always putting gum in the window. 151

X-Q. 46. Now, Mr. Bieringer, I wish you would try to remember back, as well as you can, to last spring when this was going on that we have just been talking about, and you had this display in the window, are you sure that while that display was in the window you didn't have any comments or hear any remarks about it from your customers?

A. No, not a single word.

X-Q. 47. You don't remember any at the present time?

A. No; that is positive, not a single thing, that is sure. They don't seem to care, they don't ask any questions; 152 if a man wants cigarettes he buys cigarettes, and if he wants gum, he don't care who it is made by, so long as it is good merchandise, and he buys it.

X-Q. 48. They don't come in and stand and have any talk with you about it at any time?

A. No, the customer don't care to know about it; all he knows, if it is good goods, he buys it; they never care who makes it.

Mr. Hinton: The part of the answer stating that the public does not care about who makes it is objected to as volunteered and as the mere opinion of the witness. 153

Mr. Cavanagh: In this connection it appears that Mr. Hinton is exceedingly desirous to have the witness' opinion on any subject which he thinks might be of benefit to himself.

X-Q. 49. Now, you said in your direct examination, Mr. Bieringer, that the Lorillard Company's tobacco is known, and that you are selling their tobacco. You mean you are selling it to the retail customer, or to the dealer?

A. To the people,—they can sell to the dealer or to

154 the consumer. Any amount they put out, they can sell it always successfully, any brand they put out.

X-Q. 50. Well, you think the customer does not care, then, who makes the stuff that he buys?

A. Well, they don't care so long as it is a good article. P. Lorillard Co. they always make good goods. You see that is half the battle,—that is the battle. It is the merchandise. You can't go to work and put out a brand, and if it is not good goods, it won't sell.

X-Q. 51. And it doesn't make any difference to the customer who makes it?

A. No; so the question is, is it going to sell? And
155 Lorillard makes good goods all the time.

X-Q. 52. And Beech-Nut brand on the cigarettes is not a help in the sale of them, so long as Lorillard puts them out?

A. They could go to work and pick out another brand than "Beech-Nut" because it might sell better. It is the merchandise, the tobacco that is in it. It is not the name of the cigarette that is selling the goods. It is the quality that sells the goods, it is not the name.

X-Q. 53. The name does not make any difference?

A. No difference. If you turn out Beech-Nut cigarettes in poor quality, you can't sell your brand,—you
156 can kill your brand over night, just one lot of poor goods, just one little lot, that spoils the whole lot, and it will take ten years to get it back again on the market.

X-Q. 54. In other words, if the name "Beech-Nut" stands for quality goods in the minds of the public, and the consumer should buy just one or two items with that name on that he didn't like it would hurt the business very much?

A. Well, the Beech-Nut, if it is very poor quality goods, it is not very good for the goods.

X-Q. 55. It would hurt the whole thing, the gum business and all the other business?

A. Yes; but Lorillard always produces the best, what-

ever they have. The name "P. Lorillard Co." means 157
guaranteed good quality at all times or your money back, if you want it. If I go to work and have cigarettes and they are not in good condition, they are glad to take the goods back and give me what I want. They don't want to have any customer getting old stuff, so their goods is always of the right kind. The same thing would happen with gum also. When gum gets old, gets stale, it is no good. Beech-Nut gum, when it gets old—I never tried it—but when it gets old it is never any good either.

X-Q. 56. Well now, Mr. Bieringer, just one more question: When you put that display in the window that you 158
told us about this morning, was that when you first got the Beech-Nut cigarettes?

A. Yes; that was my own idea.

X-Q. 57. And that is why you put it in the window?

A. That was my own idea, because I liked to do business with Lorillard, because they are fair in their methods; whatever they promise you, they do, and that is what all concerns will not do. I would do more for them than anybody else, because they are more fair than any other concern, and that is why I do all I can for them at all times, because they are fair in every way.

X-Q. 58. You are a great admirer of Lorillard Com- 159
pany?

A. I am, because they are very fair and square,—that is the reason. Also The American Tobacco Company is very fair but Lorillard is really the best of all concerns.

X-Q. 59. Are you acquainted with Mr. Belt, Vice President of the Lorillard Company?

A. Yes; they all come over here to see us.

X-Q. 60. Do you remember whether he came to see you last year?

A. Yes; they all come right along, all the representatives of the different companies; it is not only Lorillard,

160 but the other concerns in the same way. They want to know what is going on, especially when they put out a new piece of goods.

X-Q. 61. He is a good friend of yours?

A. No, not any more than anyone else, but I like their style of doing business, because they are doing business in a business way.

X-Q. 62. And you would not want to do anything or say anything to hurt the Lorillard Company?

A. No, but if they would do what is not right, I would just as well tell them to go to the dickens as anybody else. If anyone is fair, I am fair with them. But they
161 are always very fair.

X-Q. 63. When you made this display of this Beech-Nut gum and Beech-Nut cigarette and Beech-Nut Scrap tobacco when you first got the Beech-Nut cigarettes, did you find that cigarette sold in your store pretty well?

A. Well, they sold pretty fair, pretty well. I will tell you why they sold pretty good. They sold pretty good at that time because the Camel cigarettes, and all the other cigarettes were 18 and 20 cents a package, and Beech-Nuts were one of the first ones to come out with a price of 15 cents, and of course there was bound to be a fair marginal profit for the retailer, and of
162 course on account of that we pushed them. It was the man behind the counter that pushed the cigarettes, because there was a fair marginal profit in them. That is the reason they sold very good at that time.

Mr. Hinton: The last part of the answer is objected to as not responsive.

X-Q. 64. Well, there were 15 cent brands of cigarettes on the market at that time, weren't there?

A. Yes, there might have been, but they were made by small concerns; and then the friends of Lorillard

—Lorillard has a lot of friends in the business, and 163
they would do a great deal for Lorillard, while with the smaller companies they won't do it. All the brands, no matter what brand they put out, they will put themselves out of the way, and push them for the Lorillard Company because of course, they are always fair in their method of doing business.

X-Q. 65. And the Beech-Nut cigarette then went quite well from the very beginning?

A. They went very well at that time, because on account of the price, that had a great deal to do with it, the new price of 15 cents. Of course since that time the price on other cigarettes has come down and of 164
course the Beech-Nut cigarettes don't sell so well now.

X-Q. 66. They weren't any better than other 15 cent brands on the market, were they?

A. Well, they advertised them, their jobber pushed them all he could; the retailer did all he could, because he made a fair legitimate profit. They would have pushed it just the same if it had been a different name.

Mr. Hinton: The last part of the answer is objected to as argumentative and not responsive, and volunteered.

165

X-Q. 67. Did they go better than "111"?

A. Well, "111," they didn't work it quite as well; the American Tobacco Company didn't have as many friends as the Lorillard Company, and of course it wouldn't sell quite as well. It means the more friendship you have in the business, the better it goes.

X-Q. 68. The "111" were put out by the American Tobacco Company?

A. Yes, sir.

X-Q. 69. And that is a 15 cent cigarette?

A. "111" sell for 10 cents,—I think at that time it

930

166 sold for 15 cents, but they have changed the package since then, and it sells for 10 cents.

X-Q. 70. And the American Tobacco Company is a very large concern?

A. Yes, sir.

X-Q. 71. So far as you know, it is about as large as P. Lorillard Co.?

A. Yes, but probably at that time I would not do as much with them—I didn't buy the goods direct, but of course that is understood—

X-Q. 72. But you found the "Beech-Nut" cigarettes went better than "111"?

167 A. Yes, because I made a display. If I didn't make a display in my window on my own account, if there didn't anything appear in the window, I don't think they would have sold so well. If I go and put Beech-Nut gum into the window, and I put in the whole window Beech-Nut gum, I am going to sell a lot of Beech-Nut gum; if it is a good article it will repeat, and if it is not, it won't repeat,—I will sell it once and never again. I can sell anything I put in the window, in a busy section of the city where I am, because the people go by and see it, and they come in and buy. If I didn't put any cigarettes in the window I would not have sold
168 so many. It was my own effort; it was my own work which helped it. It also helped the Beech-Nut gum. When I had Beech-Nut gum in the window I sold more Beech-Nut gum, because I had it in the window, it helped the Beech-Nut gum along as well.

X-Q. 73. Mr. Bieringer, just one more question: Do you know whether Scrap chewing tobacco sells well or poorly in this territory?

A. Scrap tobacco is not a big seller in this market; it sells more out West; it sells big out West, but we never sell a big amount of Scrap tobacco. Everybody keeps it, but I don't call it a fast seller. Cut Plug is

the best seller in this part of the country. If I put Scrap tobacco in the window, Beech-Nut Scrap, it will sell, because there are a lot of the people who come from out West, and if they don't see it, they will buy something else, but if you put it in the window, where they can see it, it sells. I manage to put Scrap tobacco in the window always, because people from out West see it in the window and they feel at home. You can sell anything you put in the window,—the window is a great salesman. 169

X-Q. 74. And you mean it doesn't make any difference what the name is, if you put it in the window. it will sell? 170

A. As I said before, if you make your Beech-Nut gum poor, and only one lot, it will spoil it. If you make your Beech-Nut cigarettes poor, they won't sell. It is not the name. Of course, it is a good idea for a manufacturer to advertise, but that don't make the goods at all. If the goods are not good the merchandise will be killed.

X-Q. 75. Well, I suppose if you got an attractive name, you might sell the first package, or some of it, but if it was not good the customer would not buy any more of it?

A. He would not come back again. Those brands never live; they live only a short time. You see the Beech-Nut cigarette is a pretty fair seller. If it was not a good cigarette it would not sell at all, it would be dead and buried by this time; nobody would know about it no more. Poor brands, they come on the market, and they go out just as fast as they come in, if they are not good merchandise. Lorillard has been always successful in their brands; when they put out a brand and advertise you can know it is going to go. 171

X-Q. 76. Always good?

A. Always good; every brand they make is.

172 X-Q. 77. Now, your answer suggested one more thought to me. Would you consider the Lorillard Beech-Nut cigarette to be their highest quality that they make?

A. It is as good as many of their other brands, as the Camel cigarette, which costs more.

X-Q. 78. Is it as good as the Egyptian Dieties?

A. I would not say that, because I never made any cigarette; but the Egyptian Dieties is a different brand, it is a Turkish tobacco, and makes a better cigarette than the other tobacco, I suppose. I would not say that is so, but I suppose it is a different tobacco, and
173 it has a market. But Beech-Nut is just like Camels, Camels is higher price, but the Beech-Nuts are just as good.

X-Q. 79. But so far as quality goes, it is higher quality, is it not?

A. I can't give you a correct answer on that; I can't tell you. I can tell you about cigars, but cigarettes, I can't tell you. The only way is to open the package by a manufacturer and he can tell you what is in the cigarette itself. I don't know.

X-Q. 80. Then you consider the Beech-Nut cigarettes the highest grade they make?

174 A. Yes.

X-Q. 81. And Beech-Nut cigarettes—

A. (Witness interrupting): Of course there is more money made on high-grade cigarettes; they spend more in advertising them, and their profit is bigger; no matter what it is, on the other grade there isn't so much profit in it. I suppose there is a bigger demand. The high priced cigarettes, you don't sell so many of them as you do of the middle priced cigarettes, because there are more poor people than rich people. A brand like Camel is a much better brand, I would say, than a brand like the Dieties, because there are more people

who would smoke them; there are more middle people, 175
you know. Everybody can't afford to pay a quarter for a package of cigarettes, when they would pay 15 cents. (The witness, when answering this question, was handling a package of Egyptian Dieties).

X-Q. 82. Now, you consider the Pall Mall and the Egyptian Diety to represent a class of cigarettes sold to—

A. To the higher class people.

X-Q. 83. Sold to what?

A. To the better class of people.

X-Q. 84. At a higher price?

A. At a higher price. 176

X-Q. 85. Representing to-day probably a higher quality of goods?

A. Supposed to be. When you pay a higher price for anything you are supposed to get a better merchandise, but it may not be.

X-Q. 86. And the Beech-Nut cigarette would be a second grade?

A. Yes.

Mr. Hinton: That is all.

Re-direct Examination. 177

R-D Q. 55. (By Mr. Cavanagh.) In your last answer, will you state whether or not the Beech-Nut is second grade in price, or whether it has a standing in its line?

A. As I said before, I don't know what is in the cigarette, what it is made of, only it is a second grade price,—I would make it better that way, it is a second price.

R-D Q. 56. Will you state whether or not at the price at which it sells you would consider that it is a cigarette of quality?

178 A. It is a very good cigarette in quality at the price, as good as any, and better than most of them.

R-D Q. 57. Will you state whether or not you have ever tried to sell any Beech-Nut cigarettes, or ever did sell any Beech-Nut cigarettes on the reputation of the Beech-Nut Packing Company or the Beech-Nut gum?

Mr. Hinton: Objected to as calling for a conclusion of the witness.

Mr. Cavanagh: Mr. Cavanagh is calling for a fact, and not any conclusion.

179 A. No, never.

R-D Q. 58. In your experience is it necessary to sell any Lorillard produce on the reputation of the Beech-Nut Packing Company?

A. No.

R-D Q. 59. Now, in your cross-examination you were referring to some window, and the fact that you had a display of both Beech-Nut gum and Beech-Nut cigarettes in the window?

A. Yes.

R-D Q. 60. Will you state whether or not any Lorillard man told you to decorate that window in that way?

180 A. No, nobody told me anything about making that display. It was my own idea. If I had expected any trouble from it, I would not have done it, because I didn't have nothing in my mind at all, just made a Beech-Nut window exclusively.

R-D Q. 61. Now, in your cross-examination, probably as a tobacco man, you have been asked considerably about our opinion as to one kind of goods helping the other. Will you state from your experience if the Beech-Nut gum was a poor quality so that the customer did not want it, but the Beech-Nut cigarette was of a good quality and in demand, would the fact that the

gum was of a poor quality interfere with the sale of 181
the cigarette?

A. If the gum was of a poor quality it would spoil the sale of the cigarette, you mean?

R-D Q. 62. Yes.

A. Well, if it was a poor quailty it might spoil the name in a way,—it might do that.

R-D Q. 63. I am speaking now of Lorillard's Beech-Nut cigarette.

A. Yes.

R-D Q. 64. Whose reputation does that sell on, so far as you know?

A. It sells on the reputation of P. Lorillard Co. 182

Mr. Hinton: Objected as attempting to make the witness change his answer.

R-D Q. 64. Would you say from your experience whether or not the reputation of a tobacco manufacturer would depend upon the reputation of a bacon manufacturer, or of a chewing gum manufacturer?

A. No, it would not.

Mr. Hinton: Objected to as a hypothetical question containing an assumption of facts which are 183
not sufficiently complete, and as calling for the opinion of the witness.

R-D. Q. 65. Will you state whether or not you ever had any customer order from you cigarettes in the name of the Beech-Nut Packing Company?

A. No.

R-D Q. 66. And will you state whether or not you ever sold a Beech-Nut cigarette as the product of the Beech-Nut Packing Company?

A. No, sir.

Mr. Cavanagh: That is all.

184 *Re-cross Examination.*

R-X Q. 88. (By Mr. Hinton.) In your last answer you mean you never told any customer that the cigarettes were the product of the Beech-Nut Packing Company?

A. No. In fact, they didn't ask me. The customers don't ask who they were made by. They want the goods, the merchandise all the time, and you can ask customers, and I don't think they are able to tell you who they are made by.

185 Mr. Hinton: The last part of the answer is objected to as not responsive, and volunteered, and as a conclusion of the witness.

That is all.

Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

HASKELL SHARF, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

186

Q. 1. (By Mr. Cavanagh) What is your name, age, residence, and occupation?

A. Haskell Sharf.

Q. 2. Your age?

A. 38.

Q. 3. Your residence?

A. 183 Walnut Street, Chelsea.

Q. 4. And your occupation?

A. Manager cigar store.

Q. 5. Where is this cigar store located?

A. It is 253 Atlantic avenue.

Q. 6. Boston? 187

A. Boston, yes.

Q. 7. What kind of goods do you sell in this store?

A. We sell all the popular brands.

Q. 8. Of what?

A. Of cigarettes and tobacco and cigars.

Q. 9. Do you sell any confections?

A. Yes; confections.

Q. 10. What kind?

A. Candy, chewing gum, tonic, besides cigars, cigarettes and tobacco.

Q. 11. Do you know of the P. Lorillard Co., tobacco manufacturers? 188

A. Oh, sure, since I went in business.

Q. 12. How long have you known of them?

A. I have known them for over six years,—since I have been in that place.

Q. 13. Do you sell the Beech-Nut cigarette and the Beech-Nut Scrap tobacco, like these two packages I show you and which are exhibits in this case?

A. Yes, sir, I sell them.

Q. 14. Do you sell the Beech-Nut chewing gum like this package of Beech-Nut chewing gum?

A. Yes.

Q. 15. Who, if you know, is the manufacturer of Beech-Nut cigarettes and Scrap tobacco? 189

A. P. Lorillard Co.

Q. 17. Who, if you know, is the manufacturer of the Beech-Nut chewing gum?

A. Well, I never knew; I used to buy it direct from the candy man, see; I never interested myself to know who was making it. Of course I knew it was not P. Lorillard Co.,—it was a name which was strange. I don't sell much of that Beech-Nut gum, and I was not buying much of it, so it didn't interest me,—I used to get it from the candy man.

190 Q. 18. You recognize the package of Beech-Nut chewing gum when you see it, don't you?

A. Oh, sure.

Q. 19. State whether or not you were ever confused or deceived into believing that P. Lorillard Co., the tobacco manufacturers, were also manufacturers of the Beech-Nut chewing gum?

A. No, sir, of course not. I always know that, that they were different manufacturers from the cigarette; that the Beech-Nut cigarettes were made by P. Lorillard Co.

Q. 20. Whose name appears on the packages of Beech-
191 Nut cigarettes?

A. P. Lorillard Co. with a revenue stamp on it, which the Beech-Nut gum has not got.

Q. 21. State whether or not you ever heard any comment or inquiries or remarks from customers which would lead you to believe that they thought that the manufacturer of the Beech-Nut chewing gum was also the manufacturer of the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco?

A. I never heard anybody come in and put up the question, or ask if they were made by the same people. They see the Beech-Nut cigarette advertised before they
192 come to get it, see the name on it, P. Lorillard Co., that make all the B. L. tobacco, and all the Scrap tobacco, and that sort of thing, and they know just as well as I did who was making it, because they always saw it advertised on the posters in the window, see,—Beech-Nut cigarettes, made by P. Lorillard, so you see they saw it before they came into the place. Their question was answered in the window on the posters.

Mr. Hinton: All of the answer after the first sentence objected to as a mere opinion and conclusion of the witness offered without the slightest foundation.

Q. 22. As I understand you, the name P. Lorillard Co. 193
appeared on the advertisement and on the packages themselves?

A. Yes; on the package, yes.

Q. 23. Did you ever buy or sell a package of Lorillard Beech-Nut cigarettes, or a package of the Lorillard Scrap tobacco under the impression or representation that it was a product of the Beech-Nut gum people?

A. No, sir.

Q. 24. State whether or not you ever heard any customer ask in your store or elsewhere for a package of cigarettes, Beech-Nut cigarettes, or Beech-Nut Scrap tobacco, made by the same people that make the gum? 194

A. I have not heard it, no.

Q. 25. Do you have any difficulty in reading the name "P. Lorillard Co." through this glazed paper wrapper?

A. No; I could see it very plain, because we handle so many of them we know exactly who makes them. It would never enter my mind that that was made by any other concern than P. Lorillard.

Q. 26. State whether or not it is the practice in the tobacco business to wrap cigarette packages in transparent paper?

A. Yes, most all of them in the last three years.

Q. 27. State whether or not you ever knew the manu- 195
facturer of the gum to put out any tobacco products?

A. No.

Q. 28. Did you ever know or hear of P. Lorillard Co. putting out food products, or chewing gum?

A. No.

Q. 29. State whether or not you regard tobacco as the same or a different class of goods from confections, chewing gum, beverages and food products?

A. I consider it is a different product, sure.

Q. 30. Would you ever confuse a package of this Beech-Nut Scrap tobacco, or a package of these Beech-Nut cigarettes of the Lorillard Company with a package

196 or box of the Beech-Nut chewing gum, such as is before you here?

A. No, sir.

Q. 31. Why not; what is the reason for your answer?

A. Well, they always come in and ask for Beech-Nut cigarettes, see? if he wants gum he says, "Beech-Nut gum", or "Beech-Nut cigarettes", if he wants them.

Q. 32. A man, if he came into your place and wanted a package of chewing gum, and took a package of Beech-Nut cigarettes or a package of Beech-Nut Scrap tobacco in place thereof, what would your opinion of him be?

A. You mean—

197 Q. 33. If a man came in and wanted a package of chewing gum, and he walked out with cigarettes, or a package of the Scrap tobacco, what would you think of him?

A. Well, I would consider him as not being awake, or being crazy. If he wanted cigarettes he would not accept gum, or if he wanted gum he would not accept Beech-Nut cigarettes,—that is out of the question.

Q. 34. State whether or not you have any difficulty in distinguishing the appearance of the Beech-Nut Scrap tobacco package and the Beech-Nut cigarette package from the gum package?

198 A. Well, there is a difference in appearance, and that trade-mark,—they have the "Beech-Nut Cigarette", and "Beech-Nut Scrap" different from the Beech-Nut gum,—you can easily see the difference.

Q. 35. You can readily discern the difference in the appearance of the packages?

A. Oh, sure.

Q. 36. Did you ever know of the Beech-Nut gum manufacturers putting out a package of goods resembling in appearance this package of Scrap tobacco of Lorillard's?

A. No.

Q. 37. Did you ever hear or know of them putting out

a package of goods resembling the Scrap tobacco package? 199

A. No.

Q. 38. What is the reputation of the P. Lorillard Co. in the tobacco business, so far as you know?

A. Well, the majority claim it is a high grade tobacco that they are putting out. They established their name by that; that is what makes them sell their brands, it has been so many years in the market. In order to work up a name, I suppose they had to put in high grade tobacco.

Q. 39. State whether or not any representative of P. Lorillard Co., or any jobber or wholesaler, from whom you purchase the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco ever represented to you that these were products of the same people who made the gum? 200

A. No; never did.

Q. 40. State whether or not in your experience it is the practice in the trade to use the word "Quality" or some similar expression to indicate a high grade of goods?

A. The word "Quality" is used.

Q. 41. On this package of Beech-Nut cigarettes, I call your attention to the words "Perfect Quality". Whose name appears in conjunction with that statement?

A. P. Lorillard Co. 201

Q. 42. What class of customers do you handle in your store?

A. Well, different kinds; we have a good many of the laboring class.

Q. 43. About how many a day, approximately?

A. Well, about 200 or 300 customers.

Q. 44. Two or three hundred?

A. Yes.

Q. 45. Did you ever know of any of these customers being confused, or under the impression that the Beech-Nut Scrap tobacco, or the Beech-Nut cigarettes were made by the Beech-Nut gum people?

202 Mr. Hinton: Objected to as calling for a mere conclusion and opinion of the witness and answer based on hearsay.

A. No; never have.

Mr. Cavanagh: I think that will be all.

Cross-Examination.

X-Q. 1. (By Mr. Hinton) How many people work in the cigar store that you are manager of, Mr. Sharf?

A. I am there alone.

203 X-Q. 2. You are there alone?

A. Yes, sir.

X-Q. 3. You manage it yourself, then?

A. Yes; I manage it myself.

X-Q. 4. Now, do you ever have people come in your store and ask for just "Beech-Nut" without specifying whether they want the gum or cigarettes?

A. No,—no.

X-Q. 5. You don't remember that?

A. I don't remember that, no.

X-Q. 6. When you put in the Beech-Nut cigarettes, do you remember how you came to put them in? In
204 other words, did a Lorillard man or a jobber, come around to you and tell you that they were coming out with this brand of cigarettes?

A. Yes; I had the Lorillard man around telling me,—taking my orders.

X-Q. 7. Telling you you ought to take them,—ought to carry them?

A. Yes.

X-Q. 8. And you knew they were a Lorillard product before you ever put them in?

A. Yes, sir.

X-Q. 9. Now, you say you don't remember having

heard any customer make any comments, remarks or in- 205
quiries about these Beech-Nut cigarettes, and who they were made by?

A. No; I have not had that.

X-Q. 10. You don't remember any such remarks or inquiries?

A. I don't remember any, no.

X-Q. 11. Were you trying at the time, we will say a year ago, to remember,—or were you asked to make a note of, or remember any such remarks that you might hear?

A. No.

X-Q. 12. You never paid any particular attention to 206
that; you would not pay any particular attention to that, would you?

A. No, it never came to my mind.

X-Q. 13. I suppose waiting on a great many people every day, you hear a lot of things that you don't remember?

A. Yes; don't remember, sure.

X-Q. 14. And you might have heard such remarks and forgotten them, of course?

A. I might have, but I don't remember any.

X-Q. 15. You don't think you did?

A. I don't think I did; no. 207

X-Q. 16. In the ordinary case a man who is buying Camel cigarettes, for instance, comes in and says, "Give me a package of Camels" and puts down his money and takes the goods and walks out?

A. Yes.

X-Q. 17. And he don't discuss with you who made them?

A. No.

X-Q. 18. And you can't tell by looking at his face when he walks in, or by looking at the back of his head when he walks out, what he thinks about that?

A. No.

208 X-Q. 19. And nobody ever told you about these Beech-Nut cigarettes, who they were made by,—none of your customers ever said anything like that to you?

A. Well, most of them knew, I suppose.

X-Q. 20. Did they tell you?

A. Well, some of them that come in, yes, I suppose they know, because most of them that use regularly tobacco, some of them knows just exactly who makes them.

X-Q. 21. Do they tell you that?

A. Sometimes they do.

X-Q. 22. How many have you had tell you that?

A. Oh, very few.

209 X-Q. 23. Well, how many?

A. I couldn't tell you exactly, just a few.

X-Q. 24. Five?

A. Five, probably, something like that.

X-Q. 25. Then five people told you they knew who made the Beech-Nut cigarettes?

A. Well, there is no question but certain of them do; they seem to know that they are made by P. Lorillard. Sometimes they come in and ask, Is it the very same—are these Beech-Nuts, naming not only the signatures but the brand, the very same made by, as the others,—he says the name, Beech-Nut cigarettes.

210 X-Q. 26. Some of them name the Beech-Nut cigarettes?

A. Yes; it seems to me they know who made them.

X-Q. 27. Well, I want to know what they said?

A. Well, the question is whether they were made by P. Lorillard Co.

X-Q. 28. They said so?

A. Yes, sir.

X-Q. 29. They said the Beech-Nut cigarettes were made by P. Lorillard Co.?

A. Yes.

X-Q. 30. About five people would come into your store,

and they said that the Beech-Nut cigarettes were made 211
by P. Lorillard Co.?

A. I couldn't say four or five, but some.

X-Q. 31. They came in and said that the Beech-Nut cigarettes were made by P. Lorillard Co.?

A. I can't say exactly whether it is so or not, but I think I heard it.

X-Q. 32. Who started the conversation, did they start the conversation?

A. Did they start it? Yes.

X-Q. 33. They would come up and say, "Beech-Nut cigarettes are made by P. Lorillard Co.," and walk out,—perhaps buy a package and walk out?

A. Yes. 212

X-Q. 34. Is that the way it happened?

A. Well, it happened this way: We have packages, like the Beech-Nut Scrap tobacco, made by P. Lorillard, and these Beech-Nut cigarettes came out later, and they would say, "We know they are making the cigarettes, too, the same company that makes the scrap tobacco."

X-Q. 35. They would start the conversation in that way?

A. Yes, sir.

X-Q. 36. That is, you would be standing there and a man would come in and say, "I know the cigarettes are 213
made by P. Lorillard Co.?"

A. Yes, sir.

X-Q. 37. How about the Camel cigarettes, would people come into your store and say, "I know the Camel cigarettes are made by the Reynolds Company?"?

A. Yes, sir.

X-Q. 38. They would come in and tell you that?

A. Yes.

X-Q. 39. How about the Fatima cigarettes, do they come in and tell you that they know the Fatima cigarettes are made by Liggett & Meyers?

A. I haven't had them.

214 X-Q. 40. It has been just the Beech-Nuts and Camels where they have done that?

A. Just the Beech-Nuts and Camels. Perhaps the same thing happened with the Fatimas, I can't say that.

X-Q. 41. You didn't start the conversation at all?

A. No.

X-Q. 42. You never had them ask you who makes these Beech-Nut cigarettes?

A. No.

X-Q. 43. Or any of them?

A. No.

X-Q. 44. But you have had them tell you who made
215 them?

A. Yes.

X-Q. 45. Did you ask them?

A. No; of course I knew who were making them, so there was no reason for me to ask them.

X-Q. 46. So your statement with respect to what everybody knows, or what the customers know, is based upon about five people, as you say, walking into your store and saying that the Beech-Nut cigarettes are made by P. Lorillard Co.?

A. Yes, and it seems to me—it is foolish probably—that they know the Beech-Nut cigarette is made by P.
216 Lorillard ; it may be just because I was handling them and was used to it.

X-Q. 47. Probably because you knew yourself?

A. I knew myself, but it seemed to me that they all came in and knew they were made by P. Lorillard.

X-Q. 48. Now, there are two ways in which you could get that impression, one is by being a mind reader, the other is by having a customer tell you. Now, you say that there weren't more than five persons came and told you voluntarily who made them, and the rest didn't say anything.

A. The conversation was not to me, it was just talking between themselves, having a conversation.

X-Q. 49. An argument? 217

A. Well, no, no argument; they just happened to talk that P. Lorillard is making this brand, and this brand, because there are a lot of other brands. Sometimes they figured how many brands they controlled, and all that, of cigarettes; they figured Murads and Moguls, and all that, and they named the Beech-Nut cigarettes.

X-Q. 50. You had customers say that they made the Murads and Moguls?

A. Murads, Moguls, Trophies and Egyptian Dieties, and so forth.

X-Q. 51. Your customers know that the Murads, and so forth, are made by P. Lorillard? 218

A. Yes.

X-Q. 52. They know that the Camels are made by Reynolds?

A. Some of them, I suppose. Of course I know myself, but I don't think all the customers know the various brands, but they know about these Beech-Nuts.

X-Q. 53. And they know that the Fatimas are made by Liggett & Meyers,—do you think all your customers know that?

A. I wouldn't say all, but most of them, because the regular smoker notices the package, and it says on the package where it is made,—who makes it. 219

X-Q. 54. They never told you that,—that is a guess on your part, isn't it?

A. Yes.

X-Q. 55. And all this about what they told you is just guess-work, isn't it, on your part?

A. Yes, I suppose they know.

X-Q. 56. Not more than five people, you say, ever mentioned it to you?

A. Yes; but I could hear the conversation, saying the brands which were made by P. Lorillard, also naming the Beech-Nut cigarette.

220 X-Q. 57. They began by reciting the list of brands made by the Lorillard Company?

A. Yes, sir.

X-Q. 58. A certain percentage of your customers did, but you don't know how many?

A. I don't know how many; I never thought it would come up, so I didn't keep tabs.

X-Q. 59. It is just an opinion on your part?

A. Yes.

X-Q. 60. Now, Mr. Sharf, what is printed on a package of Camel cigarettes underneath the picture of the Camel?

221 A. Well, the most that you see is the Camel itself.

X-Q. 61. Yes, but what is printed under the picture of the camel, do you know?

A. Under the picture?

X-Q. 62. Yes?

A. Why, the name, I guess.

X-Q. 63. What name?

A. Reynolds, I think.

X-Q. 64. Well, that is just a guess, isn't it; you don't know that it is?

A. I don't know, that is so, but the camel,—the camel is what attracts,—the picture of the camel attracts.

222 X-Q. 65. Oh, that is the way you identify the package?

A. Yes, sir.

X-Q. 66. Now, how about the Lucky Strike cigarettes? What is printed on the package of Lucky Strike cigarettes underneath the red panel?

A. Underneath, then it is the name,—of course it is the name.

X-Q. 67. What name?

A. American Tobacco Company.

X-Q. 68. That is printed right on the package of Lucky Strike cigarettes, near the bottom?

A. Yes.

X-Q. 69. You have seen it there? 223

A. I think so; I can't say, but I think so.

X-Q. 70. I show you a package of Camel cigarettes and you observe that the name "Reynolds" is not printed underneath the picture of the camel?

A. No; it is on the other side.

X-Q. 71. Perhaps you will take my word for it that the name American Tobacco Company is not printed underneath the red panel on the Lucky Strike package.

A. Perhaps not.

X-Q. 72. Now, how many cigarettes, Camel cigarettes, do you handle in the course of a week,—just a rough guess? 224

A. About 8,000 or 10,000.

X-Q. 73. And how about the Lucky Strikes?

A. About the same.

X-Q. 74. And in spite of the fact that you hand out, if you do hand out, this large number of Lucky Strike and Camel cigarettes, you never happened to notice what was printed on the front of the package, did you?

A. Well, I did, but not on all, of course. I did of course, but I would not remember; but I always notice it when I pick up a package, I always notice it quickly.

X-Q. 75. You notice it every time you pick up a package? 225

A. Yes.

X-Q. 76. And you notice it 8,000 times a week, or more.

A. Oh, sure.

X-Q. 77. But you don't remember it?

A. No.

X-Q. 78. Now, if you never noticed what is printed on the front of a package of Camel cigarettes underneath the picture of the Camel in spite of the fact that you hand out so many packages, would you expect your customers to notice and remember what is printed on

226 the front of that package underneath the picture of the camel so that they could tell you?

A. Well, I suppose some of them would and some of them would not.

X-Q. 79. Well, very few though?

A. Very few,—I suppose a few do.

X-Q. 80. Would you expect your customers, all of them, to notice this name, "P. Lorillard Co." on this package?

A. Well, I do. It is right on the front there. I should expect them to. I don't know whether they do or not, but it is right on the front there.

227 X-Q. 81. You never heard any of them say they had seen it there?

A. Well, it never came out, such conversation as that.

X-Q. 82. Yes; it is an opinion of yours?

A. Yes, an opinion, because it is right there on the front of the package.

X-Q. 83. But they would not see what is on the front of the Camel cigarette?

A. Well, they always advertise them; they should know, because they have been putting out posters and advertisements of Beech-Nut cigarettes.

X-Q. 84. Do they advertise the Camels?

228 A. The Camels they advertise, they do that with Camels too.

X-Q. 85. Do they do that with the Chesterfields?

A. Yes; I always noticed on the Beech-Nut cigarettes, just on the front of the package, "P. Lorillard Co."

X-Q. 86. Now, what is the striking feature as you think of it now, of the Fatima cigarette; how would you identify a package of Fatima cigarettes, by the picture of a girl on the front?

A. By the picture, no, sir; by the name that is on top of the picture.

X-Q. 87. And Lucky Strike has that red panel on the front? 229

A. Yes.

X-Q. 88. That is what takes your eye?

A. Yes.

X-Q. 89. And the Camels is the picture of a camel?

A. Yes.

X-Q. 90. That central device is the conspicuous feature of the package?

A. Yes.

X-Q. 91. In other words, you could give me a pretty good picture of the central panel on the Lucky Strike?

A. Yes. 230

X-Q. 92. And the picture of the Camel on the Camel cigarettes?

A. Yes.

X-Q. 93. And the picture of the girl on the Fatima cigarettes?

A. Yes.

X-Q. 94. And the sloping name on the Chesterfields?

A. Yes.

X-Q. 95. That is what takes your eye and that is what you spot the package by?

A. Yes.

Mr. Hinton: That is all. 231

Re-direct Examination.

R-D Q. 46. (By Mr. Cavanagh.) I just want to ask you one question: Who makes the Lucky Strike cigarette?

A. American Tobacco Company.

R-D Q. 47. And who makes the Camel cigarette?

A. Reynolds.

R-D Q. 48. And who makes the Fatimas?

A. The Fatimas let me see,—it is on my tongue, but I can't just say.

232 R-D Q. 49. You can't recall who makes the Fatima?
A. I can't remember exactly, I can't recall that.
R-D Q. 50. Who makes the Murad?
A. P. Lorillard.
R-D Q. 51. Who makes the Mogul?
A. P. Lorillard.

Mr. Cavanagh: I think that is all.

Re-cross Examination.

R-X Q. 96. (By Mr. Hinton.) Does the Fatima sell more or less than the Beech-Nut cigarette, in your store?
233 A. Well, they sell a little less. It is a higher priced cigarette, you see.
R-X Q. 97. Which one do you sell the most of, the Fatima or the Beech-Nut?
A. The Beech-Nut.
R-D Q. 98. Much more?
A. Well, quite a little.
R-D Q. 99. But you sell an awful lot of Fatimas?
A. Well, we sell quite a few, but not as many.
R-D Q. 100. It is one of your leading brands?
A. Well, as against the Fatimas, of course the Beech-
234 Nut, but the Camels is the leading one.
R-D Q. 101. The Fatimas would be among the first five you sell?
A. Yes, sir; it is among the leading brands.
R-D Q. 102. And you don't remember who makes the Fatimas?
A. I do remember, it is on my tongue, the name, of course, but I can't say.

Mr. Hinton: That is all.
Mr. Cavanagh: That is all.
Deposition closed.
Signature waived.

235

ELEAZER LEBEWOHL, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age, residence, and occupation?

A. My name is Eleazer Lebewohl.

Q. 2. Age?

A. 50.

Q. 3. Your resiidence?

A. 28 Brainerd Road, Allston.

236

Q. 4. And your occupation?

A. Cigars, tobacco and men's furnishings.

Q. 5. Where is your store located?

A. 69—71 Causeway Street, Boston.

Q. 6. Are you the owner of this store?

A. Yes, sir.

Q. 7. How long have you been in the cigar and men's furnishings business?

A. Well, I am 30 years in cigars and tobacco, and about 18 in men's furnishings.

Q. 8. Do you sell any other kinds of goods in the store besides tobacco products and men's furnishings?

237

A. Oh, yes; we sell candy and gum.

Q. 9. Is this store located in a business or residential section?

A. In a business section, right near the North Station.

Q. 10. About how many customers do you serve, in a general way?

A. Why, I would imagine about 800 a day.

Q. 11. Do you handle cigarettes?

A. Yes.

Q. 12. What brands do you handle?

238 A. Oh, we handle most all of the popular brands of cigarettes.

Q. 13. Do you know of the P. Lorillard Co.?

A. Oh, yes; done business with them since I have been in business.

Q. 14. How long is that?

A. 30 years.

Q. 15. What is the reputation of P. Lorillard Company in tobacco?

A. One of the leaders and one of the oldest in the world, I always understood.

Q. 16. Who, if you know, makes the Beech-Nut
239 cigarette, like this exhibit package and the Beech-Nut Scrap tobacco like this exhibit package?

A. P. Lorillard Co. Their name is right on there.

Q. 17. Were you ever under the impression that those were made by any other concern than P. Lorillard Co.?

A. No; never.

Q. 18. What kind of gums do you handle?

A. We handle Wrigley's—well, Spearmint, of course, and Beech-Nut, and Pepsin. That is about the only thing.

Q. 19. Who, if you know, makes the Beech-Nut gum, like the package which I show you?

A. Why, I imagine the gum company, the Beech-Nut
240 Gum Company. Of course I buy them of a jobber, but I always supposed the Beech-Nut Gum people made it.

Q. 20. Did you ever buy any Beech-Nut cigarettes or Beech-Nut chewing tobacco direct from the manufacturer?

A. No.

Q. 21. You buy them through a jobber?

A. Through a jobber; yes.

Q. 22. Were you ever under the impression that the Beech-Nut cigarette and the Beech-Nut Scrap tobacco, like these two exhibit packages, were made by the same people that made the chewing gum?

A. Oh, no; not for a moment, no. They are entirely 241
different products.

Q. 23. Did you ever know of any person, or hear any inquiry from any customer which would lead you to believe that such person or customer thought that the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco were made by the people who made the Beech-Nut gum?

A. I never had it come up since I was selling it. If they come in for Beech-Nut gum, they say, "Give me a package of Beech-Nut gum", and if they come in for Beech-Nut cigarettes, they say, "Give me a package of Beech-Nut cigarettes".

Q. 24. Did you ever know the manufacturers of 242
Beech-Nut chewing gum to put out any tobacco products such as Beech-Nut Scrap tobacco?

A. No.

Q. 25. Did you ever know or hear of P. Lorillard Co. manufacturing confections, or gum?

A. No; only tobacco.

Q. 26. State whether or not you have ever seen a package of Beech-Nut cigarettes which did not have the name "P. Lorillard Co." on it?

A. Always like that, to my knowledge.

(Witness refers to exhibit package of Lorillard 243
Beech-Nut cigarettes.)

Q. 27. And likewise state whether or not you ever saw a package of Beech-Nut Scrap tobacco which did not bear the word "Lorillard" on it?

A. Never.

Q. 28. To what extent, if you know, does the P. Lorillard Co. advertise its tobacco and cigarettes in this Boston neighborhood?

A. Well, I know that every brand they put out, they advertise it very extensively, but the extent of the

244 advertising I cannot state. I know that their brands are well advertised, and that there is a demand for them, created by their advertising.

Q. 29. State whether or not in your opinion the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes of Lorillard are sold on the reputation of the Beech-Nut Packing Company?

Mr. Hinton: Objected to as calling for a mere opinion of the witness.

A. No; Lorillard's reputation only.

245 Q. 30. Would you have any difficulty in reading the name "P. Lorillard Co." on the cigarette package, or the name "Lorillard" on the Beech-Nut Scrap tobacco package?

A. No; it is right on the face of the package,—right on the face,—you can't help seeing it. It is just the same as the other products that they advertise.

Q. 31. Would you have any trouble in reading that name through the glazed paper?

A. No.

Q. 32. Would you have any difficulty in distinguishing the general appearance of the Beech-Nut cigarette

246 package and the Beech-Nut Scrap tobacco package from the gum package?

A. No; the appearance and everything is entirely different,—the size and general appearance.

Q. 33. Did you ever buy or sell the Beech-Nut Scrap tobacco, or the Beech-Nut cigarettes as the product of the Beech-Nut gum people?

A. No.

Q. 34. There was never any confusion in your mind about it?

A. No, none whatever.

Q. 35. State whether or not you regard tobacco and

cigarettes as being of the same or a different class of goods from the chewing gum? 247

A. Entirely different.

Q. 36. And if a customer wanted to purchase some Beech-Nut chewing gum and went away with a package of these Beech-Nut cigarettes or a package of Beech-Nut Srap tobacco in place of it, what would be your opinion of him?

A. Demented.

Q. 37. State whether or not you ever had any jobber represent to you, or sell to you Beech-Nut cigarettes or Beech-Nut Scrap tobacco as the product of the Beech-Nut gum people? 248

A. Never.

Q. 38. Whose product did they sell it to you as?

A. Lorillard's.

Q. 39. How long have you been selling the Beech-Nut cigarettes of Lorillard?

A. Why, since they have been out; just as soon as they came out with their cigarette we put them right in. I can't tell you the exact period, but from the time they started advertising them, we put them right in, just as with all their products; when they come out we put them right in, because we know there is a sale created by advertising. 249

Q. 40. So far as your knowledge is concerned, is it customary to wrap packages of cigarettes in transparent paper like this Beech-Nut cigarette package?

A. Yes, quite a number are wrapped in that way.

Q. 41. State whether or not, so far as you know, it is the trade practice to use the word "Quality" in connection with high grade goods?

A. Always.

Q. 42. Whose name appears in conjunction with the words "Perfect Quality," on this cigarette package?

A. P. Lorillard Co.

Mr. Cavanagh: I think that will be all.

250 *Cross Examination.*

X-Q. 1. (By Mr. Hinton.) Mr. Lebewohl, you run a men's furnishing store and sell cigars and tobacco as a side line?

A. Yes, sir.

X-Q. 2. Do I understand by "men's furnishings" clothing and haberdashery?

A. Well, haberdashery, no clothing, unless you call khaki pants clothing.

X-Q. 3. That store is located in a suburb of Boston?

A. Not a suburb; it is on one of the main streets,
251 the street where the North Station is located, Causeway Street.

X-Q. 4. How many clerks have you in your store?

A. At the present time we have two.

X-Q. 5. Including yourself?

A. Yes, sir; three in all.

X-Q. 6. Do you relieve each other?

A. Yes.

X-Q. 7. So that there are always two down there?

A. Oh, yes, always two on duty.

X-Q. 8. Do you sell confectionery of any kind?

A. Confectionery and gum.

252 X-Q. 9. And tobacco and cigarettes?

A. Yes.

X-Q. 10. Now, I wish you would try to remember when you put in these Beech-Nut cigarettes. Did a jobber or some Lorillard agent come to you and get you to stock these goods?

A, The Lorillard agent.

X-Q. 11. And he came around and told you that they were going to put out these goods, and that you should put them in?

A. Yes, sir.

X-Q. 12. And you knew he was a Lorillard man?

A. Yes.

X-Q. 13. And of course you knew before you saw the goods that they were a Lorillard product? 253

A. Yes; they would come in and say they were from the Lorillard people; they always do, no matter what they sell.

X-Q. 14. Now, you testified that people come and ask for Beech-Nut gum. Of course they won't take cigarettes if they want gum, and vice-versa; that is true, isn't it?

A. That is correct.

X-Q. 15. Did you ever have anybody come in your store, that you can remember, and just ask for "Beech-Nut", — "Give me a package of Beech-Nut"? 254

A. Well, I will tell you: When they ask for "Beech-Nut' we usually know that they mean Beech-Nut tobacco, because if they want Beech-Nut gum they generally say, "Beech-Nut gum", but if they say "Beech-Nut" we know that they want a package of Beech-Nut tobacco.

X-Q. 16. Do you have your gum and cigarettes on the same counter?

A. Oh, no; we have a candy stand at the side of the counter, and our cigarettes are on little shelves.

X-Q. 17. If a man walked up to the candy side, the candy counter, and asked for Beech-Nut gum, he would help himself to it? 255

A. Help himself; it is right in sight there.

X-Q. 18. How long have you handled tobacco products?

A. Oh, 30 years,—that is, not in this particular store, but in the store next door. You see they combined the two and we had to get out two years ago.

X-Q. 19. Can you tell me, offhand, what is printed on a package of Fatima cigarettes underneath the picture of the girl?

A. That I can't say.

X-Q. 20. How about Camel cigarettes, do you know

256 what is printed on front of a Camel cigarette package under the picture of a camel?

A. No, I can't say. I have so many different articles, you know, that those things don't fasten to my memory, to tell you truthfully, but I can pick out any particular cigarette that you might call for, but to tell you what was printed on the package, I couldn't do it. My memory is not good enough to do it.

X-Q. 21. And yet you have no difficulty in picking out a package of Camel cigarettes?

A. No; the style of the package is so different, it is easy to pick it out.

257 X-Q. 22. You mean the picture of the camel makes it easy?

A. Yes, and it has a different color from other cigarettes; they all differ somewhat.

X-Q. 23. Could you remember and picture a package of Beech-Nut cigarettes in your mind as to what is on the front of the package?

A, Certainly I can't, what is on the front; but the whole package itself, it is different. That is not any comparison with a package of gum. I suppose you refer to that.

X-Q. 24. No, I was not referring to that.

258 A. But I supposed that was what you referred to by the cigarettes, on account of a package of gum.

X-Q. 25. Now, you testified that you didn't remember that anybody ever came in and asked you whether the Beech-Nut cigarettes, or Beech-Nut scrap tobacco, were made by the gum people?

A. No.

X-Q. 26. Did you pay any particular attention a year ago to remember that, or did you try to make a note to remember if anybody would ask you that question?

A. Why, I didn't; but I knew that the Beech-Nut gum people made food products, see? And therefore if anything of that kind — if they had asked anything of that

kind it would impress it on my mind, because I have 259
bought Beech-Nut bacon and I knew they had other products. To my mind I never knew of anybody to ask that.

X-Q. 27. You don't remember that?

A. I don't remember it; if they had, it would have struck me—it would have called my attention to the fact that two big houses like these would have the same name on their products, and I think I would remember that.

X-Q. 28. Did it impress you as strange at the time that two big houses like the Beech-Nut Packing Company and the Lorillard Company should use the same 260
kind of a label on their goods?

A. No, because I had the idea that the one was a manufacturer of food products, and the other tobacco products, something entirely different; because the Beech-Nut Packing Company I knew made, as I have said, bacon, and other food products, so I didn't get the idea that they were manufacturing the cigarettes.

X-Q. 29. If a man came into your store to buy Camel cigarettes, he walks up and asks for Camel cigarettes and puts down his money and walks out again?

A. Yes.

X-Q. 30. And unless he happened to tell you, you 261
would not know who he thought made that porduct?

A. No; they never ask.

X-Q. 31. Not being a mind reader you can't tell what they have in their mind, and you can't tell why he is buying the product, or asking for it?

A. No, sir.

X-Q. 32. Do you buy your Beech-Nut gum from a tobacco jobber sometimes?

A. No; I buy it from a confectioner.

X-Q. 33. And your tobacco from another man, usually?

262 A. Yes.

X-Q. 34. When you speak about the reputation of the Lorillard Company, you mean its reputation in the tobacco trade?

A. As being an old, reliable, concern, and handling their merchandise for so many years it impresses it on your mind.

X-Q. 35. You naturally would deal with them on that account?

A. Yes; and the merchandise being so extensively advertised too, you know.

X-Q. 36. What are the leading Lorillard brands of
263 cigarettes which you have found to be the best sellers?

A. You mean any cigarettes?

X-Q. 37. Yes.

A. Well, I will tell you: In buying tobacco, I have in mind buying the tobacco, see, and my attention is so much occupied with all the other little details that I cannot tell you right off what they are,—you know, to be truthful to you.

X-Q. 38. Yes.

A. You see with the work on both sides of the store,—we work on both sides of the store, and if I am called on the tobacco side, I jump over to the
264 tobacco counter, and I know what the Camel cigarettes are, in the tobacco line; and if I want tobacco, I have my man make out a list, what he knows he wants, and he telephones for it. He handles the tobacco more than I do, in the purchase, but in the selling, he don't. If you were to ask me the different makers a few years ago, I could have told you, but I have had misfortune, and it has rather dulled my memory, to be frank with you, and I can't tell you for that reason.

X-Q. 39. Do you know who makes the Mogul cigarettes?

A. I couldn't tell.

X-Q. 40. Do you know who makes the Murad cigarette? 265

A. I couldn't tell.

X-Q. 41. Do you know who makes the Egyptian Dieties?

A. S. Anargyros.

X-Q. 42. That is a well-known tobacco manufacturer, isn't it?

A. No, not to the extent of Lorillard.

X-Q. 43. It is not?

A. No; the Lorillard products have advertised so much, they have been advertised so much, and we have used so much of their goods that it is impressed on my 266
mind; but if you ask me the tobacco manufacturer of the different cigarettes, I tell you frankly that I have had misfortunes, and that is the reason I can't. In previous years I had charge of the tobacco, before I opened up this store, and at that time I could tell you every little detail.

X-Q. 44. Who makes Polar Bear Chewing Tobacco, do you know?

A. Oh, we sell so little of that, that I would not remember.

X-Q 45. How about Honest Scrap?

A. We don't sell that. 267

X-Q. 46. Now, I wish you would name some Lorillard brands to me?

A. Well, Mail Pouch,—I don't know whether that is or not.

X-Q. 47. How about Sweet Maple?

A. We don't carry that. In plug tobacco, there is not the sale there used to be.

X-Q. 48. How about cigarettes, can you name some of the Lorillard brands of cigarettes?

A. I cannot.

X-Q. 49. You say that the Lorillard products have been so extensively advertised that it has created a great

268 demand for them, but you can't name a single brand of Lorillard cigarettes?

A. That doesn't make any difference, because they come in and ask for their brand, and it may be that I can't remember who makes the cigarettes, but it sells just the same, and I give them the brand they ask for.

X-Q. 50. That is all you are interested in, making a sale of them?

A. Yes. The fact that I can't remember, I have explained that my memory in the last few years, through misfortune is such that I cannot remember easily: and besides that I have so many details,—I do all the buy-
269 ing of the furnishings, and my store is quite a large store, and I do more than one man ought to do. The furnishing line, I handle that exclusively myself, and I can tell you everything about the furnishing line.

X-Q. 51. You have on the table in front of you, and have had since you were testifying, a package of Murad cigarettes and a package of Egyptian Dieties?

A. Yes.

X-Q. 52. Will you examine those packages and tell me who makes the cigarettes [referring to a package of Murad]?

A. Anargyros.

270 X-Q. 53. How about the Egyptian Dieties?

A. It is the same. It has "P. Lorillard Co." underneath, but it is in small letters.

X-Q. 54. You would not immediately notice it?

A. Yes, that is so, but that is because I am not so familiar with handling the merchandise as my clerk is, as I explained to you.

X-Q. 55. Now, you are not able to say who makes these various brands of cigarettes, but what are some of the leading brands of cigarettes with you?

A. Well, the best seller we have is Camels, Lucky Strike, Perfection, Sweet Caporal, and then other

similar brands; Beech-Nut goes fairly well. 271

X-Q. 56. Who makes the Camels?

A. There you have got me again, I can't tell you.

X-Q. 57. Who makes the Lucky Strike?

A. I can't tell you that.

X-Q. 58. Who makes the Fatima?

A. I couldn't tell you, sir.

X-Q. 59. Who makes the Chesterfield?

A. The American Tobacco Products,—I think that is the American Tobacco Company,—I think so.

X-Q. 60. As a matter of fact, it is Liggett & Meyers that makes the Chesterfield?

A. Yes, well, perhaps so. 272

X-Q. 61. And the Lucky Strike, the American Tobacco Company; the Camels are made by R. J. Reynolds & Company?

A. Well, of course I don't know, and I said just as I thought.

X-Q. 62. Now, of all the brands of cigarettes and tobacco that have been mentioned this morning, the only one with respect to which you are able to state the name of the manufacturer is the Beech-Nut. Why was that?

A. What; why was it?

X-Q. 63. Yes. 273

A. Why, simply my attention was called to the fact of whether I saw any difference between the Beech-Nut cigarettes and the gum.

X-Q. 64. Was this by someone who wanted you to testify in this case?

A. No, it was not by him.

X-Q. 65. Who called your attention to that fact?

A. One of the salesmen in my store.

X-Q. 66. Did that cause you to look into the matter?

A. Yes.

X-Q. 67. That is what caused you to look into it?

A. Yes.

274 X-Q. 68. And you found that Beech-Nut cigarettes were made by the Lorillard Company, and that the gum was made by another company?

A. Well, I knew that without looking into it; I knew it was made by separate companies. The only thing I noticed about the Beech-Nut was the manufacturer, because, as I told you, I don't remember the manufacturers of the different products. I know we handle them. If I want cigarettes, to buy them, I say, "Ten thousand Camels." I don't care who manufactures them. That is a secondary consideration with me. We don't have to look at the manufacturers, it is
275 the reputation that sells the cigarettes.

X-Q. 69. By advertising it, you mean?

A. Yes, sir.

X-Q. 70. By advertising the brand you make them popular?

A. Yes; if they have merit. If they don't they die. If the brand is well known and liked, they sell.

X-Q. 71. If the brand is well known?

A. Yes.

Mr. Hinton: That is all.

Re-direct Examination.

276 R-D Q. 43. (By Mr. Cavanagh): Will you state whether or not you ever sold Beech-Nut cigarettes on the reputation of the Beech-Nut Packing Company?

A. No, I have not.

Mr. Hinton: Objected to as calling for a conclusion of the witness, and as indefinite.

Mr. Cavanagh: The question simply calls for a statement of fact.

R-D Q. 44. Will you state whether or not you ever confused a tobacco manufacturer with a food product manufacturer,—whether you would ever confuse them?

A. I would not. 277

R-D Q. 45 State whether or not you would expect them to put out the same class of goods?

A. I would not.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 72. (By Mr. Hinton): Do you know anything about Austin Nichols?

A. Austin Nichols?

R-X Q. 73. Yes.

A. I do not. 278

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

L. G. CAUTO, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age, residence and occupation? Just the name first. 279

A. L. G. Cauto.

Q. 2. Age?

A. Age, 31.

Q. 3. Residence?

A. 23 Hancock Street, West Somerville.

Q. 4. Occupation?

A. Cigar salesman.

Q. 5. For what concern are you a salesman?

A. L. K. Liggett & Company.

280 Q. 6. Where is your place of business located?

A. 128 Tremont Street.

Q. 7. Is this in a business section or a residential section?

A. It is one of the busiest sections we have, centrally located.

Q. 8. How many customers a day, approximately, do you serve?

A. Over a thousand.

Q. 9. Have you ever sold the Beech-Nut cigarettes?

A. Oh, yes, thousands of them.

Q. 10. And have you ever sold Beech-Nut Scrap To-

281 bacco?

A. No; never put it in.

Q. 11. Whose product, if you know, is the Beech-Nut cigarette?

A. P. Lorillard Co.

Q. 12. How long have you known that to be their product?

A. Ever since it came out.

Q. 13. Do you sell Beech-Nut chewing gum?

A. We do, in our department.

Q. 14. Who makes the Beech-Nut chewing gum, if you know?

282 A. I think it is made by the Beech-Nut Products Company, Poughkeepsie, New York, if I am not mistaken.

Q. 15. I show you a package of Beech-Nut gum, or a box of it. Is that the Beech-Nut gum to which you refer?

A. Yes.

Q. 16. Please read the label and tell me who it is made by, and the address?

A. Beech-Nut Packing Company, Canajoharie, New York.

Q. 17. Were you ever under the impression that the

Beech-Nut cigarette was made by the same people that make the Beech-Nut chewing gum? 283

A. Oh, no, never.

Q. 18. State whether or not in your experience in Liggett's in selling Beech-Nut cigarettes and Beech-Nut chewing gum you ever heard any comments or remarks which would lead you to believe that a customer or customers thought that the cigarette was made by the same people that made the gum?

A. When the cigarette first came out there was a natural belief, among some of the customers that they were made by the same people that made the gum, but I righted them on it, and put them on the right track. 284

Q. 19. How many customers would you say had that belief at first?

Mr. Hinton: Objected to as calling for a conclusion of the witness.

A. I should say very few. That is a natural thing when a product of that kind comes out. There were a number of customers that came in expecting they were made by the same people, and they would say, "Let me have a package of Beech-Nut cigarettes. Are they made by the same people that make the gum?" And I said, "No, not the same people that make the gum." Those people who said that, I corrected them. 285

Q. 20. Tell me just about how many customers asked you that, in a general way?

A. Well, about, at least 25; that is, among over a thousand customers that we had in a day.

Q. 21. How long ago was that?

A. Oh, that was when they first came out. I haven't heard any comments or remarks since that time, when they first came out. As I say, a few customers would ask about it, perhaps 25 or 30.

286 Q. 22. And that is in one of the busiest stores in Boston?

A. Yes, sir. That thousand customers is putting it low. We sometimes have more than that, but I didn't want to exaggerate it.

Q. 23. As I understand, you haven't had any such inquiries or remarks for some time?

A. No; and just about the time I had those inquiries I was interviewed by the Beech-Nut people.

Q. 24. You mean the Beech-Nut gum people?

A. The Beech-Nut gum people at that time.

Q. 25. How long ago was that?

287 A. That was when the Beech-Nut cigarette had just come out, say within just about a month or so that the Beech-Nut cigarette had been on the market, and they interviewed me with their lawyer.

Mr. Hinton: All questions about the alleged conversation referred to by the witness is objected to as entirely irrelevant, incompetent and immaterial, and as being hearsay.

Q. 26. Will you tell me just what occurred at that conversation?

288 A. They came in and asked me, "Do you think the gum is made by the same people as make the cigarette?" And I said, "Of course not. I sell a lot of your gum, but so far as P. Lorillard is concerned, they wouldn't interfere with your label, because that is a different product." I remember that day I said, "A few of our customers thought they were made by your people, but I corrected them." They told me, "You are the first one who has answered us in that way," and asked me if I would give it in a statement at the Touraine. "That is the truth," I said, "but so far as backing the gum against P. Lorillard Company, I am not in it for that. I believe the gum is one thing and the tobacco another,

different product." That is what transpired at that 289
time, and they never called me up again.

Q. 27. You mean they never called you as a witness?

A. No. They said the testimony was good, but never came near me.

Q. 28. As I understand, you were not yourself ever confused into believing that the cigarette was made by the same people who made the gum?

A. Certainly not, because I order the different products for that department, and I have had charge of the department going on 9 years,—I have been there 11 years,—and when the product came out I picked up a package of Beech-Nut cigarettes and I naturally saw 290
the Beech-Nut brand on the package, and I said to myself, that must be somebody besides P. Lorillard who is manufacturing them, but when I saw the name "P. Lorillard Co.", I saw who it was. I ordered them from the New York Department of L. K. Liggett & Company.

Q. 29. Did you ever see a package that didn't have the name "P. Lorillard Co." on it?

A. Oh, no. I saw them when they first came out, with no wrapper,—just like that (indicating a package without the glazed paper.)

Q. 30. When you say without a wrapper, what do you mean? 291

A. Without the glazed paper, when they came out first,—it is so far back now on that point I don't remember.

Q. 31. Can you state whether it is customary to wrap cigarette packages in this glazed paper?

A. Yes; because it keeps them dry, and they retain their flavor.

Q. 32. You have no difficulty in reading the name "P. Lorillard Co." on the cigarette package, whether covered with the glazed paper or not?

A. I would on this end here, but not on this end here.

292 This end here it is very plain; on the back it is very plain, more so than on the front.

Q. 33. But you can read the name?

A. Oh, yes, on the back; I would have difficulty on the front there.

Q. 34. What brand of the P. Lorillard Company do you handle in your store?

A. Let's see, Egyptian Deities,—we carry practically all the brands, all the fast sellers, and the Murads, we carry those, and Moguls, I think.

Q. 35. Did you ever know of the P. Lorillard Co., tobacco manufacturers, making or selling chewing gum,
293 food products or beverages?

A. Never.

Q. 36. And did you ever know of the Beech-Nut gum people, — the Beech-Nut Packing Company, to manufacture and sell tobacco products?

A. Absolutely not.

Q. 37. State whether or not you have ever purchased or sold Beech-Nut cigarettes as the product of the Beech-Nut Packing Company,—the gum people?

A. No, never.

Q. 38. Whose product did you sell them as?

A. P. Lorillard Co.

294 Q. 39. State whether or not you ever knew of the Beech-Nut Packing Company, the gum people, to put out a package of goods like this Scrap tobacco which I show you, in appearance, style and the like?

A. No, I did not,—not in appearance or style.

Q. 40. Would you have any trouble in distinguishing a package of Beech-Nut cigarettes from a package of Beech-Nut gum?

A. No, I would not.

Q. 41. And if a customer came into your store and wanted a package of Beech-Nut chewing gum, and went away with a package of Beech-Nut cigarettes for the gum, what would you think of him?

A. I would think it was ridiculous, that he didn't know what he wanted; or if a man wanted "Beech-Nut" I think it would be a mistake of the salesman in not asking him what he wanted, whether he wanted gum or cigarettes. 295

Q. 42. You would not confuse the two?

A. If a customer came in and said, "Beech-Nut", I would say, "Beech-Nut cigarettes" because we are handling cigarettes; but if he wanted the gum, we have it in jars, and he can pick it right out of the jar.

Q. 43. As I understand, you regard them as a different class of goods?

296

Mr. Hinton: Objected to as leading.

A. Absolutely.

Q. 44. What is the reputation of P. Lorillard Co. in the tobacco business, so far as you know?

A. They are one of the largest concerns in the world, in the tobacco business,—in fact without a question I think the largest to my knowledge.

Q. 45. To what do you attribute the sales of the Beech-Nut cigarette in your store?

Mr. Hinton: Objected to as calling for a mere opinion of the witness. 297

A. To P. Lorillard's advertising, and the detail work they do on their items and products.

Q. 46. What kind of detail do you mean?

A. Advertising, posters on the windows, etc.,—missionary work, and sampling.

Q. 47. Would you attribute the sale of the Lorillard Beech-Nut cigarette in any manner to the fact that the Beech-Nut gum people are making gum?

Mr. Hinton: Objected to as calling for an opinion and conclusion of the witness.

298 A. No.

Q. 48 You regard them as entirely different lines of business?

A. I do; yes.

Mr. Cavanagh: I think that will be all, Mr. Cauto.

Cross Examination.

X-Q. 1. (By Mr. Hinton): Mr. Cauto, you are employed by the Liggett Company, and they run a great big drug store there on Tromont Street, isn't it?

299 X-Q. 2. And you are in charge of the tobacco counter?

A. I am.

X-Q. 3. You do the buying?

A. I do, in my department.

X-Q. 4. Yes; and you have sold the Beech-Nut cigarette we are talking about?

A. I have.

X-Q. 5. Do you sell gum on the same counter, is it displayed on the same counter with the cigarettes?

A. Yes, sir.

300 X-Q. 6. And you never sold Beech-Nut Scrap tobacco?

A. No, sir.

X-Q. 7. Don't know anything about that?

A. No.

X-Q. 8. Now, I wish you would think back, if you will, please, to a year or so ago, when you first put in Beech-Nut cigarettes, and tell me, if you can remember, whether a Lorillard agent or a jobber came around to you first and got you to take this stuff, or how you came to put them in?

A. Well, how I came to put them in, they were put on the list at our New York office; they went into the

New York people, and we ordered from there. That 301
is our rule. We order from our New York depot the cigarette, if the Liggett Company has condescended to put them in.

X-Q. 9. Did they give you some kind of authority to order so many of those cigarettes?

A. Yes; their merchandise is all standardized, and as soon as they are on the standard list, we can order them.

X-Q. 10. You knew who manufactured them, before you put them in, did you not?

A. Yes; that they were a Lorillard product.

X-Q. 11. Yes, you knew that before you ordered 302
them, or put them in?

A. Certainly.

X-Q. 12. I just want to get the facts. I am going to make this as short as possible. You saw when you first picked up a package of the cigarettes,—you saw the Beech-Nut brand on it, and you thought they were not made by the Lorillard Company?

A. No.

Mr. Cavanagh: No, where did he say that?

Mr. Hinton: Read "Q. 28."

303

X-Q. 13. I am reading your answer to Q. 28 on the direct examination. The question is:

"Q. 28. As I understand, you were not yourself ever confused into believing that the cigarette was made by the same people who made the gum?

A. Certainly not, because I order the different products for the department, and I have had charge of the department going on 9 years,—I have been there 11 years,—and when the product came out I picked up a package of Beech-Nut cigarettes and I naturally saw the Beech-Nut brand on the pack-

304 age, and I said to myself, that must be somebody besides P. Lorillard who is manufacturing them, but when I saw the name, "P. Lorillard," I saw who it was. I ordered them from the New York Department of L. K. Liggett & Company."

A. That is right. When a cigarette is new, I naturally looked to see who made it. That is proper.

X-Q. 14. And when you looked you saw what?

A. I saw "P. Lorillard Co." printed plainly on the front of the package, and on the carton.

X-Q. 15. Will you tell me during that moment, when
305 you picked up the package of cigarettes and saw the Beech-Nut brand, and were in doubt about it,—who did you think might be the manufacturer?

A. Some cigarette company, because I knew that the gum people manufactured gum, and right away I used my head and said that they were not made by the gum people, but some cigarette people.

X-Q. 16. What suggested the gum people to you?

A. Because they carry gum, the Beech-Nut gum on the counter.

X-Q. 17. When you looked at the package of cigarettes, what did you think of, what gum company?

306 A. When the cigarettes were put in, I had them on the counter and, why, I thought of the Beech-Nut people. I had about 25 customers question that, and that was a natural question; not that they cared who made it, but they said this, "Made by the people who make the gum?" And I corrected them. I said, "The gum is made by the gum company, in Canajoharie, and Brooklyn, New York," and that is all. That adjusted the matter, when I told them that the gum and cigarettes were two different products.

X-Q. 18. And you always put them straight on that?

A. I put them straight, yes, because I wanted them

to be straight about it, being in the business, and I wanted to be straight, because it is instant dismissal for misrepresenting any of the goods. 307

X-Q. 19. Yes; but they are not all as strict as you people are in regard to that, are they?

A. No, I don't believe they are.

X-Q. 20. Now, every time anybody made any remark of that kind, you straightened them out?

A. I did.

X-Q. 21. Always?

A. Always.

X-Q. 22. And you say you can remember about 25 instances of that kind? 308

A. Of that kind, since they came out. Since then nobody has bothered about it. They come in and say, "Give me a package of Beech-Nut gum," or "Give me a package of "Beech-Nut cigarettes." I guess they know it is made by an entirely different company now.

Mr. Hinton: The last part of the answer is objected to as a mere opinion of the witness, and without the slightest foundation.

X-Q. 23. Now, you haven't had any further discussion with your customers about this thing, have you? 309

A. No, I have not.

X-Q. 24. Except those 25 instances that you remember?

A. Yes, just those 25.

X-Q. 25. If a man comes into your store and wants Camel cigarettes, he puts down the money and takes the goods and walks out, usually, doesn't he?

A. He does.

X-Q. 26. If you know him, he might stop and talk to you, but the ordinary customer would walk out after he got the cigarettes?

A. That is true.

310 X-Q. 27. And you can't tell by his face when he comes in, or the back of his head when he goes out, what he thinks about who makes the stuff?

A. No.

X-Q. 28. And the only possible way you could tell what he thinks is by what he might tell you?

A. That is it.

X-Q. 29. And it is very rare that he says anything about it?

A. Very rare. Outside of, as I say, when the product is new, the product when it comes out, the customer will naturally say, "Who makes it?" It is just
311 the same with the Black & White cigar, or the Black and White Whiskey, or Battle Axe tobacco, or any new product made. We know that Scrap tobacco is manufactured by Lorillard Co.,—we don't handle it,—but I worked for Lorillard—that is, I worked for the American Tobacco Company before I worked for Liggett, and I know they had the Scrap tobacco on the market—

Mr. Hinton: Objected to as argumentative and not responsive, and volunteered.

X-Q. 30. You used to work for the Lorillard Com-
312 pany?

A. The American Tobacco Company before they divided.

X-Q. 31. How long have you been with Liggett now?

A. About 11 years.

X-Q. 32. Here in Boston?

A. Yes, sir; always in one store.

X-Q. 33. In one store?

A. Yes.

X-Q. 34. Have you a high regard for the Lorillard Company?

A. Yes, I have.

X-Q. 35. Your relations with the Lorillard Company have been such as to make you very friendly with them? 313

A. Not particularly. Everybody we do business with, we are friendly with,—we don't show any partiality.

X-Q. 36. Now, Mr. Cauto, you testified, I think, that if a person wanted a package of gum you would not hand him a package of cigarettes?

A. No, sir.

X-Q. 37. Did ever anybody come into your store, that you can remember and ask just for "Beech-Nut"?

A. Yes, sir.

X-Q. 38. Is that a common occurrence? 314

A. Not common, no,—one case in a thousand where they just say, "Beech-Nut."

X-Q. 39. What do you do in that case?

A. Give them a package of Beech-Nut cigarettes, because I run the cigarette business.

X-Q. 40. You don't ask them what they want?

A. No, I give them the cigarettes, and if they have have objection to it they say, "I don't want that, I want the gum." But those are rare instances. I would say rare instances, one in a thousand, probably. When a man comes in he usually knows what he wants, and he will say, "Beech-Nut gum" or, "Beech-Nut cigar- 315 ettes."

X-Q. 41. Now, you testified as to a certain conversation you had with two people representing the Beech-Nut Packing Company in which you told them that some of your customers had thought the cigarettes were made by the Beech-Nut people, and you related that conversation. How long ago was that conversation, Mr. Cauto?

A. That was,—well, it was a few months after the cigarettes came out,—when the cigarettes were new on the market.

316 X-Q. 42. How many Beech-Nut people came in to see you, do you remember?

A. Two people came in to see me from the Beech-Nut Packing Company.

X-Q. 43. And would you recognise those people if you saw them?

A. I think I would; I am not positive that I would.

X-Q. 44. You don't know what they look like?

A. No; I knew they were from the Beech-Nut Packing Company.

X-Q. 45. They said they were?

A. Yes.

317 X-Q. 46. Now, you are sure that you would recognize those people if you saw them?

A. I am not positive, because I only saw them once.

X-Q. 47. Are you absolutely sure that you would remember the entire conversation, word for word?

A. Oh, yes, I remember the conversation.

X-Q. 48. Every bit of the conversation?

A. I remember all the conversation, yes.

X-Q. 49. After a year has elapsed you remember all the conversation?

A. Yes, I remember practically just everything I said. In fact they told me that I was one of the few
318 that spoke the truth; that I wanted to deal fair with both sides and didn't want to show any partiality between them. I showed no partiality; I told them the truth, just as the facts were. They asked me if people asked if the cigarette was made by them, and I said, "Yes, they did; that there was a few people, a lot—(by a lot I meant 25 or 30 people)—although they didn't ask me how many,—"that thought the gum was made by the Packing Company people, and I told them that was not right." As I said before, if I misrepresented the gum, as made by the Beech-Nut people, they might buy more, or cigarettes, under that misre-

presentation. I wanted to lead them on the right track and make them understand that the cigarette was made by the Lorillard Company. 319

Mr. Hinton (To the stenographer): Will you read the last answer of the witness?

(The last anwser is read.)

X-Q. 50. Did you mean gum in that answer which you have just made?

A. Cigarette, that the cigarette was made by the Lorillard Company.

X-Q. 51. But you said if you misled them as to the gum, as made by the Beech-Nut people, they might buy more of them,—what did you mean? 320

A. My idea is that they would buy more of the cigarettes. My idea was to be very careful not to misrepresent the product to the customers, because the Beech-Nut gum people, we do a lot of business with them just the same as we do with the Lorillard Company, and I wanted to play fair with both. But I don't think the gum helps the cigarette; on the other hand, the detail work of the Lorillard Company, the detail work they are doing on their proudct helps sell the cigarettes. 321

Mr. Hinton: Objected to as not responsive.

Mr. Cavanagh: Mr. Hinton must take the answer as he finds it. It appears to be responsive to the question.

X-Q. 52. How many people make purchases at your counter every day?

A. Over a thousand.

X-Q. 53. And you said that with respect to the ordinary customer who buys the goods he takes it and

322 walks out,—you don't know what he thinks as to who makes the product?

A. No, sir.

X-Q. 54. You have no way of knowing at all?

A. No.

X-Q. 55. And any idea what you might think he thought would be your opinion?

A. That is all.

X-Q. 56. And you have been in the tobacco business a great many years, have you?

A. Yes.

X-Q. 57. Could you describe those two people who
323 came in and talked to you?

A. Well, when they came in to me and I gave them what I thought—

X-Q. 58. Will you please answer the question. Can yeou describe the people,—can you describe them?

A. No, I can't describe them. They were strangers to me,—I can't describe them other than I know they were from the Beech-Nut Packing Company, the Beech-Nut gum people. I think one was a lawyer, I am not sure.

X-Q. 59. You don't know what he looks like?

A. No.

324

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 49. (By Mr. Cavanagh): Will you state whether or not in your experience you ever sold a tobacco product, such as cigarettes, on the reputation of a food product manufacturer, or gum manufacturer?

A. Oh, no.

Mr. Cavanagh: That is all.

Re-cross Examination. 325

R-X Q. 60. (By Mr. Hinton): I understand you to mean that you never told anybody that any product was made by someone who did not make it?

A. That is it.

R-X 61. You would not misrepresent it?

A. No.

R-X Q. 62. Even if you could sell more of it?

A. No, I would not.

Mr. Hinton: That is all.

Re-direct Examination. 326

R-D Q. 50. (By Mr. Cavanagh): Will you state whether or not you would try to sell, for example hats upon the reputation of a manufacturer of machinery, if you were in that line of business?

A. No.

Mr. Cavanagh: That is all.
Mr. Hinton: That is all.
Deposition closed.
Signature waived.

327

HARRY KLEIN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation.

A. Harry Klein; 64 Allen Street, Boston, Mass.; age 28; at present cigar department manager for L. K. Liggett & Company, store 311, 375 Washington Street, Boston.

328 Q. 2. How long have you been with L. K. Liggett in this capacity?

A. In this particular store, for the last two years.

Q. 3. Before that where were you?

A. Before that I was for 11 months in the leather business in New Hampshire, and previous to that I was also employed by the L. K. Liggett Company, and also by Schulte & Company, New York.

Q. 4. They are cigar manufacturers and tobacconists?

A. Yes, sir; tobacconists.

Q. 5. As I understand it, you have for the last three
329 years been located at the Liggett address you have given?

A. It is about three years. Pardon me, before I went to this store they closed the store that they had on Summer Street, I was department manager there, and I had to wait four weeks until they got a place, and then I went up here. Why I remember it is because of my vacation. When you are with them about a year you get one week's vacation, and when you are with them over a year, and up to two years and more, you get two week's vacation.

Q. 6. In this Liggett store where you are now, what
330 kinds of goods do you sell, under your supervision?

A. Why, do you mean all kinds of goods? Tobacco, cigarettes, and razor blades and smokers' articles.

Q. 7. Do you sell any confections, chewing gum or the like?

A. No; I don't carry it on my counter. Some counters do, in the chain of stores.

Q. 8. Is this Liggett's store located in a business section or residential section?

A. Business section.

Q. 9. Approximately, how many customers do you serve a day there?

A. 500,—that is a general average. Saturdays it runs to 800. 331

Q. 10 I show you a package of Beech-Nut cigarettes, which are in this case as an exhibit. Did you ever sell any cigarettes like that?

A. Yes, sir.

Q. 11. I also show you a package of Beech-Nut Scrap tobacco, which is also an exhibit in this case. Do you sell that?

A. No, sir; but I have seen it and lived with a man who chewed it up in New Hampshire. I know that they make it.

Q. 12. Who, if you know, makes the Beech-Nut cigarette and the Beech-Nut Scrap tobacco? 332

A. P. Lorillard Co.

Q. 13. Do you know, of the Beech-Nut Packing Company or have you ever heard of them?

A. Yes, sir; I have heard of them. How I came to hear of them, when the candy clerk is out you have to go and wait on customers at that counter, and sell them gum; they ask for Beech-Nut gum, or Beech-Nut Mint, or cloves, which are all carried in the candy department.

Q. 14. Were you ever confused or under the impression that the Beech-Nut cigarette was made by the same people, or put out by the same people as put out the gum? 333

A. No, I was not. How I came to know it at first, we got a letter from the New York Office, what we call a circular letter, and it told us, or gave us authority to issue merchandise orders to representatives of P. Lorillard Co. for the purchase of cigarettes, Beech-Nut cigarettes, which was to back up an advertising campaign which was being held in our territory.

Q. 15. Who was conducting this advertising campaign, and what was being advertised?

334 A. P. Lorillard Co., to my knowledge, was conducting the campaign and they were advertising Beech-Nut cigarettes.

Q. 16. How long ago is that, about?

A. Well, it seems to me that it was about, pretty near a year ago.

Q. 17. As I understand it, you sell goods yourself across the counter, do you not, on certain occasions?

A. Always; I have charge of the cigar department there, that is my business.

Q. 18. Did you ever have any persons make any comments or remarks which would lead you to believe that
335 they thought the Beech-Nut Packing Company, who make the Beech-Nut gum, were also manufacturers of the cigarette?

A. Not in the store.

Q. 19. You never had any customers who thought that?

Mr. Hinton: Objected to as entirely incompetent, leading and as calling for an opinion and conclusion of the witness.

A. Not one customer in the store.

336 Q. 20. Would you yourself be led into confusing a package of Beech-Nut cigarettes, or a package of this Beech-Nut Scrap tobacco with a package of Beech-Nut chewing gum?

A. No, because they are in different packings or cartons. When you pick up a carton of these cigarettes, or the Scrap tobacco, it is in an entirely different carton, or box from what the Beech-Nut gum would come in, or any kind of gum, for that matter, that I have ever seen.

Q. 21. How would the comparative appearance of the cigarette package and the Scrap tobacco package strike you in connection with the gum package?

A. It would not strike me as very similar, because 337
one is red when you first glance at it, if you are not looking at anything central, and the other, it seems yellow, on the gum package particularly; but if you are handling the candy, the cloves they are brownish like, and the mint green. They don't seem to have any staple color for any of the Beech-Nut products.

Q. 22. You have never seen any package of the Beech-Nut Packing Company that resembles the package of Beech-Nut cigarettes

A. No.

Q. 23. And you have never seen any package of the Beech-Nut Packing Company that resembles the pack- 338
age of Beech-Nut Scrap tobacco?

A. No; we have never put the tobacco in the store.

Q. 24. Have you ever seen a package of these Beech-Nut cigarettes that didn't have the name of "P. Lorillard Co." on them, as shown on the sample package which I show you?

A. No.

Q. 25. Have you ever seen a package of Scrap tobacco that did not have the name, "Lorillard" on it?

A. No, I never have because I never handled it.

Q. 26. You note the name "Lorillard" on that pack- 339
age?

A. Yes, sir; when I picked it up. We don't carry it.

Q. 27. And "P. Lorillard Co." on the cigarettes?

A. Yes, sir.

Q. 28. What would that indicate to you as to the source of manufacture?

A. That P. Lorillard Co. was manufacturing both.

Q. 29. Did you ever hear of the Beech-Nut Packing Company making any cigarettes, or any tobacco product?

A. No; I never heard of them making any tobacco product. I understand that they put up such things as ham, in glass, and different products of that kind.

340 Q. 30. Food products, you mean?

A. Yes, food products.

Q. 31. Did you ever hear of the Lorillard Company putting out food products, or chewing gum?

A. No; all my time in the tobacco business I knew they were tobacco manufacturers, that they manufactured cigarettes and smoking tobacco and chewing tobacco.

Q. 32. State whether or not any customers ever asked you for any cigarette made by the Beech-Nut Packing Company?

A. Why, no, I never had anybody ask me for any
341 cigarettes in particular.

Q. 33. What would be your opinion of a person who came into your store and wanted to buy a package of Beech-Nut gum, and walked out with a package of Beech-Nut cigarettes in the place of the gum?

A. Why, I would either think a man was one who ought to have been sent for observation, or taken under observation by somebody, or that he ought to have his eyes tested. So far as that is concerned, he would be a good fellow to do business with, because if he gave you a ten dollar bill, you could give him 50 cents in change, and he would probably walk out with it. There
342 is never a person I have known—and I say I wait on 500 customers every day,—with the exception that I am out now and not waiting on them—who has asked me, or who has become confused between the Beech-Nut cigarette and the Beech-Nut chewing gum. When a man comes in and says, "Beech-Nut gum" or "Spearmint", I say, "On the candy counter," and if I look down there and the girl is not there, it is my work to go and get the nickel, or whatever money he wants to leave.

Q. 34. In your experience in the tobacco business, what is the reputation of P. Lorillard Co. as tobacco manufacturers?

A. It is now and has been of the highest; and in 343
fact the men I have come in contact with, and I have come in contact with quite a few, have always represented what was advertised, and they never misrepresented any article; and if there was anything faulty with their product they were willing to make it good.

Q. 35. State whether or not you ever heard the Lorillard man, or any jobber, or dealer in these cigarettes represent them to be a part of the Beech-Nut Packing Company's product?

A. I never heard anyone state that.

Q. 36. Previous to your being called as a witness in this case, did anyone ever approach you relative to mak- 344
ing a statement in connection with this litigation?

Mr. Hinton: Question objected to as entirely incompetent, immaterial and irrelevant; surely conversations between the witness and alleged Beech-Nut people are not admissible in this case.

A. Yes, sir; somebody, I don't remember who they were, two gentlemen who represented the Beech-Nut Packing Company, they came in and asked me about it. I didn't have to say anything,—in fact they did all the talking, and I kept quiet; they asked me if I would 345
swear to something and I said I would not.

Q. 37. In a general way, what did they want you to testify to?

Mr. Hinton: Question objected to as entirely incompetent, immaterial and irrelevant; surely conversations between the witness and alleged Beech-Nut people are not admissible in this case.

A. They wanted me to testify that people were becoming confused between the two products, the Beech-Nut gum and the Beech-Nut cigarettes, and I knew my

346 own mind was clear about that, and I could not say it. As I stated before, we would say a man was crazy if he came in for a 5 cent package of Beech-Nut gum, which is a 5 cent article, if he was given a package of Beech-Nut cigarettes, we would say, "Hold on, that is 15 cents." Anybody could see he was wrong if he accepted it, but if he kept on running to get out we would be out 10 cents. So I couldn't see my way clear to swear to an affidavit, or something I didn't believe.

Mr. Hinton: Answer objected to as entirely incompetent, irrelevant, immaterial and as referring
347 to a conversation between witness and other parties entirely inadmissible here, and as based on hearsay.

Q. 38. So you refused to testify for them?

A. I didn't refuse, or say I would. I kept quiet. You know how it is; sometimes you don't say yes and you don't say no.

Q. 39. Just what question did this Beech-Nut Packing Company man ask in connection with the cigarettes?

Mr. Hinton: Objection repeated.

A. He asked me if anybody became confused, or if
348 they thought that the Beech-Nut Packing Company was making the cigarette.

Q. 40. What answer did you give him?

Mr. Hinton: Objection repeated.

A. I told him I couldn't see how that could be possible.

Q. 41. How long ago was this,—a little over a year ago?

A. I wouldn't say over a year ago; it was a month or two after the Beech-Nut cigarette had been advertised.

Q. 42. To what extent, to your knowledge, have the Beech-Nut cigarettes been advertised around here? 349

A. In the newspapers, sampling by the salesmen, and we also had authority to keep a poster on the window while the entire campaign was in progress in Boston, which lasted a little over a month, I believe.

Q. 43. So far as your experience goes, could you state whether or not Beech-Nut cigarettes were ever sold on the reputation of the Beech-Nut gum?

Mr. Hinton: Objected to as calling for the mere opinion of the witness.

A. No, sir; I don't think they ever were. 350

Q. 44. Would you think that the Lorillard Company, as a tobacco concern, and from your experience in the business, would have to sell their goods on the reputation of any food or gum concern?

Mr. Hinton: Same objection.

A. No, sir.

Q. 45. I call your attention to one of the packages of P. Lorillard Co. Beech-Nut cigarettes which is covered with tissue paper. Do you have any trouble in reading that name, "P. Lorillard Co." through that paper? 351

A. No.

Q. 46. Can you state whether or not, of your own knowledge, it is customary in the cigarette business to cover the packages with transparent paper?

A. Yes; they always cover them so that the cigarettes will be in proper condition when they reach the customer. I think it is a good custom to do so. Egyptian Deities or Murads,—in fact all of the high grade cigarettes, the Turkish cigarettes, are covered with wax paper to preserve the flavor in them.

Q. 47. Would you regard tobacco products, such as

352 cigarettes and Scrap tobaccos, the same or a different class of goods from food products, chewing gum, and the like?

A. I would regard it as a different class of goods entirely.

Mr. Cavanagh: I think that is all.

Cross-Examination.

X-Q. 1. (By Mr. Hinton.) You don't carry Beech-Nut Scrap tobacco in your store, do you, Mr. Klein?

A. No, we don't.

353 X-Q. 2. Now, you have been with the Liggett Company for about two years?

A. Where I am at the present time.

X-Q. 3. And how long altogether?

A. Well, on and off, about six years.

X-Q. 4. And prior to that were you with the Schulte Company?

A. For six months.

X-Q. 5. What were you doing before that?

A. I was with the Liggett Company.

X-Q. 6. Always in the tobacco department?

A. With the exception of once I was in the leather
354 business for 11 months.

X-Q. 7. When was that?

A. That was right after I left Schulte, and up to the time I came back.

X-Q. 8. Schulte ran that big bunch of chain stores in New York, and different places?

A. Yes, sir.

X-Q. 9. Tobacco stores only?

A. That is all they ran, was tobacco stores and smokers' articles.

X-Q. 10. Now, before you put in these Beech-Nut cigarettes, I understand you got some kind of an ad-

vance notice from headquarters that they were coming out? 355

A. We did.

X-Q. 11. With authorization that you order those cigarettes?

A. To back up their advertising campaign. That is, so far as I can remember the letter read in that way, authorizing us to issue merchandise orders.

X-Q. 12. You haven't any recollection what the letter stated, but it was to that general effect?

A. Yes.

X-Q. 13. You knew the Beech-Nut cigarette was made by the Lorillard Company? 356

A. Yes, sir, because it said if representatives of the Lorillard Company, if they came, to issue orders to them.

X-Q. 14. And you had not up to that time seen the cigarettes, but you knew in advance who made them?

A. No, I hadn't seen them, but I knew in advance that it was coming.

X-Q. 15. And who made it?

A. Yes, P. Lorillard Co.

X-Q. 16. And you can't remember that you ever had any of your customers make any inquiries about the manufacturer of the cigarettes?

A. No. 357

X-Q. 17. They just came in and asked for Beech Nut cigarettes, and walked out with the goods?

A. That is all.

X-Q. 18. The same as they do with Camel cigarettes?

A. Yes, that is all they done was to ask for Beech-Nut. When they first came out they were 15 cents, and when they were reduced to two for a quarter, why, of course their sales increased.

X-Q. 19. Did they ever come in and ask for just "Beech-Nuts"?

A. Yes, occasionally a man would come in and say "Beech-Nut," and lay down 15 cents.

358 X-Q. 20. Do you carry Beech-Nut gum on your counter?

A. Not on my counter.

X-Q. 21. So if he comes to your counter, you know he wants cigarettes?

A. Yes.

X-Q. 22. And you don't carry scrap tobacco in the store?

A. No, sir.

X-Q. 23. Now, in answer to one of the questions, Q. 21 when you were asked about the comparison between the gum package and the scrap tobacco package and the
359 cigarette, you said:

> "It would not strike me as very similar, because one is red when you first look at it, if you are not looking at anything central, and the other it seems yellow, on the gum package particularly; but if you are handling the candy, the cloves they are brownish like, and the mint green. They don't seem to have any special color for any of the Beech-Nut products.

What did you mean by that expression "if you are not looking at anything central?"

360 A. What I meant by that was this: This package of Beech-Nut tobacco, that has got red on it; although the Beech-Nut cigarettes have red on them. That is their main color, you see. While on the Beech-Nut gum, if you pick it up, it is yellow, which is true, and if you pick up a package of cloves, that is another color, and also the mints. The lime tablets are also green. I spoke of eye sight, when I had to go from the tobacco counter to wait on someone at the candy counter—

X-Q. 24. All I am concerned is the expression "if you are not looking at anything central". What did you mean by that expression in your answer?

A. Why, from what the gentleman here asked me— 361
he asked me if I would get confused, and I said not at all, nothing would confuse me, because there was no similarity that I could see.

X-Q. 25. What did you mean by the expression "if you are not looking at anything central", in your answer?

A. Well, before a customer came in you might be looking at anything at all, and when he comes in your attention is on him, to get just what he wants as quick as you can get it to him. I don't remember that I used the word "central." Did I?

Mr. Cavanagh: I don't remember. It is in the 362
answer.

X-Q. 26. You were talking about these packages and you were asked (Q. 21) "How would the comparative appearance of the cigarette package and the scrap tobacco package strike you in connection with the gum package?" And you said, "It would not strike me as very similar, because one is red when you first glance at it, if you are not looking at anything central," all I want to get at is what you mean by "if you are not looking at anything central?"

A. Well, as I said a moment ago, just before some- 363
one might come in you would have nothing on your mind, and when the man comes in and says, "Beech-Nut cigarettes," or he might ask for Murads, or Dieties, and then your mind is concentrated on what he is asking for, and you look for it.

X-Q. 27. Didn't you have reference to the background on the package—

Mr. Cavanagh: Objected to. The witness is just answering the question, what he had reference to.

364 X-Q. 27. (Continued) —and the cigarette package is red and white, and the Beech-Nut gum might be yellow, and different colors on other products, isn't that it?

A. Yes, sir.

X-Q. 28. That is what you had in mind?

A. Yes.

X-Q. 29. As distinct from the central devices?

Mr. Cavanagh: The witness made no reference to central devices on packages; he explained what he meant by the expression, "if you were not looking at anything central".

365 Mr. Hinton: I object to this constant interference with the cross-examination.

Mr. Cavanagh: This is not interference with the cross-examination, but, as a matter of law of evidence the witness has already answered the question as to what he meant by the word "central," that his mind was not concentrated until the customer came to him.

Mr. Hinton: The record speaks for itself. Now, continuing the testimony, if I may.

X-Q. 30. You said that you had in mind the back-
366 ground of the package of the cigarette, which is red, and the scrap tobacco, which is red and white, while on the Beech-Nut Packing Company products, you mentioned that it might be yellow or any other color?

A. Yellow, and the different colors I have mentioned on the different products.

X-Q. 31. You are talking about the background as distinguished from the central device on the package?

A. Yes.

Mr. Cavanagh: The witness has already answered what he meant by the word "central," and that he

was not speaking about any central figure on the 367
package itself.

Mr. Hinton: The interference of Mr. Cavanagh is entirely improper.

X-Q. 32. Now, in the ordinary course, Mr. Klein, if a man comes into your store and wants a package of Camel cigarettes, he asks for Camels, and puts his money on the counter and walks out and he doesn't tell you anything about what he thinks about who makes the Camels; is that the fact?

A. Why, that is true.

X-Q. 33. And the same thing with the Fatima cigarette, or the Lucky Strike, or anything else? 368

A. Yes.

X-Q. 34. They come in and ask for what they want, and put their money down, and then walk out?

A. Why, that is the general course.

X-Q. 35. And you can't tell by looking at a customer's face when he walks in the store or the back of his head when he walks out what he thinks about who makes the product he is buying?

A. Why, not unless he tells you what he thinks.

X-Q. 36. Perhaps you don't understand. A customer comes in, and wants Camel cigarettes, and asks for 369
Camel cigarettes. You can't tell by looking at his face when he walks up to you, or at the back of his head when he walks away, anything about what his idea is as to who makes the Camel cigarettes,—do you understand that?

A. You want to know if when a man comes in and says, "Give me Camel cigarettes", what he is thinking about, with reference to who makes Camel cigarettes?

X-Q. 37. Yes.

A. The only thing I could tell you, if he likes Camel cigarettes that is why he is buying them.

370 X-Q. 38. And except that you have been told by some customer, you would not know who he thought made any product that he was buying?

A. Why, he wouldn't know unless he looked at the package, because practically every manufacturer puts his name right on the package. It would not be necessary for him to ask the clerk whom he was buying it from.

X-Q. 39. Do you know what is written on a package of Camel cigarettes under the picture of the camel?

A. R. J. Reynolds.

X-Q. 40. And that is on the front of the package?

A. What do you mean, where it is on the package?

371 X-Q. 41. On the front of a package of Camel cigarettes, underneath the picture of the camel, do you know what is written there?

A. Well, there is camel in the middle, isn't there? Where do you mean on the package?

X-Q. 42. Below the picture of the camel?

A. R. J. Reynolds.

X-Q. 43. And what is written on a package of Lucky Strike cigarettes underneath the red panel containing "Lucky Strike"?

A. American Tobacco Company.

X-Q. 44. That is on the front, on the bottom of the

372 package?

A. It is.

X-Q. 45. I show you a package of Camel cigarettes, and you see that you are wrong in your answer to that question; you see that the name of "R. J. Reynolds" does not appear under the picture of the camel, do you not?

A. Well, I was of the opinion that it was. Let me see the package a minute. (Witness examines package of Camel cigarettes).

X-Q. 46. Now, thinking again about a package of Lucky Strike cigarettes, you are not at all sure now

that the name "American Tobacco Co." appears under the red panel with the name, are you? 373

A. I will bet you a straw hat that the name, "American Tobacco Co." is on the package.

X-Q. 47. It is somewhere, but about the position, near the bottom, you can't say with certainty that the name "American Tobacco Co." is there, can you?

A. No.

X-Q. 48. As a matter of fact, it is not, if you will take my word for it. Now the reason you thought the name "American Tobacco Co." was on the Lucky Strike package, and the name "R. J. Reynolds" was on the Camel cigarette package, was because you knew 374 that those concerns were making those products?

A. Yes.

X-Q. 49. That is the reason you would expect to find it, that you know that those concerns were manufacturing those cigarettes, and that you would find the name on the package somewhere?

A. Yes.

X-Q. 50. Now, you have said that two people from the Beech-Nut Packing Company came to see you. How long ago was that?

A. Oh, well,—it must have been a little over a year ago, or more, I believe. 375

X-Q. 51. And you didn't say much to them one way or the other about it?

A. I didn't, no.

X-Q. 52. You didn't commit yourself?

A. No, I didn't.

X-Q. 53. And you told them that you hadn't heard any remarks or comments from your customers about the question of who makes the Beech-Nut cigarettes?

A. Well, I told them that no customers I had had, had asked me anything,—about who the different manufacturers were,—whether the Beech-Nut Company was making the cigarette.

376 X-Q. 54. That was the extent of the information that you gave them at that time?

A. Yes, that is right.

X-Q. 55. Did you previously tell a man who came into your store that you thought the Beech-Nut cigarettes were selling at the beginning because they had the name "Beech-Nut" on them?

A. No, sir.

X-Q. 56. You don't remember that?

A. No, sir.

X-Q. 57. With respect to this visit of these two people you are talking about now, you merely said that
377 you hadn't had any cases of comments or remarks or inquiries from your customers?

A. That is just what I told them.

X-Q. 58. And did you tell them that nobody would take a package of gum in the place of a package of cigarettes?

A. They didn't ask me that question, so I had no occasion to tell them.

X-Q. 59. You say here, when you were asked what these people wanted you to testify,—in answer to question 37 in your direct examination:

378 "They wanted me to testify that people were becoming confused between the two products, the Beech-Nut gum and the Beech-Nut cigarettes, and I know my own mind was clear about that, and I could not say it. As I stated before we would say a man was crazy if he came in for a 5 cent package of Beech-Nut gum, which is a 5 cent article, if he was given a package of Beech-Nut cigarettes, we would say, "Hold on, that is 15 cents." Anybody could see he was wrong if he accepted it, but if he kept on running to get out we would be out 10 cents. So I couldn't see my way clear to swear to an affidavit, or something I didn't believe."

Now, in that part of your direct examination you were talking about confusing a package of cigarettes with a package of gum? 379

A. Why, yes.

X-Q. 60. And then you also said in that answer that the people who came in wanted you to testify, "that people were becoming confused between the two products." But you have just said that they did not ask you that question.

A. They did want me to testify.

X-Q. 61. They did, or did not?

A. They asked me if I would swear to something, and I said no. 380

X-Q. 62. What was it they wanted you to swear to?

A. That people were becoming confused between the two packages.

X-Q. 63. You just said two or three minutes ago you didn't say so.

A. What didn't I say?

Mr. Hinton (To the stenographer.) Will you turn back and read his testimony on that.

(The last seven questions and answers are read by the stenographer.)

381

X-Q. 64. In other words, if I understand this record which we have just had read to us, you say in your direct testimony that they wanted you to testify to a confusion between the two packages, and now, as well as you can recollect, you say that they did not ask you that particular question.

A. I said they did.

X-Q. 65. Didn't you just say they did not?

Mr. Cavanagh: He didn't say any such thing. You must read the record straight. Now, I will

382 ask the stenographer to go back and read the testimony again.

(The testimony is again read.)

The Witness: They did ask me.

X-Q. 66. They did ask you that question?

A. Why, sure, they asked me that question. Now, let me say something: When two men are talking to you and you are at the counter and they are talking to you, you can surmise from their talk to you just what they have in mind. If you say to me from their remarks, did they want you to testify, my answer is yes.

383 X-Q. 67. You don't remember the language that they used? A. No, I don't.

X-Q. 68. You could not positively remember very definitely after a year what they said?

A. No, I can't remember definitely, but I am telling you that that is what they were really after.

X-Q. 69. That is what you thought they were after?

A. Yes.

X-Q. 70. That is what you made up your mind they were after, but you can't quote their words?

A. No, I can't quote their words, but that is what I made up my mind they were after.

384 X-Q. 71. That is what you understood they were after?

A. Yes.

Mr. Hinton: In view of the statement of the witness, the objection to question 36, 37, 38, 39, 40, 41, in the direct examination, is emphatically repeated.

X-Q. 72. Now, going back to the time when the Beech-Nut cigarettes first came out, and you put them in, Mr. Klein, did they go pretty well from the beginning, do you remember?

A. Why, for a new brand they took hold fairly well.

X-Q. 73. Did you make any special effort to push them? 385

A. No, sir.

X-Q. 74. Did you ever tell anybody that the word "Beech-Nut" was a good name and would sell the cigarette, that you remember?

A. No, sir.

X-Q. 75. You don't remember having said that?

A. No, sir.

X-Q. 76. Did you make any special effort at the time the Beech-Nut cigarettes first came out to make a note of, or remember any conversation that you may have heard over the counter about them? 386

A. No, sir.

X-Q. 77. You didn't try to remember anything that may have been said?

A. No, sir.

X-Q. 78. Waiting on hundreds of customers a day, you could not possibly remember any incidental conversation that may have occurred a year ago?

A. Why, I could remember it if it was something which would be out of the ordinary routine.

X-Q. 79. But I mean the ordinary discussion with customers?

A. No. 387

X-Q. 80. You would not remember it, and there was no reason why you should make a note of it?

A. No.

X-Q. 81. And there may have been some remarks at that time that you have forgotten; it is possible, isn't it?

A. No, I don't think there were any remarks with reference to Beech-Nut gum or Beech-Nut cigarettes that I would forget so easily, because I don't handle the gum on my counter.

X-Q. 82. But you don't just happen to remember any such remarks?

388

A. No; I never had a customer get confused on my counter between the two products.

X-Q. 83. They knew the difference between the gum and cigarettes?

A. They did, those I waited on.

Mr. Hinton: That is all.

Redirect Examination.

R-D Q. 48. (By Mr. Cavanagh.) Will you state whether or not if customers have come to your counter
389 and made inquiries as to whether the cigarette was made by the same people as made the gum that you would have remembered the fact of such inquiries?

Mr. Hinton: Objected to as calling for a conclusion of the witness.

A. Yes.

R-D Q. 49. In your cross-examination you were asked about some central figures on the scrap tobacco and cigarette package and the gum package. Will you state whether or not you can distinguish between the
390 central figures on the scrap tobacco and cigarette packages, and the central figure on the gum package?

A. You mean those two (indicating a package of Beech-Nut cigarettes and a package of Beech-Nut chewing gum)?

R-D. Q. 50. Yes.

A. Why, yes.

R-D Q. 51. You had no difficulty in that respect?

Mr. Hinton: Objected to as grossly leading.

A. No.

Mr. Cavanagh: That is all.

Re-cross examination. 391

R-X. Q. 84. (By Mr. Hinton.) All three of those central devices are oval, are they not,—oval like an egg?

A. Yes.

R-X. Q. 85. And all three have the name, "Beech-Nut" around the top part of the oval, generally?

A. Well, one has "Beech-Nut" and the other has "Beech-Nut Brand" for the first letters over it.

R-X. Q. 86. How about the inside of the line of the oval, the Beech-Nut?

A. That also has Beech-Nut underneath

R-X. Q. 87. Do you see any similarity between those 392
central devices?

A. No, sir, I do not.

R-X. Q. 88. Absolutely conspicuously different?

A. They are, sir.

R-X. Q. 89. Nothing alike about them at all?

A. Not that I can see.

R-X. Q. 90. No similarity at all?

A. No, sir.

R-X. Q. 91. Just as different as the Camel is from the Lucky Strike?

A. Yes.

393

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 52. (By Mr. Cavanagh.) Taking those central devices as a whole, in the comparison of the cigarettes or the Beech-Nut Scrap tobacco with the Beech-Nut Packing Company's mark, would you have any difficulty in distinguishing those two, one from the other?

A. What is that?

R-. Q. 53. Would you have any difficulty in distin-

394 guishing that central device from that central device (referring to a package of cigarettes, a package of scrap tobacco, and a package of Beech-Nut chewing gum?)

A. No, I would not.

Mr. Cavanagh: That is all.
Mr. Hinton: That is all.
Deposition closed.
Signature waived.

395 Room 401, 53 State Street, Boston, Mass.,

August 9, 1922.

The taking of testimony resumed at 10.30 A. M. Present, as before.

BENJAMIN HURVITZ, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Please state your name, age, residence and
396 occupation?

A. My name is Benjamin Hurvitz; my age is 29; residence 29 Calder Street, Dorchester, Mass.; occupation, in the tobacco business now. If you want my profession why, that is different. I don't know how long I will be in it.

Q. 2. Are you in business for yourself,

A. No, I represent Mr. Solomon Hurvitz; that is, I am his manager.

Q. 3. Is he a relative of yours?

A. My brother.

Q. 4. How long have you been in the tobacco business?

A. Oh, this is counting. Well, steadily, I have been 397
in it for the last four years, but on and off,—that is, with my father,—and previously I have seen the tobacco business, and been in it to some extent, for 20 years.

Q. 5. Where is the store located where you work?

A. 42—44 Salem Street, Boston.

Q. 6. Is this in a business section or a residential section?

A. It is business; there are a few residences, but they are practically gone; it is in the market section,—in fact it is in the tobacco section there.

Q. 7. How many customers a day do you serve down there?

398

A. Oh, during week days we serve about a thousand, or eleven hundred, and Saturday we serve, Oh, as high as twenty-two or twenty-three hundred. That is, upon an average, about fifteen hundred customers.

Q. 8. What kind of goods do you sell besides tobacco?

A. We sell strictly tobacco,—we handle practically no pipes,—and of course we sell gum. Gum is our only—well, gum, and at the present time there are life savers, that stuff—it is our only side issue.

Q. 9. Do you sell Beech-Nut cigarettes and Beech-Nut scrap tobacco, like these packages which I show you?

A. We sell them both.

399

Q. 10. Do you sell the Beech-Nut gum, like this box, in packages like these, which I show you?

A. Yes, sir; we sell that too.

Q. 11. Whose product, if you know, are the Beech-Nut-cigarettes and the Beech-Nut scrap tobacco?

A. The cigarettes and scrap tobacco are products of P. Lorillard Co.

Q. 12. Whose product is the chewing gum?

A. The Beech-Nut Packing people, with that queer name, the city they belong to.

400 Q. 13. How long have you known the P. Lorillard Co.?

A. Oh, ever since I have known the tobacco business; that is, nearly 20 years, since the days of my memory of it, I guess.

Q. 14. So far as you know, what is the reputation of P. Lorillard Co. in the tobacco business?

A. I wish I possessed the same—an admirable one.

Q. 15. Were you ever under the impression that either the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco, like the packages you have examined, were put out by the same people that put out the Beech-Nut chewing
401 gum?

A. Never; never was under that impression.

Q. 16. State whether or not you ever had any inquiries or heard any comments from customers or others that would lead you to believe that they were under such an impression?

A. Well, really, in the handling of cigarettes and gum,—or cigarettes, rather, from the time of its inception, and the gum at pretty nearly the same time,- and of course that is almost a year and a half now; and the inquiries whether Beech-Nut cigarettes and the Beech-Nut gum were made by the same company haven't been
402 over two or three,—they have been by retail consumers only.

Q. 17. And what did you tell the retail consumers when they asked this question?

A. Well, the way we put it to the retail consumer, wanting to make the sale of Beech-Nut cigarettes, to make our allotment, we emphatically told them that they were made by the people who made the Helmars, Trophies, Moguls, Murads, and so forth, which were made by the Lorillard Company.

Q. 18. These are well-known brands of cigarettes, are they that you have mentioned?

A. Yes; these are well-known brands. 403

Q. 19. State whether or not you have sold either the Beech-Nut cigarette, or the Beech-Nut Scrap tobacco, as the product of the same people who make the Beech-Nut gum?

A. Never sold them as made by the same company. The cigarettes and tobacco are made by an entirely different company.

Q. 20. And you regard tobacco as entirely different from gum and food products?

A. Always. In fact gum has only been handled by us for the last year and a half.

Q. 21. State whether or not you ever saw a package 404
of Beech-Nut cigarettes that did not bear the name of "P. Lorillard Co." on it?

A. No; they all bear the name "P. Lorillard Co."

Q. 22. And did you ever see a package of Scrap tobacco that did not bear the name "Lorillard's" on it?

A. The same answer applies to the tobacco.

Q. 23. Did you ever know the Beech-Nut Packing Company to put out any tobacco products?

A. No; if they had put out tobacco products we would have been interested to buy their product.

Mr. Hinton: What is that? 405

The Witness: If we did know they put out tobacco products we would buy their tobacco products direct. But, so far as I know, they don't put it out.

Q. 24. Did you ever know the P. Lorillard Co. to put out any food products?

A. No.

Q. 25. Or gum?

A. No; They never put out gum.

Q. 26. So far as you know, to what extent has the Beech-Nut cigarette and the Beech-Nut scrap tobacco of P. Lorillard Co. been advertised in this Boston section?

406 A. Oh, they have been very greatly advertised. In fact they have been advertised so as to enable us to sell them in considerable quantities.

Q. 27. Did you ever have any customer come into your store and want to buy some Beech-Nut gum, and did you sell him some Beech-Nut scrap tobacco, or Beech-Nut cigarettes, in the place of the gum?

A. Why, the only way we do it at the store, when a man said "Beech-Nut" if he wanted cigarettes, he would say Beech-Nut cigarettes; and if he said "Beech-Nut" we would always take it for granted that he meant cigarettes. If he specified gum, we would give him gum.

407 We gave him what he asked for.

Q. 28. But you did not confuse the two?

A. Not in the wholesale trade, but in the retail trade, there is a "fire back", you know. They ask for gum—for instance they want Beech-Nut gum and they ask for "Beech-Nut", sometimes, without really specifying. But the confusion is really negligible; we have really no trouble about that.

Q. 29. What I meant is this: If a person came to your store and wanted to buy a box of Beech-Nut chewing gum, and asked you for that article—

A. (Interrupting) He would positively get it.

408 Q. 30. You would not give him Beech-Nut cigarettes?

A. Positively not.

Q. 31. Or Beech-Nut Scrap tobacco?

A. No.

Q. 32. Can you state from your experience whether or not it is the practice to wrap a package of cigarettes in transparent paper, like this package of Beech-Nut cigarettes before you?

A. The practiice, well it is not universal, but it is becoming universal, on what we call the cup or oval packages.

Q. 33. Then you know that it is the practice to wrap certain packages of cigarettes with glazed tissue paper?

A. It is the practice, positively; to what extent,— 409
I am just merely qualifying,— to what extent, I can't say, that is all.

Q. 34. Do you have any difficulty in reading the name "P. Lorillard Co." on this package of cigarettes which I show you?

A. No, not at all; there is no difficulty in reading it.

Q. 35. Would you have any difficulty in distinguishing between a package of cigarettes, or a package of scrap tobacco, and a package of gum, or a box?

A. No; the real background colors on both of them are almost entirely opposite, one is red and the other is yellow, or light brown. 410

Q. 36. You are referrrirng to the Beech-Nut gum, or the Beech-Nut cigarettes?

A. The Beech-Nut gum has a yellow background, and the Beech-Nut cigarettes a red background.

Mr. Cavanagh: I think that is about all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) How many people wait on the counter in the store in which you are employed, Mr Hurvitz? 411

A. Well, those steadily employed there,—three of us,

X-Q. 2. Three of you who are working at the same time, or do you relieve each other?

A. Yes, we are in at the same time, because our store is kept on practically regular hours.

X-Q. 3. That means that you always have three clerks working there?

A. No; of course in the evening one is let off.

X-Q. 4. And there are two there then?

A. There are two right straight through the day time.

412 X-Q. 5. And on week days you wait on about a thousand customers?

A. A thousand customers week days; that includes wholesale and retail.

X-Q. 6. That is, you are expected to make about 500 sales a day yourself?

A. Yes, sir; about 400 or 500. Of course Saturdays we have a bigger trade. I am taking only the week day trade now.

X-Q. 7. What would be the Saturday trade?

A. The Saturday trade is from twenty-two to twenty-three hundred.

413 X-Q. 8. So that Saturdays you would wait on seven or eight or nine hundred?

A. We have extra help on Saturdays.

X-Q. 9. Yes. This is a pretty busy place.

A. We have two extra helpers on Saturdays.

X-Q. 10. Now, when you say that you have had only about two or three inquiries in respect to the question of whether or not the Beech-Nut people make the Beech-Nut cigarettes, of course you mean that you can remember?

A. Oh, yes I meant—I can't account for a year and a half, but, as I say, it was only at the beginning that
414 we had two or three calls, and after that there was no question at all.

X-Q. 11. That is, so far as you can remember there was not?

A. That is as far as I can remember. You know that it is impossible to remember, because we are handling such a large number of customers a day, and it is a difficult thing to remember specifically.

X-Q. 12. You don't make it a practice, and there is no reason why you should have paid any particular attention to that when the cigarette first came out?

A. No; there was no need of it.

X-Q. 13. Now, I suppose in the ordinary practice a customer walks into your store and asks for what he wants, and puts down his money, and takes the goods and walks out, and there is very little conversation between you and the customer? 415

A. There is very little, except perhaps at the time when we desire to push cigarettes, we desire to give a display, and we specialize sometimes for the company. That is, we give a favor for a favor, because it is the practice to do so; but in the ordinary run of business we give the customer what he asks for.

X-Q. 14. If a man comes into your store and asks for Camel cigarettes, you would naturally give him Camel cigarettes, and he walks out, and if he talks at all, it would be about base ball, or about some of the topics of the day, and not about who makes Camel cigarettes? 416

A. Yes, the business man would, but if he is a friend or some relative, or some family relation, we would probably talk about something else.

X-Q. 15. It would not be an ordinary incident if you discussed with a man who made the Camel cigarettes, or anything of the kind, would it?

A. No, it is not.

X-Q. 16. By the way, what is the printing on a package of Camel cigarettes underneath the picture of the Camel; do you know? 417

A. Why, I have not taken particular pains to notice it on any cigarettes because when I pick up a package of cigarettes and am asked what is printed on it, I read it off and tell the man,—when a man is asking who makes the Beech-Nut cigarettes, I could tell him without looking, or Beech-Nut gum, but when you ask what is on any particular package it is difficult to remember.

X-Q. 17. You haven't noticed?

418 A. I haven't noticed in the ordinary small run, but asked to do a thing, it would be very easy to notice it.

X-Q. 18. In other words, if you are asked to look at a package of cigarettes to see what is printed on it, you would of course be able to look at it and tell what was on it, but aside from that you would not notice particularly?

A. Yes; but if you ask me what I do know, or what I notice, that is different. I know that practically all the companies print their names on the packages, particularly cigarettes. If you asked me to give those, referring to particular cigarettes, I could not say, but
419 I know that all do put their names somewhere on the package. You see there is a point there, on which way you ask your question.

X-Q. 19. Yes. Could you tell me offhand what is printed on the face of a package of Lucky Strike cigarettes, underneath the red panel?

A. Why, yes; on the Lucky Strike, the "American Tobacco Company" is on there. I remember about them. I don't remember about the Camels, but I will say that it is so used, because I know that the tobacco company is particular to get their name somewhere on the package in front.

420 X-Q. 20. On the front of the package underneath the red panel, you remember seeing that the "American Tobacco Co." is printed there?

A. I wouldn't say specifically in front of the package but I do know they print it on Lucky Strike to some extent,—and I know they have a label on the package, like stamping cigars, and the law applying to it; but on cigarettes I couldn't state specifically whether they all really do put it in front.

X-Q. 21. How many packages of Lucky Strike cigarettes do you suppose you have handed out over the counter? Of course you could not say within ten thousand.

A. I could give you a good estimate, very easily. Well, I should judge that we handle over the counter—you mean in single packages or cartons? 421

X-Q. 22. I am talking about the retail packages.

A. The retail packages,—we handle, I should judge, well—I should judge that we handle about 500 packages a day.

X-Q. 23. Now, you have been in the tobacco business for about four years?

A. That is steadily for four years now. I have been in the tobacco business a good number of years more than that; but if you ask me if that is my vocation, I would say yes, for the last four years. But I have been doing a tobacco business in off hours and vacation times longer than that, but most of my time has been spent in my profession. 422

X-Q. 24. You sell in your store a very small quantity of gum, relatively, and you don't feature your gum particularly?

A. No, we don't feature gum. We carry gum, because tobacco men who come in, simply demand it, and we carry it as an accommodation.

X-Q. 25. They expect to find gum for sale?

A. They expect to find gum, because we have to accommodate them, but we don't feature it in our business. Our business is tobacco. 423

X-Q. 26. Now, in regard to this business of the name on the retail package, if I understand you, you would not immediately notice and remember what is printed on a package of cigarettes, unless you were asked to look for it?

A. No, of course not. I have too many brands to look at,—too many brands to see.

X-Q. 27. Now, about these Mogul cigarettes and Murads,—and did you say Egyptian Dieties?

424 A. Yes, Dieties,—they are all included. I probably missed one or two of the brands, naming them offhand.

X-Q. 28. And in these one or two cases that you were asked about the manufacturer of Beech-Nut cigarettes, you told the people that they were made by the same crowd that made the Moguls and Murads?

A. Yes.

X-Q. 29. What manufacturer's name is featured on the Moguls and Murads and Dieties; do you know?

A. Why, I have never taken particular notice, as I say, of any particular case, but when you ask me to specify a case like the Beech-Nut cigarette, I know that
425 P. Lorillard Co. manufacture them. If you take one particular case I might be able to tell you; but if you are taking it offhand in a number of instances,—for instance, like the Camel, and I happen to notice it on the Camel, I could say whose name is printed on it, but if I didn't notice, I couldn't say. Of course I know who makes it, but I couldn't say whose name is on there; but in the case in question I happen to know that Lorillard's name is printed on Beech-Nut cigarettes and on the packages of Scrap tobacco. But I have not taken notice on either Helmars, or some of the other brands, but I do know it is not on the front of Helmars.

426 X-Q. 30. It is not on the front of Helmars?

A. No, I think not.

X-Q. 31. Now, how about the Egyptian Dieties and Murads and Moguls? What manufacturer's name is featured on those packages; do you know?

A. I don't think, so far as I remember, the name is featured on the front of the package.

X-Q. 32. There isn't any manufacturer's name featured on the front of the package?

A. No, not on the front. In the case of the high grade Turkish cigarettes you speak of, I think they are featured on the inside.

X-Q. 33. On the inside? 427

A. I think they are.

X-Q. 34. You must have sold a great many packages of Egyptian Dieties and Moguls??

A. Not so many Egyptian Dieties, but Moguls and Murads I have.

X-Q. 35. And you don't know whether there is any manufacturer's name featured on the front of those packages?

A. No, I don't think the manufacturer's name is featured on high grade cigarettes, not the name of the manufacturer.

X-Q. 36. You don't think it is? 428

A. I know they are featured, but I don't recall that they are featured on the front, I don't think they are. I know they are featured somewhere, but I think it is inside.

X-Q. 37. In what way is it featured on these brands?

A. The way it is featured, I think the original manufacturer's name is featured, and then the successor.

X-Q. 38. What is the original name?

A. I don't know how you pronounce it, S. Anargyros. In fact we receive their bills as "P. Lorillard Co. Successor to S. Anargyros", in the case of Turkish cigarettes. Whereas on the Beech-Nut cigarettes and Scrap 429 tobacco, we get the original P. Lorillard Co. bill.

X-Q. 39. And that is where you get your definite knowledge as to who makes them?

A. That is, as to the original maker,—and I don't say they are the original makers of Beech-Nut cigarettes, or Scrap, but our knowledge comes from the face of the bill, the maker of the cigarette, as I say,—The Turkish cigarettes, as I say, are somewhat different.

X-Q. 40. Well, then, if I understand your statement, except from the fact that you told these customers who inquired about it, they would have had very little

opportunity to find out or know whether it was the Lorillard Company who made the Egyptian Dietics and the Moguls and Murads or not, no manufacturer's name being featured on that package; is that the case?

A. Why, just make that a little plainer, will you, please?

X-Q. 41. All I mean is that Anargyros' name is featured, as I understand you to say now, you think it was for instance on the Murad cigarettes. That would be the name that the customers would associate with the manufacture of those cigarettes, wouldn't it?

A. Not necessarily, because it is darned hard for customers to associate cigarettes with the man who makes them.

X-Q. 42. Is that so?

A. Very few customers ask me who makes Beech-Nut cigarettes, or Beech-Nut gum; they are not concerned about it.

X-Q. 43. They rely on the name and label?

A. That is the idea; but when you feature Beech-Nut cigarettes, as we feature cigarettes we give them all a show. Understand, we do not take any particular brand. We feature sometimes Camels. We are out for the sales, not any particular brand; and if we can qualify the cigarette, we do it. Now, with the Beech-Nut cigarette, we qualify it with the statement that it is made by the people who make a good brand of cigarettes, such as the Moguls, Murads, and Helmars. If a person comes in for chewing tobacco, and I am featuring Apple, I say it is manufactured by the same people who make Camels. They don't care who makes it, but it is customary for us to mention the name of the company to them.

X-Q. 44. What do you mean by, "It is the custom to tell them?"

A. We tell them who makes a cigarette and qualify 433
it with who makes some other brand along with it.

X-Q. 45. You do it in the ordinary course of business?

A. Oh, yes, in the ordinary sales.

X-Q. 46. If I came into the store and asked for a Camel cigarette, would you tell me who makes them?

A. Oh, no. If I was featuring Apple tobacco, and you came in and asked for B. L. and I wanted to feature Apple, I would ask you if you had ever tried Apple, and if you said no, I would tell you that is was manufactured by R. J. Reynolds, but at the same time we are not attempting to wean you from B. L., and give you 434
Apple. I am just featuring Apple for that day. We don't feature every day, but once in awhile we give each company an opportunity.

X-Q. 47. That is an effective way to sell; the one product on the other products?

A. The other products, on which we give the name of the company who makes them. I, as a matter of fact, know that the people who smoke care very little who makes it, some do, but, as a general rule people care very little, who smoke, who makes it.

X-Q. 48. If that is a fact, why do you tell them who makes it? 435

A. We simply prevent them from being misled. Now, I could just as easily say that Beech-Nut cigarettes are made by R. J. Reynolds Company, but that would not be just. Whether he is interested, I can't exactly say, except I do know that nine out of ten people are not interested in who makes any particular brand.

X-Q. 49. But you produce an effect on the sales by arguing it?

A. It is a fact, because we carry the other brand of cigarettes. If we are featuring a sale on Helmars, and the same company make Beech-Nut cigarettes, we mention the name.

436 X-Q. 50. You use that as a sale argument?

A. Of course in featuring for that day, we don't always do it, but if a man comes in and asks for Camels, I don't give him a Beech-Nut and try to push it over on him, but if I am specializing on Beech-Nut, I tell him they are made by the people who make —

X-Q. 51. The reason is that you are attempting an effective way to sell it?

A. That is the idea.

X-Q. 52. And if he has a high regard for that product, he is apt to buy it?

A. Certainly.

437 X-Q. 53. If he likes the other products of that company who makes the cigarette, the chances are that he will buy it?

A, Yes, sir.

X-Q. 54. Now, you say that people come into your store,—and I think it is common experience—and ask for "Beech-Nut"?

A. Yes.

X-Q. 55. And if he comes in and asks for Beech-Nut —

A. (Witness interrupting) He usually refers to Beech-Nut cigarettes.

438 X-Q. 56. And if he asks for "Beech-Nut", you hand him cigarettes?

A. Yes, usually; but if he specifies gum, he gets Beech-Nut gum, and if he specifies Beech-Nut Scrap, similarly he gets Beech-Nut Scrap. So gum is in the same position as Beech-Nut Scrap. If he specifies Scrap, he will get Scrap; and if he specifies gum, he will get gum.

X-Q. 57. I see. If you happen to be right —

A. Why, in the usual course of business we are right, he usually gets cigarettes, but he gets what he wants, if it is not Beech-Nut cigarettes.

X-Q. 58. Now, Mr. Hurvitz, I wish you would go back 439
in your mind, if you can, to the time you first put in the Beech-Nut cigarettes, and tell me, if you remember, how you came to put them in. Did a jobber, or a Lorillard man, or somebody come around and offer you these cigarettes, to put them in for you?

A. The Lorillard representative comes in, just as the representative of any company comes in, and we give them the same opportunity that we give every other big representive company that advertises their brand.

X-Q. 59. And he came in and told you that they were coming out with the Beech-Nut cigarette, and got you to take those cigarettes and sell them? 440

A. Yes.

X-Q. 60. You knew that they were Lorillard products before you ever sold them?

A. Yes.

X-Q. 61. That is true?

A. Yes.

X-Q. 62. Because you are in the tobacco business?

A. Exactly.

X-Q. 63. Now, about this Beech-Nut Scrap tobacco. Do you sell much of that?

A. Well, we sell quite a bit of Beech-Nut Scrap, as a scrap tobacco. Scrap is, as a general rule, not very 441
largely sold, but we sell more Beech-Nut Scrap than any other scrap.

X-Q. 64. There is not much market in this territory for Scrap, is there?

A. No.

X-Q. 65. Not so much as there is in the Middle West?

A. No; I know that it is sold out in the Middle West to a considerable extent.

X-Q. 66. One more question. Where do you have your gum and hard candies — do you sell hard candies?

A. We don't sell them retail.

442 X-Q. 67. How about mints?

A. We don't sell them retail.

X-Q. 68. Or Life Savers?

A. We sell them wholesale.

X-Q. 69. Where do you display, for instance, gum, in your store?

A. The retail gum, we display it right on top of the cigar showcase.

X-Q. 70. And the cigarettes are behind?

A, The cigarettes are behind, just as any tobacco dealer keeps them. You know, the cigars are generally in the showcase, and the cigarettes are back, and the
443 usual practice is for the gum to be on the showcase, so that all the customer does, usually, is to help himself. We, on the contrary, keep them in jars, because we prefer to give it out ourselves so that there will be no handling of it.

Mr. Hinton: That is all.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 37. I just want to ask one or two questions
444 in re-direct examination. You spoke in your featuring the Beech-Nut cigarettes that you mentioned they were made by the same concern that made the Murad and Moguls and Egyptian Deities?

A. Yes.

R-D Q. 38. That is, you mean P. Lorillard Co.?

A. The Lorillard Company, yes.

R-D Q. 39. Why would you make that statement in connection with the Lorillard Company?

A. Well, we make that statement because the public, —that is, any of those who use Helmars, Murads and Moguls, know that Lorillard makes good cigarettes.

R-D Q. 40. In other words, you are selling the Beech-Nut cigarettes on the reputation of the Lorillard Company? 445

A. Why, certainly. Our chances of getting returns on Beech-Nut cigarettes, or products of any other company, would be small, unless we have a reputable firm behind them.

R-D Q. 41. So, as I understand you, the reputation of the Lorillard Co. is sufficient to sell them?

A. Sufficient to sell Beech-Nut cigarettes, yes.

R-D Q. 42. State whether or not you have ever sold any Beech-Nut cigarettes, or Beech-Nut Scrap tobacco, on the reputation of the Beech-Nut packing Company? 446

A. We never did, and we never would, no more than I do the Beech-Nut gum.

R-D Q. 43. Beech-Nut gum on what, on the reputation of the Lorillard Company?

A. I would not depend upon the reputation of one company to sell the other company's goods. I would not expect to do it to the Beech-Nut people any more than I would expect to do it to the Lorillard Company.

R-D Q. 44. As I understand it, you would not sell one product upon the reputation of another concern, which may be a different product, although they both have the same name? 447

A. No.

R-D Q. 45. In your opinion would a tobacco user, or a customer, prefer a tobacco product made by a tobacco company rather than made by a food product company?

Mr. Hinton: I object to that.

A. I refuse to render such an opinion. I can't get into a man's head—I would not venture to say what a man would do.

Mr. Cavanagh: That is all.

448 *Re-cross Examination.*

R-X Q. 71. (By Mr. Hinton.) Mr. Hurvitz, you say you never sold any of these Beech-Nut cigarettes on the reputation of the Beech-Nut Packing Company. I understand you to mean that you never told anybody that they were made by the Beech-Nut Packing Company?

A. Of course not. I would not tell anybody, and I would apply the same rule to the Beech-Nut Packing Company products, you understand. That is, I would not treat one fairly and the other unfairly.

R-X Q. 72. What you mean is that you didn't tell
449 anybody that these cigarettes were made by the Beech-Nut Packing Company?

A. Positively; I never did.

Mr. Hinton: I think that is all.

Re-direct Examination.

R-D Q. 46. (By Mr. Cavanagh.) But I understand you to say that the reputation of the Lorillard Company was sufficient to sell their product?

A. Yes; I have stated that before.

450 Mr. Hinton: I object to that as leading in form and as a conclusion of the witness.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

451

JOHN A. RATTO, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age, residence and occupation?

A. My name is John A. Ratto; age 28; residence 10 Hull Street, Boston; occupation, I am running my father's store, a fruit store, at 143 Causeway Street, Boston.

Q. 2. What lines of goods do you sell in that store? 452

A. Fruits, that is the main line,—tobacco, candies, gum and groceries, and soda.

Q. 3. Do you sell Beech-Nut cigarettes like this exhibit package?

A. Beech-Nut cigarettes, yes.

Q. 4. And do you sell Beech-Nut Scrap tobacco, like this exhibit package?

A. Yes.

Q. 5. And also the Beech-Nut chewing gum, like the box which I show you?

A. Yes; it is a good seller.

Q. 6. Who, if you know, makes the Beech-Nut cigarette? 453

A. Lorillard, it is written right on the package there.

Q. 7. And who makes the Beech-Nut gum?

A. The Packing Company.

Q. 8. The Beech-Nut Packing Company?

A. Yes, sir.

Q. 9. Did you ever have the impression, or belief, that the Beech-Nut cigarettes were made by the same concern that makes the Beech-Nut gum?

A. No.

Q. 10. Did you ever know of anybody who was so confused?

1026

1027

454 A. I never came in contact with anybody.

Q. 11. You never had any inquiries or heard comments that would lead you to believe that they were made by the same people?

A, No, never.

Q. 12. You say that the maker's name appears on the package. You have no difficulty in reading that name on the package of cigarettes, have you?

A. No.

Q. 13. If a customer came into your store and wanted Beech-Nut gum, woud you be so confused as to sell him Beech-Nut cigarettes for Beech-Nut gum?

455 A. No.

Q. 14. And likewise, if he wanted Beech-Nut cigarettes, you would give him Beech-Nut cigarettes?

A. Yes.

Q. 15. Whose cigarettes?

A. P. Lorillard's.

Q. 16. Why wouldn't you confuse cigarettes with chewing gum?

A. Why, because of the difference in the packages. In Beech-Nut gum there is but one beech nut with leaves around it, and with the cigarettes there are two beech nuts. And the cigarette has a yellow border, and around
456 the gum (pointing to the oval) it has a red border.

Q. 17. Then from the dress and shape of the package you would have no difficulty in distinguishing them?

A. No.

Q. 18. State whether or not you would ever be confused into taking any gum for any cigarette?

A. No.

Q. 19. Why not?

A. Why, usually when a person comes in they distinguish what they want, whether they want gum or cigarettes.

Q. 20. You would not confuse the two goods?

A. Not I.

Q. 21. What would you think of a man who would confuse gum with cigarettes? 457

A. I guess he would not know what he was going to purchase. That is what I figure.

Mr. Cavanagh: I think that is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) You say you run a grocery store?

A. Grocery.

X-Q. 2. A delicatessen store?

A. No, just Italan goods. 458

X-Q. 3. Italian goods, an Italian grocery. You sell Beech-Nut Packing Company goods there?

A. Not outside of Beech-Nut gum.

X-Q. 4. You don't sell any of their goods except Beech-Nut gum?

A. No.

X-Q. 5. You don't sell marmalade or bacon?

A. No.

X-Q. 6. And you handle tobacco?

A. Tobacco.

X-Q. 7. Now, how did you come to put in the Beech-Nut cigarettes; do you remember? 459

A. How did I come to put them in?

X-Q. 8. Yes.

A. Well, they were being advertised and there was a demand for them.

X-Q. 9. Did the Lorillard man come around to see you and get you to put them in?

A. Why, yes, he came to see me, and I put them in, but there was a demand for them before he came around. I didn't put them in as soon as they were out.

X-Q. 10. How long have you been selling tobacco products?

460 A. All of eight years.

X-Q. 11. Do people come into your store and just ask for "Beech-Nut"?

A. Yes, certainly.

X-Q. 12. When they just come in and ask for "Beech-Nut" and don't say whether it is tobacco, cigarettes, or gum, what do you give them?

A. I ask them to distinguish whether they want gum or cigarettes.

X-Q. 13. Do you sell Lucky Strike cigarettes?

A. Yes.

X-Q. 14. Do you sell Camels?

461 A. Camels.

X-Q. 15. Do you sell Fatimas?

A. Fatimas.

X-Q. 16. And Chesterfields?

A. Chesterfields.

X-Q. 17. What is printed on the Lucky Strike package, underneath the red panel with the name "Lucky Strike" in it?

A. Well, I tell you, I never looked at it. I think it is the American Tobacco Company that is printed underneath there.

X-Q. 18. I mean on the front of the package?

462 A. I think it is the American Tobacco Company. I know it is made by them anyway. I know that.

X-Q. 19. Being in the business you would know that, of course?

A. Certainly.

X-Q. 20. Now, what is printed on the package of Fatima cigarettes underneath the picture of the girl with he cimitar?

A. I think Liggett & Myers is printed there.

X-Q. 21. And what is printed on the Camel cigarettes underneath the picture of the Camel?

A. R. J. Reynolds, I think. I know he makes them.

X-Q. 22. That is printed underneath the camel? 463

A. Well, I won't say for sure, but I know he is the man who manufactures them.

X-Q. 23. You never noticed really what is printed on any of these packages, did you?

A. Well, I know there is on everyone of them a label, I know that, of a manufacturer, that I know, but just exactly where it is I couldn't say.

X-Q. 24. But you never noticed what is printed on the front of these packages, and underneath the device, the conspicuous device that is there on the label; you never noticed what is printed on the bottom of the front of the package, did you,—no reason why you should? 464

A. No.

X-Q. 25. Now, how many customers do you wait on in a day, do you suppose?

A. Well, I couldn't say.

X-Q. 26. Just give me an estimate. Would it be fifty?

A. Yes.

X-Q. 27. One hundred?

A. Between fifty and one hundred.

X-Q. 28. An that is in the grocery trade, or the whole business?

A. Well, it is mostly fruit. We did have a good to- 465
bacco line until prices went up.

X-Q. 29. How many people work in this place?

A. There is five.

X-Q. 30. That is a family, is it?

A. No; there are three in the family and two outsiders.

X-Q. 31. And I suppose in the ordinary course, when a man wants to buy cigarettes he comes in and asks for whatever brand of cigarettes he wants, and puts down his money, and takes the cigarettes and walks out, and

466 you don't have any conversation with him about who makes them, or anything of the kind?

A. No.

X-Q. 32. If he came into your store and wanted Camel cigarettes, he would ask for Camel cigarettes, and you would give them to him and he would pay for them, and take them, and walk out?

A. Yes.

X-Q. 33. That is the ordinary course?

A. Yes.

X-Q. 34. Now, can you remember when you put in the Beech-Nut cigarettes? A year ago was that?

467 A. I couldn't say.

X-Q. 35. About a year ago?

A. I can't remember that.

X-Q. 36. You don't remember when you put them in. You don't remember about when you put them in?

A. No.

X-Q. 37. Now, were you making any special effort at the time you put in those cigarettes, or have you since that time, to remember any discussion that you may have had with your trade about them?

A. No, sir.

X-Q. 38. It would be ordinary casual conversation
468 with a customer, and there would be no reason why you should remember that conversation any more than any other?

A. No.

X-Q. 39. You were not asked to notice and remember about that, were you?

A. No.

X-Q. 40. And you would very likely forget such a conversation about the manufacturer of Beech-Nut cigarettes, or any other cigarettes?

A. Oh, yes.

X-Q. 41. If a man asked you who made Camel cigarettes, you would not remember that for a year and a half? 469

A. Well, I know that.

X-Q. 42. I know, but you would not remember that he asked you,—you would not pay any attention to it?

A. I never had such a question thrown at me anyway.

X-Q. 43. Nobody asked you that question?

A. No.

X-Q. 44. But if you were asked you would not be apt to remember it?

A. I know who makes the brand.

X-Q. 45. You know who makes them, yes, of course. 470

A. Yes.

X-Q. 46. So far as you know you may have had discussion on this question of who made the Beech-Nut cigarettes, particularly, when they first came out, and it might slip your mind?

A. No, I never had any.

X-Q. 47. Are you positive of that?

A. Yes.

X-Q. 48. They just came in and bought them and walked out of the store?

A. That is all.

X-Q. 49. And of course what they thought you don't know? 471

A. Of course I couldn't read a man's mind.

X-Q. 50. No, you are not a mind reader, and you can't tell why they bought them. All you know is that they asked for them?

A. Well, we keep our tobacco counter in one place and the confectionery on the other side, so naturally if the man wants to buy gum, it is right in front of him, and if he wants to buy tobacco, he walks up to the tobacco counter.

Mr. Hinton: That is all.

472 *Re-direct Examination.*

R-D. Q. 22. (By Mr. Cavanagh.) You knew the Beech-Nut cigarettes were made by P. Lorillard Co.?

A. Yes.

R-D. Q. 23. What is the reputation of P. Lorillard Co. as tobacco manufacturers?

A. So far as I find them, they are O. K., and one of the biggest tobacco manufacturers in the country.

R-D. Q. 24. So you sold the cigarettes on the reputation of the Lorillard Company?

A. Yes, sir.

473 Mr Hinton: I object to that as leading. The witness has already testified that he has had no conversation with customers about the manufacture of cigarettes.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X. Q. 51. (By Mr. Hinton.) Didn't I understand you to say that you simply sold these cigarettes when people asked for them, and you didn't have any discussion with them about who made the cigarettes?

474 A. Why, yes, I don't believe that anybody asked about them.

R-X. Q. 52. You never had any occasion to discuss the question of who made the cigarettes with any of your customers that you can remember?

A. No.

R-X. Q. 53. They came in and asked for the cigarettes and they took them and walked out, and that is all there was about it?

A. Yes.

Mr. Hinton: That is all.

Re-direct Examination. 475

R-D. Q. 25. (By Mr. Cavanagh.) As I understand you, you got these cigarettes from the Lorillard Company, did you not?

A. Yes, sir.

R-D. Q. 26. And you didn't sell them on the reputation of the Beech-Nut Packing Company, did you?

A. No.

Mr. Hinton: Objected to as grossly leading.

R-D. Q. 27. State whether or not you have ever told anyone that the Beech-Nut cigarettes were made by the same people who make the Beech-Nut chewing gum? 476

A. No, I never told anyone that. In fact I have never had anybody throw that question to me.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X. Q. 54. (By Mr. Hinton.) As a matter of fact, you don't know why they buy the cigarettes, and as you said, you are not a mind reader, are you?

A. No. 477

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

478 MAX DUBLIN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answers to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age, residence and occupation?

A. My name is Max Dublin; age 32; I live at 1,326 Blue Hill Avenue, Mattapan; manager for my father, A. Dublin, wholesale and retail tobacconists at 834 Washington Street, Boston.

Q. 2. How long have you been in the tobacco business, Mr. Dublin?

479 A. Well, I have worked at it—I have been in it 16 years, but I have worked at it before that; but I have been with my father 16 years.

Q. 3. In your store do you sell any goods besides tobacco products?

A. Yes; a little stationery, magazines, and also gum.

Q. 4. Do you sell the Beech-Nut cigarette, like this exhibit package which I show you, and also the Beech-Nut scrap tobacco, like this exhibit package which I show you?

A. Yes.

480 Q. 5. And do you also sell the Beech-Nut chewing gum?

A. Yes.

Q. 6 How long have you been selling the Beech-Nut cigarettes?

A. Why, since they came out.

Q. 7. About how long ago was that?

A. I can't remember dates.

Q. 8. To the best of your recollection, approximately how long ago, a month, or year, or what?

A. Oh, it is more than a year. Let's see how long is it? Why, I think it is over two years, but I am not positive.

Q. 9. Who, if you know, is the manufacturer of the 481
Beech-Nut cigarettes?

A. The P. Lorillard Co.

Q. 10. And who, if you know, is the manufacturer of the Beech-Nut chewing gum?

A. The Beech-Nut Packing Company.

Q. 11. So far as you know, what is the reputation of the P. Lorillard Co. as a tobacco manufacturer?

A. Why, I have never had any trouble; I have found them always honorable and I know they don't do any misrepresentation, so far as I am concerned.

Q. 12. Is it a well-known concern?

A. Yes, their name is well known by everybody. 482

Mr. Hinton: Objected to as a conclusion of the witness.

Q. 13. State whether or not you were ever under the impression that the Beech-Nut cigarette or the Beech-Nut Scrap tobacco was made by the same people that make the gum?

A. No, sir, because I always knew the packing company, and the Lorillard Company. I know some of the brands they make I use in my own home.

Q. 14. You mean some of the brands of the Beech- 483
Nut Packing Company?

A. Yes.

Q. 15. What do you use in your own home of those brands?

A. My mother buys them. We have used a ginger ale of theirs, and I think it is a pickle she uses. You know what I mean. And she has got, I think, a syrup from the Beech-Nut people. I have seen the name on the table, something like that, that they have, on there (indicating).

Q. 16. You are pointing to a package of gum?

484 A. Yes; something like that they have on the gum.

Q. 17. State whether or not you ever had any inquiries or heard any comments or remarks which would lead you to believe that customers or others, were under the impression that the Beech-Nut cigarettes were made by the same people who made the Beech-Nut gum?

A. Why, in my experience I haven't had anybody ask me, but in an offhand way sometimes one would say, "Is the one made by the other, or is the other made by the other," and I would say, "No, one is the Beech-Nut Packing Company, and the other is Lorillard." I said, "P. Lorillard Co. makes tobaccos and cigarettes, and the
485 Beech-Nut Packing Company makes food products."

Q. 18. Were you ever confused,—or would you ever confuse tobacco with food products?

A. No, sir; I would not.

Q. 19. What would you think of a person who would confuse tobacco with food products?

A. I would not say what I think about others.

Q. 20. Would you think that he didn't know, or that he was crazy?

A. I don't know, I can't understand, because the packing of the cigarettes is so different. You can always tell it, and you can tell a package of gum when you
486 see it.

Q. 21. Well, are they separate and distinct products in your opinion?

A. Yes, surely. In fact, the largest selling gum is Beech-Nut, larger than Wrigley's, and I never had anybody ask if this concern made cigarettes or Scrap tobacco. I mean that P. Lorillard Co. made the Beech-Nut gum or the Beech-Nut Packing Company ever made the Beech-Nut cigarettes.

Q. 22. State whether or not you have ever sold any Beech-Nut cigarettes as, or told anyone that those cigarettes were made by the Beech-Nut Packing Company?

A. I absolutely never did. I don't do that way. 487

Q. 23. State whether or not you have known these Beech-Nut cigarettes to be advertised?

A. They have been extensively advertised. In fact posters put up all over the stores, on the windows and newspaper advertising that I have read myself.

Q. 24. State whether or not you ever sold any Beech-Nut gum on the reputation of the Lorillard Company?

A. Well, I personally believe that the Beech-Nut Packing Company has a wonderful reputation, and I also believe that P. Lorillard Co. has a wonderful reputation; and I believe that the Beech-Nut Packing Company gum is selling on their own merit, and the cigar- 488
ettes are selling on their merit as being manufactured by the P. Lorillard Co.

Mr. Hinton: Objected to as an opinion of the witness.

Q. 25. There is no confusion in your mind on this point at all?

A. No, sir.

Q. 26. State whether or not it is the practice, so far as you know, in the cigarette business, to wrap cigarettes in transparent paper, like this package of Beech- 489
Nut cigarettes which I show you?

A. That has been done for over five years to my knowledge. The different manufacturers started in, and they are practically all packing in this way, outside of a few packages of the Turkish goods.

Q. 27. Is your store located in a business section or a residential section?

A. Why, it is now practically a wholesale district,—or rather a retail district for credit furniture dealers. That is practically what is there now.

Q. 28. How many customers do you serve a day, about,—approximately, I mean?

490 A. Well, it is about 700 a day.

Q. 29. How did you come to know that the Beech-Nut cigarettes were put up by the P. Lorillard Co.?

A. Why, it is customary when a new brand comes out, for a salesman to come in the store, and he says, "Here is a new product of the P. Lorillard Co." I happen to know who the P. Lorillard Co. are, but I know of dealers who do not know who the P. Lorillard Co. are, and the P. Lorillard Co. man says, "They manufacture Helmars and Trophies and Moguls, and so forth, and B. L. tobacco." So there is no confusion. They let them understand. They say, "This is the P. Lorillard Co. who
491 make these cigarettes."

Mr. Hinton: Objected to as the opinion of the witness.

Q. 30. And they state that the P. Lorillard Co. make these well-known brands?

A. Yes.

Q. 31. And it is on that reputation that they sell the cigarettes?

A. Yes. Anybody knows that when they buy a product from the P. Lorillard Co. they guarantee the brand,
492 that they put them in, and if anything goes wrong they have nothing to lose.

Q. 32. And that is the reputation of the Lorillard Co.?

A. That is the reputation of the P. Lorillard Co.

Q. 33. And their brands are well known?

A. Yes, they are very well known.

Q. 34. What are some of their other brands?

A. The B. L. chewing tobacco, Murad cigarettes, Helmars and Trophies and Moguls, and all the well-known brands.

Q. 35. Would you have any difficulty in distinguishing a package of cigarettes, or a package of Scrap tobacco, from a package of gum, or food products?

A. No, sir. I sold Beech-Nut Scrap tobacco first. I 493
sold that long before I sold this. (Pointing to a package of Scrap tobacco, and also a package of cigarettes.)

Q. 36. How long have you been selling the Scrap tobacco, about?

A. Why, I have sold Scrap tobacco since we have been in business.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) You say that the Beech- 494
Nut chewing gum is one of your best sellers. As a matter of fact it is your best selling chewing gum?

A. Yes, it is, in my store.

X-Q. 2. And you make approximately 700 sales a day in your store?

A. Yes.

X-Q. 3. Do you mean that you personally make that many sales?

A. I didn't say that I make personally that number of sales. I say the sales in the store are about that.

X-Q. 4. How many clerks work in your store?

A. I and my father, and I have another gentleman 495
who helps me out.

X-Q. 5. How many are there ordinarily, one or more than one?

A. Sometimes one and sometimes two.

X-Q. 6. Never more than two?

A. Never more than two.

X-Q. 7. You are in the wholesale and retail business?

A. Yes, sir.

X-Q. 8. And you operate that business in this same store, the wholesale sales and the retail?

A. Yes.

496 X-Q. 9. And you job these Beech-Nut cigarettes, do you?

A. Yes, sir.

X-Q. 10. And do you job other tobacco products?

A. Yes, sir.

X-Q. 11. Do you job gum?

A. Yes.

X-Q. 12. When you talk about 700 sales a day, do you mean retail sales to consuming customers, or do you include the wholesale too?

A. No, sir; there are 700 retail sales. In fact, I believe it is more.

497 X-Q. 13. Just the retail sales?

A. Yes, sir. We also handle newspapers; don't forget that we sell over 200 newspapers a day. That is 200 customers. It probably looks large to you.

X-Q. 14. Now, you say that some dealers don't know who the P. Lorillard Co. are?

A. No, sir; some dealers do not.

X-Q. 15. You mean tobacco dealers?

A. Why, no, sir; they are fruit merchants, or maybe they run a barber shop and handle, as a side line, tobacco.

X-Q. 16. They handle tobacco?

498 A. Yes, sir.

X-Q. 17. They handle cigarettes, and perhaps chewing tobacco and cigars there in that business?

A. It is a side line.

X-Q. 18. I am not talking about whether it is a side line or not. They are selling tobacco products to the public?

A. Yes, sir.

X-Q. 19. And they don't know who the P. Lorillard Co. is?

A. Why, they are new merchants in the business, and they have not got to distinguish one manufacturer from

the other. In fact, some think that the tobacco companies are one concern, because they buy all their tobacco from the jobber, and they think the jobbers are the owners of the product, when he sells it,—they think he owns the brand,—these small fellows don't know the difference. 499

X-Q. 20. They don't know who makes the stuff?

A. No, the small dealers who handle it as a side line; but there is nobody who sells tobacco only but who knows who manufactures it.

X-Q. 21. Would you expect a man in the tobacco business as you are, would know the P. Lorillard Co.?

A. Certainly. 500

X-Q. 22. But a man who is handling tobacco as a side line may not,—that is about it, isn't it?

A. Yes, sir; that is, I have found some in my experience that way.

X-Q. 23. Now, when you mentioned Murads, Moguls, Egyptian Dieties,—do you know that brand?

A. Yes, sir.

X-Q. 24. Do you know what manufacturer's name is featured and made prominent, if any, on those products?

A. Yes.

X-Q. 25. What?

A. Some of them say S. Anargyros, and it says on some, "Stock controlled by P. Lorillard Co." 501

X-Q. 26. What is featured on that package (showing witness box of Egyptian Dieties)?

A. Both names. The other name is written fancy, and the "P. Lorillard Co." is very plain.

X-Q. 27. Very small type, isn't it?

A. But it is distinct; you can see it.

X-Q. 28. You can see it if you look for it?

A. Well, I can see it, and I have poor eyesight.

X-Q. 29. Now, the Egyptian Dieties, do you sell those?

502 A. The Egyptian Dieties, I know all about the Egyptian Dieties, but I am not in a section that buys that cigarette,—I am not in a section where they pay 25 cents for a package of cigarettes.

X-Q. 30. How about the Murads, do you sell that brand?

A. Yes, sir.

X-Q. 31. Is that an Anargyros brand?

A. Yes, sir.

X-Q. 32. Is the name Anargyros featured on that?

A. It is on there.

X-Q. 33. Is the name, "P. Lorillard Co." printed on
503 there, do you know?

A. I think it is in the inside, on a piece of paper between the cigarettes, the name, "P. Lorillard Co." I am not positive, but I think it is.

X-Q. 34. Did you ever notice what is printed on a package of Camel cigarettes underneath the picture of the Camel?

A. No, I didn't.

X-Q. 35. You couldn't say, you never noticed?

A. I have never noticed.

X-Q. 36. You would never notice in the natural course of events, because you would simply take the cigarettes
504 off the shelf and hand them out?

A. I know that R. J. Reynolds make the cigarette, and I know they are Camels, and I put them on the shelf, and if anybody wants them I hand them out to them.

X-Q. 37. How many Camel cigarettes do you suppose you handle every day?

A. I handle 50 000 a week, I couldn't say by the day, but I know I buy 50 000 a week.

X-Q. 38. How about Lucky Strike cigarettes, do you happen to have noticed what is printed on the bottom of the front face of the Lucky Strike package?

A. I think it says on the Lucky Strike, "Man- 505
ufactured by the American Tobacco Co."

X-Q. 39. You know that they are manufactured by the American Tobacco Co.?

A. Yes.

X-Q. 40. And you are guessing that the name appears on the package, are you not?

A. No, the Lucky Strike, it appears on the new brand which is put out,—which we are putting out. As you know, they put on the name.

X-Q. 41. Well, you know that.

A. That is all I can say. The American Tobacco Company, they put that on their new brands. They 506
have not been doing it very long. For instance, most of the old packages, they have Wright's name and then their name on the back; but on the new brand they put their name on.

X-Q. 42. I am not talking about the general practice. I want to know if you can tell me specifically what is printed on the bottom of the package of Lucky Strike?

A. Oh, no, I could not.

X-Q. 43. You never noticed?

A. No, sir; but I have noticed on other brands. When the brand came out, I noticed when they came out with a new brand, they make this statement, "Manufactured 507
by the American Tobacco Co."

Mr. Hinton: Objected to as not responsive.

X-Q. 44. Now, you can't remember with any degree of accuracy when you first put out these Beech-Nut cigarettes,—when you first started selling them?

A. No, because we handle so many different brands. I couldn't remember.

X-Q. 45. Do you remembber whether some Lorillard man, or some salesman came to you and told you that

508 these cigarettes were coming out and you wanted to stock them?

A. The usual method or way they sell me, the salesman, sometimes Mr. Madden of the Lorillard Company comes in and says to me, "Here is a new cigarette we are manufacturing. I want you to put them in. You know our reputation, and that cigarette will sell. So long as we manufacture it you are not taking any chance." Of course I have in mind that it is the P. Lorillard Co. who manufactures them.

X-Q. 46. Of course you know that he refers to the P. Lorillard Co.?

509 A. Yes, sir.

X-Q. 47. And he tells you that they are coming out with these cigarettes?

A. Yes, sir.

X-Q. 48. And you know then that it is the Lorillard brand?

A. Yes, sir.

X-Q. 49. It is very simple, isn't it? Now, you said that you had an occasional inquiry from a customer about whether one concern that makes the gum, whether the same concern makes the cigarette, indicating some doubt in the mind of the customer. Is that the fact?

510 A. Why, I have had,—yes, I have had very few retailers that I sell, which I sell to, small dealers, I don't sell to the big stores, and I have had perhaps a few consumers that I have heard them talking, but not while the purchase was made in the store. When the Beech-Nut cigarette first came out, I said, that is the same brand that they have had, they have had that brand for years. They had the Beech-Nut scrap, which I have always carried, and I have always informed the public that one brand was the Beech-Nut Packing Company, and the other the P. Lorillard Co. that makes the Helmars and the Trophies, and so forth.

X-Q. 50. But you say you have had this question come up with the retailers to whom you have sold the Beech-Nut cigarette? 511

A. I have had one or two, or more, I wouldn't say definitely on it, and I satisfied them,—I showed them the name on the goods. In fact I can't tell why they ask me, because the name "P. Lorillard Co." is there. The fact is when I see this picture on the Murad, when I see the picture, I know it is very plain that it is Lorillard's. When you see that brand you know it is their brand.

X-Q. 51. Of course a man who has been in the business for a great many years could tell that, and of course you could tell that. 512

A. Yes, I could tell the Murad was made by them.

X-Q. 52. On account of the style of advertising it?

A. I know that picture, I know that that picture is P. Lorillard's picture.

X-Q. 53. Now, you made no special effort, of course, and there is no reason why you should, to remember all the conversation you had with the consuming public and the retail dealers on this question?

A. Why, I could not, no.

X-Q. 54. You don't remember exactly when the cigarette came out, and of course you would not remember the incidental conversations you had with your customers and the retailers? 513

A. I always said to them,—I say to them of all the brands I ever sold, for instance, I saw a cigar called "Beech-Nut" cigar, and I don't know who makes it,—in fact I have seen it in stores,—but I know it is not the Beech-Nut Packing Company.

Mr. Hinton: Objected to as not responsive to the question.

514 X-Q. 55. Now, do you ever have people come in your store and say, "Give me a package of Beech-Nut"?

A. Yes, sir.

X-Q. 56. And what do you do then?

A. Why, some of the customers I happen to know, and when I know a customer that comes in and buys cigarettes every day, and he says, "A package of Beech-Nut", I give him a package of cigarettes; and if a lady comes in and asks for "Beech-Nut" I would give her gum.

X-Q. 57. And if it was not a lady or customer that you know, what would you do?

515 A. I would ask them whether it was cigarettes or gum that they wanted.

X-Q. 58. Have you got them, the gum and the cigarettes, side by side in your store?

A. No, sir; I have the gum in a jar on the case.

X-Q. 59. Are the Fatimas wrapped in a glazed paper package?

A. No, sir.

X-Q. 60. Or the Camels?

A. No, sir.

X-Q. 61. The Fatimas and the Camels are very popular brands, are they not?

516 A. Yes.

X-Q. 62. They sell in great quantities?

A. Yes.

X-Q. 63. The Camels sell more than any other, doesn't it?

A. Why, it does in my store.

X-Q. 64. You say you have used the Beech-Nut products in your home?

A. Yes; my mother has bought them. I have not bought any of them.

X-Q. 65. You have seen the Beech-Nut label on those goods?

A. Yes, and I have seen their advertising. 517

X-Q. 66. Do you see any similarity between the Beech-Nut label, as you remember it, and the label on these cigarettes?

A. Personally, I think the labels do—that the name somehow or other makes it look the same.

X-Q. 67. You think they look a good deal alike, don't you?

A. The Beech-Nut brand, yes, sir.

X-Q. 68. That label on the cigarette looks to you very much like the Beech-Nut brand?

A. Why, that type,—the type looks the same to me.

X-Q. 69. The labels? 518

A. Not the label, the type of the "Beech-Nut". I mean the Beech-Nut type,—at one time I worked in a printing business, and the type looks the same to me.

X-Q. 70. Now, you said in one place in your testimony that everybody knows the Lorillard Company?

A. Everybody that handles tobacco.

X-Q. 71. You said that dealers that didn't handle tobacco to any great extent didn't know the Lorillard Company,—what did you mean?

A. When I answered that, I meant every man who is in the tobacco business knows the P. Lorillard Co.

X-Q. 72. You mean people who specialize in some way or other in the tobacco business, that is what you meant by "everybody"? 519

A. Yes.

X-Q. 73. Naturally the Lorillard Company, being one of the largest companies in the business, people who deal in its product would know who they were?

A. Yes.

X-Q. 74. You don't mean the ordinary fellow on the street?

A. No.

520 X-Q. 75. As a matter of fact, the ordinary fellow on the street would not know about the Lorillard Company, would he?

Mr. Cavanagh: That question is objected to, as he has not testified to what the ordinary man on the street thinks.

A. I don't know what he thinks.

X-Q. 76. You don't know what he thinks?

A. The average man, no, sir. I happen to know anybody in the tobacco business knows who P. Lorillard
521 Company is.

X-Q. 77. You would expect a man in the tobacco business would know who P. Lorillard Co. is?

A. Yes.

X-Q. 78. Now, Mr. Dublin, in ordinary practice a man comes into your store to buy cigarettes, and I suppose he walks into your store and he asks you for a package of Camels, he planks down his money, and you hand him a package of Camels and he walks out?

A. Yes.

X-Q. 79. In ordinary practice you don't have any conversation with him as to who makes Camel cigar-
522 ettes?

A. No, sir.

X-Q. 80. You are not a mind reader?

A. No, sir.

X-Q. 81. You don't know why he buys Camel cigarettes from anything he says, except in rare cases?

A. No, sir; I don't.

X-Q. 82. And that is true of most of the stuff that you sell, isn't it?

A. That is true of the most of the brands I sell, I don't know what the customer thinks.

X-Q. 83. You are not in the business to stand behind

the counter and discuss with customers as to who makes all these various products? 523

A. No, sir; I don't but if any customer should ask me, I would tell him.

X-Q. 84. Oh, yes, of course.

A. That is all.

Re-direct Examination.

R-D Q. 37. (By Mr. Cavanagh): State whether or not you have found that all the retailers know who make the Beech-Nut chewing gum, that is, the barbers and persons you have spoken of? 524

A. Why, I think everybody does who handles it. When I say "everybody" the Beech-Nut brand is on the Beech-Nut Packing Company products and, to my way of thinking, they probably know by seeing it. And the retailer also knows the P. Lorillard Co. in their line; and I think people who buy and handle Beech-Nut gum know that it is made by the Beech-Nut Packing Company.

R-D Q. 38. And who do they know the cigarettes and tobacco are made by?

Mr. Hinton: Oh, I object. 525

Mr. Cavanagh: Mr. Hinton's whole cross-examination has been devoted to what other people think, and really I am entitled to a few opinions on the other side.

Mr. Hinton: I don't think that that statement is quite accurate.

R-D Q. 39. Who do they know that the cigarettes are made by?

A. Why, by the tobacco manufacturers.

R-D Q. 40. What tobacco manufacturers?

A. Why, when I sell Beech-Nut cigarettes, I take the

526 order as manufactured by the P. Lorillard Co., and if there is any doubt in the customer's mind I tell them that they are manufactured by P. Lorillard Co., and if he is a small retailer, and he don't know who is the manufacturer, as they sell different brands of P. Lorillard Co., I mention the different brands. There is never an argument in the case. I had occasion to sell Beech-Nut cigarettes to a man last week, and I said, "If they don't sell, I will take them back. They are made by the same people that sell the large size Helmars," and he wanted to carry these, and I told him "If you carry these (referring to a package of Beech-
527 Nut cigarettes) you are carrying them as you carry the large size Helmars, because they have a good backing behind them."

R-D Q. 41. Did you ever know in your experience of any customer confusing a Beech-Nut food product, or Beech-Nut gum, with the Lorillard Beech-Nut products?

A. No, sir.

R-D Q. 42. Do those two labels, the dress on those packages, look alike to you (showing witness a package of Beech-Nut cigarettes and also a package of Beech-Nut chewing gum)?

528 A. No, sir; but so far as the type is concerned, they are somewhat similar.

R-D Q. 43. You mean the name, "Beech-Nut"?

A. Yes, sir; the name "Beech-Nut."

Mr. Hinton: Objected to as leading.

R-D. Q. 44. As to the color of the gum packages, is there any distinction between those and the cigarette packages?

A. They are both somewhat different.

R-D Q. 45. What is the color of the gum package?

A. It is yellow, and the beech nut is red.

R-D Q. 46. You wouldn't have any trouble in distinguishing the two, would you? 529

A. No, sir.

R-D Q. 47. Did you ever know of the Beech-Nut Packing Company putting out any tobacco product at all?

A. No, sir.

R-D Q. 48. Did you ever know of the P. Lorillard Co. putting out any food products, or chewing gum?

A. No, sir.

R-D Q. 49. Did you ever know or see any Beech-Nut Packing Company product like that package of Beech-Nut Scrap tobacco in appearance? 530

A. No, sir.

R-D Q. 50. And likewise as to the Beech-Nut cigarette package?

A. No, sir.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 85. (By Mr. Hinton): This man to whom you sold the Beech-Nut cigarettes last week was a retailer who expected to sell them to the public? 531

A. Yes.

R-X Q. 86. And you told him who the Beech-Nut cigarettes were made by?

A. Yes, sir.

R-X Q. 87. And you told him that the Lorillard Company made the Murads and Moguls and those other brands?

A. Yes.

R-X Q. 88. Did he handle the other brands?

A. Yes; and he also sells Beech-Nut gum.

R-X Q. 89: Had he previously bought any Beech-Nut cigarettes?

532 A. No, sir; he hadn't.

R-X Q. 90. So far as you know, he hadn't?

A. No, sir; so far as I know.

R-X Q. 91. And they have been on the market around here, you say, approximately two years?

A. Yes, sir.

R-X Q. 92. And he has been selling cigarettes?

A. Yes; but he don't carry a large line, because he has a fruit stand.

R-X Q. 93. I see, but he is selling cigarettes, and has sold them for years, so far as you know?

A. Well, he is only in business a little over a year.

533 R-X Q. 94. I see. Now, if I understand the latter part of your testimony, it is to the effect that you would not mistake a package of Beech-Nut cigarettes for a package of Beech-Nut chewing gum?

A. Yes.

R-X Q. 95. Or for a package of Beech-Nut Scrap tobacco?

A. Yes.

R-X Q. 96. You would not. And you would not mistake a ham for a package of peanut butter, would you?

A. No, sir.

R-X Q. 97. That has got nothing to do with the label
534 or names on the goods,—a cigarette package is a cigarette package, and a gum package is a package of gum?

A. Yes; I can tell the difference in the different brands.

R-X Q. 98. One is gum and the other cigarettes?

A. Yes, sir.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 51. (By Mr. Cavanagh): And if any customer came in retail or ordinary customer, you would

tell him the same as you told that retailer that bought the cigarettes? 535

A. I tell everyone, when we happen to sell a brand that he never had carried before—he might feel skeptical about it,—and I tell him that if he buys a brand of P. Lorillard Co. they will take it back and reimburse him, you know, and that is why I told him the same thing. If I sell Beech-Nut cigarettes, I say, "You don't take any chance, they will take them back and guarantee the sale, so you don't lose anything."

Mr. Cavanagh: That is all.

536

Re-cross Examination.

R-X Q. 99. (By Mr. Hinton.) Then it is a very effective argument with which to get people to take your product, to tell them that it is made by the people who have such a good reputation?

A. Yes.

R-X Q. 100. That their reputation is so good?

A. Yes, sir.

R-X Q. 101. That the reputation of the manufacturer is well known, and so they are taking no chance?

A. Yes, sir; and they back it up with advertising and everything else; they sample and advertise. I have seen Beech-Nut cigarettes advertised in foreign language papers myself. They have a reputation on these products, on these Beech-Nut products. 537

R-X Q. 102. You say you sell Beech-Nut chewing gum?

A. Yes.

R-X Q. 103. Do you find you can sell the gum on the reputation of the Beech-Nut Packing Company?

A. Yes.

R-X Q. 104. In the same way?

A. Yes.

538 R-X Q. 105. But there is a great demand for the Beech--Nut Packing Company products, generally, so far as you know?

A. All I know is the gum. I know they have a good reputation.

R-X Q. 106. And that is a good sales argument in selling their stuff?

A. Yes.

Mr. Hinton: That is all.

Re-direct Examination.

539 R-D Q. 52. (By Mr. Cavanagh.) There is no confusion between the gum and the food product line, and the tobacco line so far as the "Beech-Nut" is concerned —

Mr. Hinton: Objected to as leading and indefinite.

A. Not so far as I know.

Mr. Cavanagh: That is all.
Mr. Hinton: That is all.
Deposition closed.
540 Signature waived.
(Noon recess.)

541

AFTERNOON SESSION

1.30 p. m.

HARRY STONE, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. (By Mr. Cavanagh.) Please state your name, age, residence and occupation?

A. Harry Stone; age 35; residence, city; occupation, my occupation is tobacco. 542

Q. 2. Are you the proprietor of a store?

A. Yes.

Q. 3. And where is this store located?

A. At 3 Causeway Street, Boston.

Q. 4. Do you sell any goods in that store besides tobacco?

A. Yes, we sell just gum, — razor blades and gum, Spearmint, Beech-Nut, Juicy Fruit, and such stuff, all Wrigley's brands, you know.

Q. 5. Do you sell the Beech-Nut cigarette like package I show you, and this Beech-Nut Scrap tobacco, like the package I show you? 543

A. Yes, we sell both packages, cigarettes and Scrap tobacco.

Q. 6. And is this the Beech-Nut chewing gum you also sell (showing the witness a package of Beech-Nut chewing gum)?

A. Yes.

Q. 7. Who makes the Beech-Nut cigarette and the Beech-Nut Scrap tobacco?

A. They are made by P. Lorillard Co.

Q. 8. Who makes the Beech-Nut gum, if you know?

A. I don't know; I never bought it direct; I don't know. The Beech-Nut Company, I suppose.

544 Q. 9. State whether or not you would ever be confused into believing that the Beech-Nut cigarette and the Beech-Nut Scrap tobacco were made by the same people that make the Beech-Nut gum?

A. No; I know that P. Lorillard Co. make the cigarette and other brands of tobacco, but they have not got any gum.

Q. 10. Will you please state whether or not you ever knew of any customer or other person who was confused or deceived into the belief that the Beech-Nut gum people made the Beech-Nut cigarette?

545 Mr. Hinton: Objected to as leading and calling for a conclusion of witness and answer based on hearsay.

A. I never heard of it; nobody was asking me that question, that the same people make the gum and the cigarettes.

Q. 11. Would you ever confuse tobacco, such as the cigarettes and this scrap tobacco, with chewing gum so that you would be deceived into taking one for the other?

A. No. In the first place a man comes into a store
546 and asks for Beech-Nut cigarettes, or Beech-Nut Scrap, and if he wants chewing gum he asks for Beech-Nut chewing gum.

Q. 12. What would you think of a person who would take Beech-Nut cigarettes, or Beech-Nut Scrap tobacco when he wants gum?

A. You mean when he comes in and asks for "Beech-Nut?"

Q. 13. Yes.

A. I would ask him what it was he wanted, Beech-Nut cigarettes or Scrap tobacco, or Beech-Nut gum. If a man comes in and expresses himself, "Beech-Nut" I mention the three names.

Q. 14. State whether or not you ever told any one 547
that the Beech-Nut cigarettes, or Beech-Nut Scrap tobacco was made by the gum people?

A. No, never.

Q. 15. State whether or not anyone ever asked you that question?

A. No, never did; no, nobody asked me.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) Mr. Stone, do you run a 548
wholesale business as well as a retail business?

A. No; my business is more retail than wholesale.

X-Q. 2. But you have some wholesale business?

A. Sure.

X-Q. 3. You sell to tobacco retailers?

A. Yes.

X-Q. 4. You job Beech-Nut chewing gum?

A. No, I don't job that. I take up jobbing on my side; I buy Wrigley's, but we have a bigger demand for it than Beech-Nut, and I may sell these to retailers.

X-Q. 5. You buy this gum, whether it is Wrigley's or Beech-Nut, and you sell that to retailers? 549

A. Yes.

X-Q. 6. You sell tobacco and gum?

A. Yes.

X-Q. 7. Do you sell the Beech-Nut cigarette to these same people too?

A. Yes, sir.

X-Q. 8. And the Beech-Nut Scrap tobacco?

A. Sure.

X-Q. 9. Do you know whether there is much market for Scrap tobacco in this territory, as compared with other territories?

A. What do you mean, my territory?

550 X-Q. 10. I mean as compared with the Middle West and other parts of the United States?

A. That is a thing I can't tell you; that I don't know. I can tell you in my store that I sell quite a lot of Beech-Nut Scrap.

X-Q. 11. What do you mean by quite a lot?

A. You know my business is mostly cigarettes; that section is the foreign section, and they all smoke cigarettes, but I can sell about four dozen of the Scrap, that includes wholesale and retail both. That Beech-Nut cigarette, we sell quite a few of, about 20,000 a week.

551 X-Q. 12. How many people work in your store?

A. Only one.

X-Q. 13. That is you?

A. Me and another fellow; I am the boss and the other fellow works for me.

X-Q. 14. Do you relieve each other?

A. Yes.

X-Q. 15. Do you sell razor blades?

A. Yes; Gillette razor blades and Gems, and others.

X-Q. 16. Stationery?

A. No.

X-Q. 17. Newspapers?

552 A. Yes.

X-Q. 18. Have a lot of newspaper trade?

A. We sell the newspapers just to cover the law, to keep open on Sunday.

X-Q. 19. I see. Now, Mr. Stone, in the ordinary course of events, I suppose a man comes to your store and asks for Camel cigarettes, we will say,—

A. Yes.

X-Q. 20. —and he puts down his money,—

A. Yes.

X-Q. 21. —and he takes his cigarettes and he walks out?

A. Yes, sure. 553

X-Q. 22. And you don't have any conversation with him about who makes the Camel cigarette, do you?

A. No, of course not. It is only one Camel cigarette in the market.

X-Q. 23. But you don't tell him who makes the Camel cigarette?

A. I don't have to; he don't ask me, and I don't have to tell him.

X-Q. 24. And it is so with your other brands, they come in, put down their money, and take the Camel cigarettes or the Beech-Nut cigarettes,—or whatever they ask for, and walk out? 554

A. Yes, whatever it is, and put down 15 cents, or whatever it is, and walk out.

X-Q. 25. And not being a mind reader you don't know what is in their mind at all?

A. No.

X-Q. 26. Now, how long have you had these Beech-Nut cigarettes?

A. How long are they on the market?

X-Q. 27. How long have you sold them?

A. Since they came out.

X-Q. 28. How long is that?

A. It is almost 2 years, I think, I am not quite sure,— 555
I never stopped to think of it. I think around 2 years, as I figure it.

X-Q. 29. Would you make any special effort to remember it, if customers asked you whether the Beech-Nut cigarettes were made by the gum people?

A. They never did.

X-Q. 30. You never tried to remember that particularly?

A. They never asked me.

X-Q. 31. Are you absolutely positive that nobody ever asked you that?

556 A. No, never did. They come in and asked me to give them a package of Beech-Nut cigarettes, as I said before, a package of gum, or Scrap tobacco.

X-Q. 32. And they walk out?

A. Yes.

X-Q. 33. But frequently they come in and say, "Beech-Nut", don't they?

A. Well, I don't know,—I don't think so. Of course I know they want cigarettes, because everyone knows that there are Beech-Nut tobacco and cigarettes.

X-Q. 24. You testified on your direct examination that people sometimes came in and asked you for
557 "Beech-Nut", and you asked them which they wanted?

A. I didn't say that.

X-Q. 25. That never happened?

A. That never happened to me.

X-Q. 26. They don't come in and just ask for "Beech-Nut"?

A. No, sir.

X-Q. 27. And you don't ask them what they want?

A. No.

Mr. Hinton: I would like to have the witness' testimony read on this point.

558 (Witness's previous testimony read as follows:

"Q. 12. What would you think of a person who would take Beech-Nut cigarettes, or Beech-Nut Scrap tobacco when he wants gum?

A. You mean when he comes in and asks for "Beech-Nut?"

Q. 13. Yes.

A. I would ask him what was it he wanted, Beech-Nut cigarettes or Scrap tobacco, or Beech-Nut gum.

If a man comes in and expresses himself, "Beech-Nut" I mention the three names.")

X-Q. 28. We have just had read to us a portion of your direct testimony in point, and apparently you did testify that they came in and asked for "Beech-Nut" sometimes, and then you would ask them whether they wanted the Scrap tobacco, gum, or cigarettes, is that true or isn't it? I want the fact. 559

A. I will tell you. So far as I remember, they are so used to getting Beech-Nut cigarettes, that when they come in and ask for it, just "Beech-Nut", I know what they want.

X-Q. 29. Do you sell any other Beech-Nut products besides the gum, cigarettes and Scrap tobacco?

A. No. 560

X-Q. 30. Do you sell mints?

A. Mints, no.

X-Q. 31. Sell any lime or lemon drops or small candies, or anything of that kind?

A. No; no candy line at all.

X-Q. 32. Do you put out any brands of tobacco of your own?

A. No.

Mr. Hinton: That is all.

Re-direct Examination. 561

R-D Q. 16. (By Mr. Cavanagh.) When a customer comes in and throws down 5 cents and says that he wants some chewing gum, just like the tobacco, do you have any argument with him?

A. No.

R-D Q. 17. And suppose a man comes in asks for "Beech-Nut", what would you ask him?

A. I would ask him Beech-Nut Cigarettes or Beech-Nut tobacco, or Beech-Nut gum? That is what I mean, but usually he don't come in and just ask for Beech-Nut.

562 R-D Q. 18. Approximately, or in a general way, about how many customers do you serve in a day,—just in a general way?

A. Between 800 and 1,000.

Mr. Cavanagh: That is all.
Mr. Hinton: That is all.
Deposition closed.
Signature waived.

BENJAMIN LESCOVITZ, a witness called in behalf of
563 the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age, residence, and occupation?

A. Benjamin Lescovitz; age 30, residence 967 Cambridge Street, East Cambridge; occupation, storekeeper: cigar store.

Q. 2. How long have you been keeping store?

A. Three years in Cambridge.

Q. 3. What kind of goods do you sell?

564 A. Tobacco.

Q. 4. Anything else besides tobacco?

A. Yes sir; I sell tonics and chocolates, that is about all.

Q. 5. Do you sell Beech-Nut gum, like this exhibit package of Beech-Nut gum which I show you?

A. Yes, Beech-Nut and Spearmint and Juicy Fruit.

Q. 6. Do you also sell the Beech-Nut Scrap tobacco like these exhibit packages I show you?

A. Yes, sir; I sell all of those.

Q. 7. Who makes the cigarettes and the Beech-Nut tobacco, if you know?

A. P. Lorillard Co.

Q. 8. Do you know who makes the Beech-Nut gum? 565
A. The Beech-Nut Packing Company.
Q. 9. Were you ever confused into the belief that the tobacco or the cigarettes were made by the people who make the Beech-Nut gum?
A. No, sir.
Q. 10. Did you ever have any inquiries or comments from anybody who did believe it?
A. Yes, sir; I had two fellows ask me, and they said, "Benny, what is this? Is this made by the same company?" (Pointing to a package of Beech-Nut cigarettes) as the Beech-Nut chewing gum." I says, "No, this is made by the P. Lorillard Company, (pointing to a 566
package of Beech-Nut cigarettes), and this is made by the "Beech-Nut Packing Company, (referring to a package of Beech-Nut chewing gum). Only them two fellows asked me that.
Q. 11. How long ago was that?
A. That was last winter. They didn't ask the question because they were interested, but because of curiosity they asked it.

Mr. Hinton: The last part of the answer is objected to as a conclusion of the witness.

Q. 12. State whether or not you have sold either the 567
Beech-Nut cigarette or the Beech-Nut Scrap tobacco as a product of the Beech-Nut packing Company?
A. I don't get it.
Q. 13. Did you ever sell these tobacco products as the goods of the gum people?
A. No, sir; that is impossible. If a fellow comes around and asks, "Give me Beech-Nut tobacco," I am not going to hand him a package of gum.
Q. 14. Why wouldn't you, naturally?
A. It is the same thing as if a man comes in and

568 asks for a horse and I give him a cat. They are both animals. If a man comes in to buy a package of gum and says, "Give me a package of Beech-Nut", it is my duty to ask, "Do you want Beech-Nut cigarettes?" "No, gum", so I have to give him the gum.

Q. 15. So you never had any confusion in regard to that?

A. No, absolutely not.

Mr. Hinton: Objected to as leading and indefinite.

Q. 16. Will you please state whether or not you ever
569 had any confusion between the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco, or the Beech-Nut gum?

A. No, absolutely no confusion at all.

Q. 17. State whether or not you have any difficulty in distinguishing between a package of Beech-Nut cigarettes, or a package of Beech-Nut scrap tobacco, or a package of Beech-Nut gum?

A. It is all different colors anyway. Cigarettes are red, and the Scrap tobacco is a white ground, and the Beech-Nut gum package is a different color; it looks kind of yellow; it is more like a light yellow.

Q. 18. Regarding the shape of the packages, state
570 whether or not in your opinion does the Beech-Nut Scrap tobacco,—package of the Beech-Nut Scrap tobacco, in any way resemble a package of Beech-Nut gum?

A. Absolutely not; it is not the same.

Q. 19. Would you have any trouble in distinguishing the goods?

A. Never; absolutely no. It is all different.

Q. 20. State whether or not if a customer came into your store and asked you for a package of Beech-Nut gum you would be confused or deceived into handing him Beech-Nut Scrap tobacco or Beech-Nut cigarettes for the gum?

A. It is an impossibility. If he is asking for gum, I have got to give him gum. 571

Q. 21. State whether or not you consider gum to be the same kind of goods as tobacco?

A. No, sir.

Q. 22. How many people do you serve a day in your store, about,—just approximately?

A. I am not sure.

Q. 23. In a general way?

A. Around 400.

Mr. Cavanagh: That is all.

572

Cross Examination.

X-Q. 1. (By Mr. Hinton.) How long have you been selling the Beech-Nut cigarette?

A. Since February last year; February I began, just when they came out.

X-Q. 2. Just when they came out?

A. Just when they came out I got them.

Mr. Cavanagh: February, 1921, that is?

The Witness: Yes.

X-Q. 3. Did you make any special effort to remember whether people asked you about the people who made the cigarettes and the gum last year? 573

A. No.

X-Q. 4. You didn't keep any notes of the names of people who asked you about whether or not the cigarettes were made by the gum people, did you?

A. No, I didn't.

X-Q. 5. You didn't make any effort to remember it at all?

A. Absolutely no; because you see the customers are in the store, and they simply asked me, as a foolish

574 question: "Say, Benny, is this the same company, the Beech-Nut gum and the Beech-Nut cigarette?" And I said, "No, the gum is made by the Beech-Nut Packing Company and the cigarettes are made by P. Lorillard Co."

X-Q. 6. When they asked you, you told them they were made by different companies?

A. Yes, sir.

X-Q. 7. And you didn't pay any attention at all to it at the time?

A. No.

X-Q. 8. And you couldn't say definitely how many
575 times it happened, could you?

A. No; they didn't ask me any more. About two fellows asked me.

X-Q. 9. You don't remember whether there were any others or not?

A. No.

X-Q. 10. There may have been others?

A. No. I will tell you; I, myself, was in the store last year, and I could remember easily enough if anybody asked me, but nobody asked me; two fellows only asked me.

X-Q. 11. You don't think there were any more than
576 that?

A. No.

X-Q. 12. But you paid no attention to it?

A. I didn't pay any attention, but I would remember if some customers asked me the same question over again; but only two fellows did ask me that question.

X-Q. 13. Now, in the ordinary course, suppose a customer comes there and asks for Beech-Nut cigarettes, or Camel cigarettes, or something like that, he puts down his money and takes the goods and walks out,—that is what he does, isn't it?

A. If I hand him the item, he gives me the money, yes. 577

X-Q. 14. You don't have any discussion with a customer as to who makes this or that?

A. No, unless somebody asks the question.

X-Q. 15. Now, when you were talking about confusion between the tobacco and the gum, and the cigarettes, what you meant, I suppose, was that you were able to tell a cigarette package from a package of gum, and from a package of Scrap tobacco, very easily?

A. Positively.

X-Q. 16. You would not ever get confused into mistaking a package of Beech-Nut chewing gum for a package of Beech-Nut cigarettes? 578

A. No. When they ask for Beech-Nut cigarettes, I reach out and get hold of the cigarettes, and when they ask for something else I will give them that. There is never any mistake.

X-Q. 17. When a customer comes into your store and just asks for "Beech-Nut" you say, "What do you want, the cigarettes, gum or tobacco?"

A. Yes; I never know. Now, the Beech-Nut Scrap tobacco is a slow seller in my store, but take the Beech-Nut cigarette and the Beech-Nut gum sells very well, and if a man comes around and says, "Give me a package of Beech-Nut," I say, "Which do you want, cigarettes or gum?" And he says, cigarettes or gum. 579

X-Q. 18. And there is no more discussion than that?

A. Positively not; and he knows from the price which it is; the gum is only a nickel, and cigarettes are 15 cents.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 24. (By Mr. Cavanagh.) State whether or not when you say, "Beech-Nut cigarettes or Beech-Nut

580 gum," do you have any discussion with the customers, or do they say which they want, and throw down their money, and take it and go out?

A. They say, "Give me a package of Beech-Nut gum," or "a package of Beech-Nut cigarettes," and I give it to them.

R-D Q. 25. And that is all there is to it?

A. Yes.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

Deposition closed.

581 Signature waived.

HUGH F. WALLACE, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh.

Q. 1. Please state your name, age, residence and occupation?

A. Hugh F. Wallace; 514 Broadway, Somerville, Mass.; saelsman for Leopold, Morse Co.

582 Q. 2. What line of business is Leopold, Morse Company engaged in?

A. Clothing, furnishings, shoes.

Q. 3. Mr. Wallace, I show you a package of Beech-Nut cigarettes, which are in this case as an exhibit. Did you ever use those cigarettes as a consumer?

A. I have.

Q. 4. How long have you been smoking them?

A. 12 or 15 months.

Q. 5. So far as you know, what concern manufactures those cigarettes?

A. P. Lorillard, so far as I know.

Q. 6. Did you ever believe that any other concern 583
manufactured them?

A. I never did, no.

Q. 7. I show you a package of Beech-Nut gum, which is in this case as an exhibit. Can you state whether or not you have ever used any Beech-Nut chewing gum?

A. I have; yes, I have used it.

Q. 8. State whether or not you were ever confused or thought that the cigarettes were made by the same people who make the gum?

A. No, I knew that they were not, because I see the name, "P. Lorillard Co." all over the cigarette package, and the name of the packing company on the oth- 584
er,—on the gum package.

Q. 9. Did you ever have any difficulty in distinguishing between the two packages?

A. No, I never did.

Q. 10. How often have you bought the Beech-Nut cigarette?

A. Well, I use about a package every day.

Q. 11. How long have you been using them, do you say?

A. About 12 months, 12 or 15 months. How long have they been out?

Q. 12. Oh, about that time. If you went into a store 585
state whether or not you could be confused or deceived in taking a food product, or Beech-Nut gum in place of Beech-Nut cigarettes?

A. No.

Q. 13. Why not?

A. I could tell from the red package what I was getting and by the signs on it.

Q. 14. Could you tell the difference between the two products?

A. Yes, easily.

586 Q. 15. In other words, you would not confuse cigarettes with gum or food?

A. No.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton): Mr. Wallace, are you acquainted with any of the Lorillard men in Boston?

A. Well, I ran a store in City Square, in Charlestown, Massachusetts, for a long time.

587 X-Q. 2. What kind of a store?

A. Gent's furnishings; and there was a Mr. Madden, who worked for the company, and he had the habit of coming in, and he is the man who started me on Beech-Nut cigarettes. I smoked Murads before, but I have been smoking Beech-Nuts ever since.

X-Q. 3. And this man was the employee of the P. Lorillard Co.?

A. I suppose so. He had the habit of coming into our store.

X-Q. 4. And he gave you some samples of Beech-Nut cigarettes?

588 A. That is how I got started on them. Before that he came and asked me if I smoked cigarettes, and I told him yes, and at that time I was smoking a Murad. He got me started on these Beech-Nuts, and I have smoked them ever since.

X-Q. 5. He gave you samples and told you that it was a good cigarette, and you started smoking them?

A. Yes.

X-Q. 6. You knew that he was Lorillard man, and he told you he had this brand, this new brand of cigarettes—

A. I didn't know at this time whom he was working

for, but I did know,—I could see the name—"P. Lorillard Co." on the package. 589

X-Q. 7. Yes, but this man was an employee of the Lorillard Company?

A. I suppose so.

X-Q. 8. And he gave you samples?

A. Yes.

X-Q. 9. It would not be possible that he would give you samples of somebody else's cigarette, if he was a Lorillard man, but it would be a Lorillard product?

A. Yes, of course.

X-Q. 10. Now, you say that before that you smoked Murad cigarettes? 590

A. Murad cigarettes.

X-Q. 11. Who is the manufacturer of the Murad cigarettes?

A. I suppose Lorillard, but I don't know for sure.

X-Q. 12. Didn't you ever get samples of Murad cigarettes from your friend, the Lorillard man?

A. No, not at that time; I don't know that they passed them out at that time.

X-Q. 13. You bought them on the market?

A. Yes.

X-Q. 14. How many packages of Murad cigarettes do you suppose you smoked? 591

A Oh, a lot of them.

X-Q. 15. You smoked them for some time?

A. Yes, sir.

X-Q. 16. A year or two?

A. Oh, four or five years, I think.

X-Q. 17. What manufacturer's name is printed on the Murad cigarette package?

A. That I don't know; I have smoked them and never noticed.

X-Q. 18. Did you ever smoke the Fatima cigarette?

A. No.

592 X-Q. 19. Did you ever smoke the Lucky Strike cigarette?

A. Yes.

X-Q. 20. What is printed on the bottom of the front of Lucky Strike cigarette packages?

A. You have got me. I am no cigarette man, but I have smoked them.

X-Q. 21. What is printed on the bottom of the front of the Chesterfield cigarette package; do you know that?

A. I don't know. I know it is a white package.

X-Q. 22. But you never noticed the name of the
593 manufacturer on any of these other cigarettes that you have seen or smoked?

A. No, but take the Perfection cigarette, I know that that is a Liggett & Meyers, and Sweet Caporal is Dukes, I think, I am not sure,—or Kinney Borthers.

X-Q. 23. What is on the front of the Sweet Caporal, near the bottom?

A. Kinney Brothers.

X-Q. 24. That appears on the package near the bottom?

A Near the bottom.

X-Q. 25. When did you first notice the name "Beech-
594 Nut Packing Company" on the gum package?

A. Well, I have often bought the package, the gum, and I have gone to stands on the Elevated structure and bought Beech-Nut gum.

X-Q. 26. And you read the name carefully enough to see the name "Beech-Nut Packing Company"?

A. Not carefully, but I just glanced at it.

X-Q. 27. Did you know before you prepared for this testimony that there was "Beech-Nut Packing Company" printed on the gum packages?

A. Yes, sir.

X-Q. 28. Then with reference to the Murad cigarette and the Lucky Strike cigarette, you don't know what

is printed on those packages, but in respect to the chewing gum you do know? 595

A. Well, some of them I do, and some I do not.

X-Q. 29. You just happened to notice those two things?

A Not only on those, but I have noticed on the Sweet Caporal cigarette, and I think Liggett & Meyers on the Perfection, and the Chesterfield, I don't just know what that is, or the Mogul.

X-Q. 30. Now, do you ever use any of the Beech-Nut Packing products in your home?

A. Yes, sir; my sister has bought it.

X-Q. 31. What kind of product? 596

A. Bacon, that is all I remember of seeing there. I suppose there have been other goods in there, but that is a long strip of bacon, and very thin,—I remember that.

X-Q. 32. It comes in closed packages?

A. Yes.

X-Q. 33. Have you examined that label recently?

A. No, I have not noticed that.

X-Q. 34. Do you know whether the name "Beech-Nut Packing Company" appears on that label?

A. I do not.

X-Q. 35. You don't know? 597

A. I don't know; I never looked at it.

X-Q. 36. Did you ever handle any tobacco products?

A. I never did, no, sir.

Mr. Hinton: That is all.

Re-direct Examination.

R-D. Q. 16. (By Mr. Cavanagh): Mr. Wallace, I call your attention to a package of Murad cigarettes, and also to a package of Beech-Nut cigarettes, which is in this case as an exhibit. In your opinion—both of those

598 packages bear the name of "P. Lorillard Co.",—in your opinion, which appears more prominent, the name "P. Lorillard Co." on the Beech-Nut cigarette package, or the Murad cigarette package,—which would strike your eye first?

A. On those two samples I think the word "Lorillard"—

R-D Q. 17. Well, I mean between the two packages, which name, "P. Lorillard Co." could you read more easily?

A. This package right here (pointing to the package of Beech-Nut cigarettes). The Beech-Nut cigarettes
599 has the name most prominent, I think, of the two.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 37. (By Mr. Hinton): Mr. Wallace, you have examined these two packages of cigarettes on the table immediately in front of you. Have you seen the name of P. Lorillard on this Murad cigarette package?

A. Yes, I have seen it in black and white, isn't that, on the face, the black running on the bias there across the face of it?

600 R-X Q. 38. Will you please examine that carefully? (Witness does so.) You find that the black and white print is not the name "P. Lorillard Co."?

A. No, I see it is not.

R-X Q. 39. Do you find the name, "P. Lorillard Co." on that package which you have now again examined for some time? (Referring to package of Murad cigarettes.)

A. I don't see it on there at all.

R-X Q. 40. You haven't seen it at all?

A. Yes, I see it now.

R-X Q. 41. You finally see it when you study it over carefully? 601

A. Yes; right on the bottom.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 18. (By Mr. Cavanagh.) You had some difficulty in finding the name "P. Lorillard Co." on the Murad package. I now put this Beech-Nut cigarette package at the other end of the table, approximately four feet away. Do you have any difficulty in reading the name, "P. Lorillard Co." on it? 602

A. I can read it very easily.

R-D. Q. 19. I put the two packages at a distance across the table (referring to the Beech-Nut cigarette package and the Murad cigarette package). State whether or not you can read the name of "P. Lorillard Co." on each of them, and on which is it the most prominent?

A. I can read the name "P. Lorillard Co." there on the Beech-Nut cigarette package, but not on the Murad, it is too small.

R-D. Q. 20. Which appears the more prominent to you? 603

A. The name on the Beech-Nut cigarette package

Mr. Cavanagh: That is all.

Mr. Hinton: I have no further questions.

Deposition closed.

Signature waived.

604 GEORGE O. ADAMS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your full name?

A. George O. Adams.

Q. 2. Are you the proprietor of the cigar stand in the Chamber of Commerce Building?

A. I am.

Q. 3. How long have you been proprietor of this stand?

605 A. Since November, 1921.

Q. 4. Do you sell the Beech-Nut cigarettes?

A. I do.

Q. 5. And also the Beech-Nut gum?

A. Yes.

Q. 6. Who, do you know, make the Beech-Nut cigarettes?

A. P. Lorillard Co.

Q. 7. Have you ever had any inquiries, or heard any comments from customers, asking if the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum?

606 A. No.

Q. 8. Did you ever have any confusion in that respect between the two goods at all?

A. No.

Q. 9. And you have been here daily at this stand since you bought it?

A. Every day.

Mr. Cavanagh: I think that is all.

Cross Examination. 607

X-Q. 1. (By Mr. Hinton.) How long have you been in the tobacco business?

A. Since November.

X-Q. 2. You just started in in November?

A. Yes, sir.

X-Q. 3. Did you make any special effort to remember whether people asked you about these cigarettes?

A. No special effort, no.

X-Q. 4. Did anybody ask you to make a note of any questions that have been asked you in that connection?

A. What do you mean? 608

X-Q. 5. Did anybody ever ask you to try to remember and make a note if anybody did ask you about the chewing gum an cigarettes?

A. No.

X-Q. 6. And you made no special effort to remember?

A. No.

X-Q. 7. Now, this is a very busy little stand in the Chamber of Commerce which you keep?

A. Yes.

X-Q. 8. And people walk by rapidly and slap down their money and ask for this or that kind of goods and take the goods and walk along? 609

A. Yes.

X-Q. 9. And it is a very rare thing for you to have conversation of any kind about the manufacturer of the product you sell?

A. Yes; they call for what they want and get it and go on.

X-Q. 10. And of course you have no way of knowing what is in the man's mind, but if he asks for Beech-Nut cigarettes, he gets them?

A. Yes.

X-Q. 11. And he walks off?

610 A. Yes.

X-Q. 12. Do you sell any other Beech-Nut Packing Company product except gum? Do you sell mints?

A. No, I don't think I have anything but the gum.

X-Q. 13. Can you tell offhand what is printed on a package of Lucky Strike cigarettes underneath the red panel?

A. No. I could not.

X-Q. 14. You sell lots of those, don't you?

A. Quite a few.

Mr. Hinton: That is all.

611

Re-direct Examination.

R-D. Q. 10. (By Mr. Cavanagh.) If you have had any great number of inquiries as to who made the Beech-Nut cigaretes, you would recall it?

A. Yes, of course.

Mr. Hinton: Objected to as leading, and calling for the conclusion of the witness.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

612 Deposition closed.

Signature waived.

GEORGE C. SMITH, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Will you please state your name, age, residence and occupation?

A. George C. Smith; 152 Chestnut Avenue, Jamaica Plain; occupation, manager of the Faneuil Hall

Smoke Shop, 1 Faneuil Hall Square, Boston, Massa- 613
chusetts; 29 years old,—born in 1892.

Q. 2. What do you sell in your store, Mr. Smith?

A. We sell tobacco, sodas, lunches, and Beech-Nut gum. That is all we sell of the Beech-Nut product.

Q. 3. I show you a box, or a package of the Beech-Nut gum, an exhibit in this case. Is that the kind of gum you sell, which you refer to?

A. Yes.

Q. 4. Do you sell Beech-Nut cigarettes like the package I show you?

A. Yes.

Q. 5. Who makes the cigarettes? 614

A. P. Lorillard Co.

Q. 6. And who makes the gum?

A. The Beech-Nut Packing Company.

Q. 7. Would you ever be confused into believing that the Beech-Nut cigarettes were made by the Beech-Nut Packing Company?

A. Personally, no.

Q. 8. Do you handle the Beech-Nut Scrap tobacco, like the package which I show you?

A. We do.

Q. 9. Who makes the Scrap tobacco?

A. P. Lorillard. 615

Q. 10. Have you always believed that he made this tobacco?

A. P. Lorillard so far as I can remember.

Q. 11. Did you ever believe that that was made by the gum people?

A. No.

Q. 12. Did you ever hear any comments or remarks from customers, or people which would lead you to believe that they thought that either the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco was made by the concern that makes the Beech-Nut gum?

A. Well, I can remember distinctly two cases where

616 people have come in and asked me if the Beech-Nut Packing Company put out the cigarette. That is when they first came out. I told them that they had nothing to do with each other.

Q. 13. How long ago was that?

A. That is when the Beech-Nut cigarette first came out. I think that is pretty nearly two years, very close to it.

Q. 14. And those are the only two instances of that?

A. That is the only two I can remember.

Q. 15. How many customers a day do you serve, approximately?

617 A. About 375; it will average more than that in a week's time, because Saturdays it will run 600 or 700 customers. That is on cigars alone; it does not include the fountain or lunches.

Q. 16. Is your store located in a business section of the city?

A. It is right in Faneuil Hall Square.

Q. 17. It is right in the business section?

A. Yes, right in the market there.

Q. 18. State whether or not you ever heard of the Lorillard Company making either chewing gum or food products?

618 A. No; I never heard of it.

Q. 19. State whether or not you ever heard of the Beech-Nut Packing Company making tobacco products?

A. I never heard of it, no.

Q. 20. If a person came into your place of business and wanted to buy Beech-Nut cigarettes, or Beech-Nut scrap tobacco, could you be confused into selling him Beech-Nut gum in place of it?

A. No, I would not be confused.

Q. 21. Why?

A. Because they are different altogether.

Mr. Cavanagh: That is all.

Cross Examination. 619

X-Q. 1. (ByMr. Hinton.) How long have you been manager of the Smoke Shop?

A. I think I have been down there two years the first of June.

X-Q. 2. How long have you been in the tobacco business?

A. I have been in the tobacco business ten years last May.

X-Q. 3. Now, Mr. Smith, did you make any particular note of the inquiries that you referred to, about whether the cigarettes were made by the gum people,— 620
did you make a note of it at the time?

A. I made no note of it, no.

X-Q. 4. Did you pay any particular attention to it?

A. No.

X-Q. 5. Did you make any effort to remember it?

A. No, I didn't.

X-Q. 6. But you can remember two cases?

A. I can remember two cases, there may have been five or six, but I can't remember over two.

X-Q. 7. There may have been others?

A. There may have been others, but I don't remember it. 621

X-Q. 8. Now, I suppose a man comes into a busy place like yours, and he asks for what he wants, and he planks down his money, and gets it and goes out?

A. Yes.

X-Q. 9. And if he asks for Camel cigarettes he gets them and goes out?

A. Yes.

X-Q. 10. And he does not discuss Camel cigarettes with you?

A. No.

X-Q. 11. Of course, you can't tell what he thinks about it, unless he tells you?

622 A. No.

X-Q. 12. Do you sell much of that Beech-Nut Scrap tobacco?

A. Well, the Scrap tobacco is not a big seller; that is, I would not call it a big seller, not in the store that I am in, but I probably sell six dozen a month. I don't call that big.

X-Q. 13. Have you examined a package of this Beech-Nut Scrap tobacco recently?

A. Well, no, not particularly I have not.

X-Q. 14. Do you know whether the name Lorillard's is on this scrap tobacco?

623 A. Yes, I do.

X-Q. 15. Where is it?

A. I believe it is on the front of the package, right on top.

X-Q. 16. Up here at the top where I show you?

A. Yes, sir.

X-Q. 17. Do you know what is written in the other three panels, that is like that on this package (indicating a package of Beech-Nut Scrap tobacco.)

A. What do you mean, on the other side?

X-Q. 18. Well, there are four panels on this package like this panel with the name "Lorillard's" in it.

624 Can you tell me what is written in any of the other three?

A. Well, "Beech-Nut Scrap Tobacco", on one, and there should be the factory number there somewhere.

X-Q. 19. How does Beech-Nut gum sell in your store?

A. It sells very good. That is, I say good; we sell probably four boxes a week.

X-Q. 20. Is it the best selling gum you have?

A. Yes, it is.

X-Q. 21. Do people ever come into your store and ask you for a package of "Beech-Nut" without saying whether they want cigarettes or the gum?

A. I never had them say that to me in any case. If a man should come in, and I am on the cigar counter and asks for "Beech-Nut", I should ask him, "Cigarettes" or "Scrap"? 625

X-Q. 22. You don't carry your gum on the same counter with your tobacco?

A. No.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 22. (By Mr. Cavanagh.) When a man comes in and wants to buy Beech-Nut gum does he throw down a nickel and take the gum without talking about it? 626

A. Yes; they never say anything.

R-D Q. 23. Just the same as they do with the cigarettes which you spoke of?

A. Yes, and he goes off. If I am on the counter and he asks for gum, he gets it and goes off.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

627

(The taking of further depositions adjourned to Thursday, August 10, 1922, at 10 a. m.)

628

Room 401, Exchange Building,
53 State Street, Boston, Mass.,

August 11, 1922.

The further taking of testimony is resumed at 10 a.m.

Present: Same as before.

AARON ANSEL, a witness called in behalf of the defendant being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavan-
629 agh:

Q. 1. What is your name, age, residence, and occupation?

A. Aaron Ansel; age 24; residence 884 Washington Street,—that is the business place.

Q. 2. And your occupation?

A. Well, owner of a cigar store.

Q. 3. Is this cigar store located in a business or residential section of the city?

A. Business.

Q. 4. What is the name of the cigar store?

630 A. It goes under the name of the "Economical Tobacco Company."

Q. 5. You are a clerk in that store?

A. No, I am part owner with my father in the business.

Q. 6. Do you serve customers in that store?

A. Yes; I do.

Q. 7. About how many customers do you serve a day,—approximately?

A. Fifteen to sixteen hundred.

Q. 8. Do you sell the Beech-Nut cigarette and the Beech-Nut Scrap tobacco?

A. Yes.

Q. 9. And do you also sell Beech-Nut gum in your 631
store?

A. Yes, sir.

Q. 10. Do you know who makes the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes?

A. Yes; P. Lorillard Co.

Q. 11. And do you know who makes the Beech-Nut cigarettes?

A. Yes; P. Lorillard Co.

Q. 12. And do you know who makes the gum?

A. The Beech-Nut Packing Company.

Q. 13. Will you state whether or not you were ever under the impression that the Beech-Nut Scrap tobacco 632
and the Beech-Nut cigarette were made by the same company that makes the gum?

A. I never was.

Q. 14. Will you state whether or not during your experience or service in your store you ever have had any questions come up, or heard any remarks or inquiries from customers, or others, which would leave you under the impression that they thought the gum people made the cigarettes?

A. Well, just once; I recall one person.

Q. 15 How long ago was that?

A. That was about seven or eight months ago. 633

Q. 16. And that is all you can remember?

A. That is all I can recall.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton): How many people work in that store that you run?

A. There are—well, all in all?

X-Q. 2. Yes.

A. There are five.

634 X-Q. 3. Is that a cigar store exclusively?

A. Well, it is a wholesale cigar store, and retail; we also carry confectionery.

X-Q. 4. Roughly, what proportion of your business is a wholesale business, do you know?

A. Well, I should say about 75 per cent.

X-Q. 5. 75 per cent. wholesale and—

A. 25 per cent. retail.

X-Q. 6. Yes. Now, did you make any effort to remember if customers asked you about these Beech-Nut cigarettes and who they were made by?

A. Well, no; nobody ever asked me about who they
635 were made by.

X-Q. 7. So far as you can remember?

A. So far as I can remember; yes.

X-Q. 8. But at the time those questions might have been asked you, would you make a note of them, or try to remember them?

A. No; but if they asked me I would remember them all right.

X-Q. 9. You wait on a great many customers every day?

A. Yes; I am behind the counter all the time.

X-Q. 10. And everything that any customer said,
636 you would remember that?

A. Yes; I would remember that positively.

X-Q. 11. You would remember all that is said to you?

A. Yes; everything is remembered.

X-Q. 12. If a hundred customers came to you and made remarks, you could remember a year afterwards the remarks?

A. Oh, yes; I have a good memory on that; I try to get an idea of it anyway.

X-Q. 13. Even though it was just a casual remark at the time they said it?

A. Oh, yes, I would remember.

X-Q. 14. How long have you been selling the Beech-Nut cigarettes? 637

A. Now, I don't really remember when they first came out, but I believe it is over a year ago now.

X-Q. 15. About how many packages would you sell a day when they first came out?

A. Well, I would sell on an average in a day about 150 or 160 packages,—a day.

X-Q. 16. A day or a week?

A. A day.

X-Q. 17. Now, when a man comes into your store in the ordinary course of business, and asks for Camel cigarettes, he puts his money down, takes the goods and 638 walks out, and you would not in the ordinary course have any discussion with him about who makes them?

A. No.

X-Q. 18. And you could not tell from looking at his face when he walked in, or at the back of his head when he walked out, about what he thought about who made that stuff?

A. No.

X-Q. 19. You would have no idea about what was in his mind?

A. No.

X-Q. 20. Unless he told you? 639

A. No.

X-Q. 21. In the ordinary course he would not tell you, would he?

A. That is right.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 17. (By Mr. Cavanagh): Will you state whether or not if 10 or 15 people had come into your

640 store daily and asked you if the Beech-Nut cigarettes were made by the gum people you would have recalled it?

Mr. Hinton: Objected to as leading.

A. Oh, yes, I would.

R-D Q. 18. Will you state whether or not you ever told anyone that the Beech-Nut cigarettes were made by the gum people?

A. Oh, no: I never told anybody that. I always knew it was P. Lorillard Co. that made the cigarettes.

641 Mr. Cavanagh: That is all.

R-X Q. 22. (By Mr. Hinton): Did you ever tell anybody that they were not?

A. Yes, I did; one party he wanted to know, and I just told him about it.

Mr. Hinton: That is all.
Mr. Cavanagh: That is all.
Deposition closed.
Signature waived.

642 GEORGE DOUGALL, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your full name, Mr. Dougall?
A. George Dougall.
Q. 2. Where do you reside, Mr. Dougall?
A. I live at 96 Grant Street, Somerville, Mass.
Q. 3. And what is your occupation?
A. Manager cigar store department.

Q. 4. What store are you connected with? 643

A. L. K. Liggett & Company.

Q. 5. Where is their store located?

A. 242 Huntington Avenue, Boston.

Q. 6. How many years have you been the manager of that cigar store?

A. I have been manager in the cigarette department about 8 years.

Q. 7. In this store do you sell Beech-Nut cigarettes?

A. Yes, sir.

Q. 8. Do you sell any Beech-Nut scrap tobacco?

A. No, sir.

Q. 9. In that store do you sell the Beech-Nut chewing gum? 644

A. We do.

Q. 10. Who, if you know, makes the Beech-Nut cigarette?

A. Why, P. Lorillard Co. makes the Beech-Nut cigarette.

Q. 11. Do you know who manufacturers the Beech-Nut chewing gum?

A. The Beech-Nut Packing Company.

Q. 12. Will you state whether or not you were ever under the impression that the Beech-Nut cigarettes were made by the same people that make the Beech-Nut chewing gum? 645

A. Why, I never was under the impression. There was only once that I can remember when a young fellow asked me, when they first started, he came in—

Q. 13. I mean yourself,—were you ever yourself under the impression that the Beech-Nut cigarettes were made by the same concern that makes the gum?

A. No, sir.

Q. 14. Well, will you please state whether or not you have had any questions, inquiries, or comments made by customers, or others, which would lead you to think that

646 they were under the impression that these cigarettes were made by the gum people?

A. I have just had one instance that I remember.

Q. 15. Please state it.

A. That is when the cigarettes first came out somebody came in the store and asked me if they were made by the same people that made the gum.

Q. 16. What was your answer?

A. Why, I told them that the cigarettes were made by the P. Lorillard Co. and that the gum was made by the Beech-Nut Packing Company.

Q. 17. About how many customers a day do you serve
647 in your store?

A. Well, I serve about 800 or 900.

Q. 18. Is the store located in a business section of the city?

A. Yes, sir.

Q. 19. How long have you been selling Beech-Nut cigarettes, about?

A. Well, I have been selling them since they came out, that is about a year and a half or two years, isn't it? I could not exactly tell you the exact time.

Q. 20. And as far as you recollect you have only had this one inquiry in regard to who manufactures them?
648 A. That is the only one.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) You wait on 800 or 900 customers a day?

A. Yes, sir.

X-Q. 2. How many people work behind the counter in that store?

A. Well, I am the only one that is there on the cigar

counter just now. We have had two men until just lately. 649

X-Q. 3. And that keeps you pretty busy, I suppose?

A. Yes, it does.

X-Q. 4. I suppose you are handing out goods just about as fast as you can, in the ordinary course?

A. Yes, sure.

X-Q. 5. Customers coming in and buying goods and walking out?

A. Yes.

X-Q. 6. Now, in the ordinary course a man comes in and wants, for instance, Camel cigarettes, and he asks for a package of Camel cigarettes, and takes them and 650 puts down his money, and walks away with the goods, and you don't have any conversation with him about who makes the goods?

A. No.

X-Q. 7. And not being a mind reader you can't say what he thinks about them as to who makes them, can you?

A. Why, no, not when he don't bring up the subject.

X-Q. 8. How long ago was this single inquiry that you heard?

A. That was just when we were first putting them out. That is when we had a display on the counter. 651 There was one while that the Liggett Company displayed them on the counter and also put a sign in the window.

X-Q. 9. Were you asked by anybody at that time to make a note of any inquiries or remarks that you had or might hear?

A. No, sir.

X-Q. 10. You made no special effort to remember it?

A. No, sir.

X-Q. 11. And you say you are quite busy and there is no reason why you should make a special effort to re-

652 member a remark of a customer like that,—you would not pay particular attention to it,—you would not, would you?

A. Why, yes, I would pay particular attention to it if they spoke to me about it.

X-Q. 12. It would be an important matter to you?

A. Why, yes. it would be an important matter.

X-Q. 13. Why would you pay attention to it?

A. Why, a man behind the counter is supposed to satisfy the public. If you came in and asked me a question, you would think I was a very poor salesman if I could not answer that question.

653 X-Q. 14. Oh, perhaps you misunderstood me. I appreciate that you know who makes the products you sell, and I appreciate that you would not misrepresent any product to anybody.

A. No.

X-Q. 15. But I am talking about your remembering the conversation that you may have had with the public, or with some person or persons. You don't make it a practice to remember everything that anybody says to you?

A. Oh, no, of course not.

X-Q. 16. You couldn't possibly do that, busy as you
654 are, and remember it for a year or so?

A. No.

X-Q. 17. You sell Camel cigarettes, of course, don't you?

A. Yes, sir.

X-Q. 18. Lots of them?

A. I should say we do.

X-Q. 19. How many of those do you suppose you hand out in a week?

A. Ten or twelve thousand a week.

X-Q. 20. Do you know what is printed on a package of Camel cigarettes underneath the picture of the camel?

A. Let me see, I think it is "manufactured by the Reynolds Co." isn't it? That is, I don't know,—I may be mistaken, but I think that is what it says on the bottom. 655

X-Q. 21. You never noticed, did you?

A. Why, yes, I have noticed that there is some printing there of some kind, but whether it is on the front or back, I don't know. It is not so plain as on some cigarettes.

X-Q. 22. That name, "Reynolds" on the front, you mean?

A. Not so plain as some.

X-Q. 23. I show you a package of Camel cigarettes, and if you will examine those you will find that the name does not appear on the front of the package. 656

A. Well, I see it is not. It is on the back. I knew it was there somewhere—it is on the back.

X-Q. 24. You never noticed that it was on the back before, did you?

A. Why, no, I can't say that I did.

X-Q. 25. You never noticed what, if anything, is printed on the front of Lucky Strike cigarettes, underneath the red panel?

A. I might notice it by looking it over and forget it. I will tell you that when we get a new brand of cigarettes we generally look and see who makes it, and generally the name is on most of them. 657

X-Q. 26. But aside from some special reason for making an examination of the package you would not notice what is printed on it at all?

A. Oh, no.

X-Q. 27. And you would not be able to say, although you might be handing out 10,000 a week?

A. Sure.

658 X-Q. 28. But you would recognize a package of Lucky Strike or Camel cigarettes, instantly?

A. Yes, surely.

Mr. Hinton: That is all.

Re-direct Examination.

R-D. Q. 21. (By Mr. Cavanagh.) Who makes the Lucky Strike, if you know?

A. The American Tobacco Company, isn't it?

R-D. Q. 22. Will you state whether or not if say a
659 dozen people a day had come into your place and inquired whether the Beech-Nut cigarette was made by the Beech-Nut gum people, that you would have recollected that fact?

A. Why, yes, I should think I would.

R D. Q. 23. Such inquiries would have been impressed on your mind?

A. Why, surely.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

Deposition closed.

660 Signature waived.

661

Lynn, Mass., August 10, 1922.

The taking of depositions resumed at Lynn, Mass., at 10.30 a. m.

Present: Same as before.

MARTIN O. CONNORS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answers to interrogatories by Mr. Cavanagh:

662

Q. 1. Please state your name, age, residence and occupation.

A. Martin O. Connors; occupation, manager of A. S. Hovey Store, 17 Exchange Street, Lynn, Mass.

Q. 2. In what line of business is A. S. Hovey engaged?

A. Cigars, tobaccos, confectioneries and sodas.

Q. 3. Is this store located in a business or residential section?

A. In a business section.

Q. 4. Approximately, or in a general way, how many customers do you serve a day?

A. Probably a thousand customers a day is their average.

663

Q. 5. It is a pretty busy store?

A. Yes.

Q. 6. Do you handle the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco?

A. Yes, sir.

Q. 7. Do you know who makes the Beech-Nut cigarettes, and the Beech-Nut Scrap tobacco?

A. P. Lorillard Co.

Q. 8. Do you handle Beech-Nut chewing gum?

A. Yes, sir.

Q. 9. Do you know who makes that?

664 A. The Beech-Nut Food Products Company, I imagine, is the name of the company.

Q. 10. How long have you been handling the Beech-Nut cigarettes?

A. Since their inception in this market,—let's see. I think a couple of years or so.

Q. 11. State whether or not you were ever under the impression that the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco was made by the people who make the Beech-Nut gum?

A. I never knew that anybody other than just the P. Lorillard Co. made the cigarettes.

665 Q. 12. State whether or not you ever have had any customers or persons make any comments or queries as to whether the cigarettes were made by the people who make the gum?

A. I never had anybody raise the question as to the possibility that the tobacco and the food products were produced by the same concern.

Q. 13. You handle quite a bit of the Lorillard goods, do you not?

A. Yes.

Q. 14. And, so far as you know, what is the reputation of P. Lorillard Co. in the tobacco trade?

666 A. Why, their reputation ranks fully as high as any of the other different tobacco companies; I never heard their integrity questioned.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) You are the manager of the A. S. Hovey Company?

A. The A. S. Hovey store.

X-Q. 2. Is there more than one store operated under that name?

A. No. 667

X-Q. 3. It is not a chain proposition?

A. No; it is an independent proposition.

X-Q. 4. How long have you been manager of this store?

A. I have been manager five years.

X-Q. 5. You do the buying, of course?

A. Yes.

X-Q. 6. And supervise the store?

A. Yes.

X-Q. 7. And spend a good deal of your time in that kind of work in addition to waiting on the counter?

A. I do very little waiting now. Most of my work 668
is supervision.

X-Q. 8. I see. You have a good many clerks here who work under you?

A. Well, I have had, at times, 15 or more in help, clerks, and so forth,—there are 10 clerks at different times.

X-Q. 9. And the supervision and management of course takes most of your time?

A. It takes most of my time.

X-Q. 10. Mr. Connors, when a person comes in and buys cigarettes, for instance Camel cigarettes in the ordinary course, he just comes in and asks for Camel 669
cigarettes, and puts down his money, and gets them, and walks out.

A. Yes.

X-Q. 11. And there isn't any discussion as to who makes the product?

A. No.

X-Q. 12. In the ordinary course you don't discuss with customers who make the various brands you sell here, do you?

A. No.

670 X-Q. 13. And not being a mind reader, you don't know what they think about it unless they tell you?
A. No.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 15. (By Mr. Cavanagh.) And when they purchase gum, they just simply come in and ask for the brand of gum that they want, and put down the money, take it and go out?

671 A. Yes; the Beech-Nut gum,—most of my customers, the Beech-Nut customers, come in, and it is zip bang, there's your money, we punch it up, and they are gone.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 14. (By Mr. Hinton.) Do you ever have anybody come in and ask just for "Beech-Nut"?

A. On one occasion, I, myself, had someone step up to me at the tobacco counter and ask for Beech-Nut, and I, seeing the possibility of a little levity, paused, and
672 repeated, "Beech-Nut"? And they said, "Cigarettes". I just gave them a chance. I felt that personally—it was a patron of mine for years,—and I didn't feel it was a person who was trying to trap me to hand them out cigarettes instead of gum or gum instead of cigarettes, and at the time I paused I was reaching for cigarettes,—and you know how customers will straighten up and look at the rack, and in that way they give us the cue of what they are asking for,—and I reached out, and just to interject a little levity, I said, "Beech-Nut"? And he said, "cigarettes".

R-X Q. 15. In your store here the chewing gum and cigarettes are on opposite sides of the store? 673

A. Yes.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 16. (By Mr. Cavanagh.) You have personally sold or served both the Beech-Nut cigarettes and the gum to customers.

A. Oh, yes.

674

Mr. Cavanagh: That will be all.
Mr. Hinton: That is all.
Deposition closed.
Signature waived.

TIMOTHY JAMES DUMAS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation? 675

A. My name is Timothy James Dumas; I live 21 Moulton Street, West Lynn; place of business 68-70 Magrane Square, West Lynn.

Q. 2. What line of business are you in?

A. Cigarettes, tobacco, and gent's furnishings.

Q. 3. Besides cigarettes, tobacco, and gent's furnishings, do you sell other things?

A. Package candy and gum and magazines, newspapers, periodicals.

Q. 4. How long have you been in business here?

A. 27 years.

676 Q. 5. Is this a business or residential section?

A. Well, now I call it the business section.

Q. 6. It was a residential section once?

A. It was, yes; it is partly now, but it is mostly business now.

Q. 7. Approximately how many customers do you serve a day, or week?

A. Well, I will wait on probably 2,500 people a month.

Q. 8. Do you sell Beech-Nut cigarettes, like this exhibit package, like I show you, and the Beech-Nut Scrap tobacco?

A. Yes, sir.

677 Q. 9. Who, if you know, makes those products,—or who is the manufacturer?

A. P. Lorillard Co.

Q. 10. Do you sell the Beech-Nut chewing gum?

A. I do.

Q. 11. Who makes that, if you know?

A. Well, I can't answer that question, I am sure, right out. I suppose it is—I get it from jobbers—I suppose it is the gum company, I don't know who it would be, whether it is Wrigley's, or who it would be.

Q. 12. State whether or not you were ever under the impression that the Beech-Nut cigarettes and the Beech-
678 Nut Scrap tobacco were made by the same people that make the gum?

A. Well, I couldn't say about that. Well, I will tell you, I never bought any gum from Lorillard that I know of. I buy tobacco from Lorillard, but I never got any gum from Lorillard. I know I get my gum from that candy man, and lately I get my gum through the tobacco jobber; they are selling gum now.

Q. 13. State whether or not you ever had any comments or inquiries made by customers or purchasers as to whether the Beech-Nut cigarette or the Scrap

tobacco was made by the same people who make the gum? 679

A. Well, I can state beyond a shadow of a doubt that they are made by different people.

Mr. Hinton: Objected to as a conclusion of the witness.

Q. 14. Did you ever have any inquiries made in that direction?

A. No. They come in here and get it, and of course people come in and call for Beech-Nut tobacco and Beech-Nut gum. 680

Q. 15. State whether or not you would confuse Beech-Nut cigarettes or Beech-Nut scrap tobacco with chewing gum?

A. I never had any trouble in that direction.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton): You have a clothing store and you sell hats, and a good many kinds of clothing here, don't you? 681

A. Yes, sir.

X-Q. 2. A sort of a small department store, isn't it?

A. Yes.

X-Q. 3. And your tobacco and gum business is very small in comparison with the rest of your business?

A. Yes, sir.

X-Q. 4. And these 2500 customers a month, are those who purchase anything in the store, any of the dry goods and so forth?

A. Yes, sir; and tobacco and cigars.

X-Q. 5. Now, Mr. Dumas, do you remember how

682 you came to put in the Beech-Nut cigarettes? Did a man from Lorillard's, or a jobber come around here and put them in here for you?

A. Of course ever since I handled tobacco, I have got it through Manning; he is a jobber.

X-Q. 6. And his salesman came around, and you know he was a Lorillard man?

A. Yes.

X-Q. 7. And told you that they were putting out the Beech-Nut cigarettes and you put them in?

A. Well, I do all my business through him,—I do my business in the tobacco line through one man,—I
683 leave it to him.

X-Q. 8. When you say you never heard any comments or remarks or had any inquiries from your customers, you mean you don't remember any?

A. I don't remember any now.

X-Q. 9. You are pretty busy in this store most of the time, are you not?

A. Yes.

X-Q. 10. And there is no reason why you should remember such comments, remarks or inquiries?

A. Well, if I heard any comments, I would naturally think there was something funny about it,—if I heard
684 any comment, if I had any inkling for a moment that there was any confusion between the two companies and thought there was anything wrong, I would naturally like to know what it was,—that is what you mean?

X-Q. 11. Yes; what I wanted to know is if you made any special effort to remember any comments, remarks or inquiries that you may have heard?

A. No. At one time I was buying my gum from the candy people, and I was buying my ciagrettes and tobacco from the tobacco people—

X-Q. 12. Now, just one more question. So far as you know, you can't remember any discussion whatever about that question with your customers?

A. Never heard a word about it with any of them, 685
that I could honestly swear to.

X-Q. 13. You wait on the tobacco counter yourself all the time?

A. Not all the time; I have a clerk here.

X-Q. 14. But you do wait on it sometimes?

A. Yes.

X-Q. 15. I suppose in the ordinary course a man comes in and asks for Camel cigarettes, for instance, and he put his money down and takes it and walks out?

A. Sure.

X-Q. 16. And he does not ask you who makes them?

A. No. 686

X-Q. 17. And you don't know what he thinks about them as to who makes them?

A. No.

X-Q. 18. No way to tell, unless he told you?

A. No.

X-Q. 19. And none of your customers ever tell you what they think about the Beech-Nut cigarettes or any other cigarettes, that you can remember?

A. No.

Mr. Hinton: That is all.

Re-direct Examination. 687

R-D. Q. 16. (By Mr. Cavanagh): If there had been any remarks, or comments, extended comments by customers as to confusing the gum and the tobacco manufacturers, you would remember it, wouldn't you?

A. I certainly should, sure.

R-D. Q. 17. And if people come in and they want to buy gum they usually don't hold any discussion with you as to who makes it?

A. No; they ask for Beech-Nut gum or Wrigley

688 Spearmint; they call for the gum that they want, and get it.

R-D Q. 18. Do you know where the store of C. A. Wilkins is located in West Lynn?

A. I do.

R-D Q. 19. It is in West Lynn here, isn't it?

A. Yes, sir.

R-D Q. 20. About how far from here is it?

A. Well, it is three-quarters of a mile.

Mr. Cavanagh: That is all.

689 *Re-cross Examination.*

R-X Q. 20. (By Mr. Hinton.) One more question: How many of these Beech-Nut cigarettes do you suppose you sell here, as a rough guess?

A Well, I might sell five cartons a week; that is, average about five cartons a week,—that is about 50 packages a week. That is, here in this store. My other store would probably do the same.

R-X Q. 21. But you are located in this store?

A. Yes, right here.

R-X Q. 22. This is where you work?

690 A. Yes; I sell about five cartons a week of Beech-Nut cigarettes here.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all

Deposition closed.

Signature waived.

691

PHILIP H. MORAN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation.

A. Philip H. Moran; age 34; 30 Kirkland Street, West Lynn; propreitor of a store.

Q. 2. What kind of goods do you keep in this store, Mr. Moran?

A. Cigarettes and tobacco and tonics.

692

Q. 3. How long have you been in this place of business here?

A. About 12 years in this particular location.

Q. 4. Do you know of a store here occupied by C. A. Wilkins, in this neighborhood?

A. Yes, sir; up on the corner of Myrtle and Boston Street.

Q. 5. Do you sell the Beech-Nut cigarette and Beech-Nut Scrap tobacco?

A. Yes, sir.

Q. 6. Who makes these products, if you know?

A. The Lorillard people. I don't know the exact initials, but I know it is Lorillard.

693

Q. 7. How long have you been selling the Beech-Nut cigarettes?

A. Since they were first put on the market, very shortly after, I think the first week after the salesman came around.

Q. 8. How long ago is that, approximately?

A. Well, I don't know whether it is—I couldn't exactly say whether it is one year or five years, or ten years, but it seems to me it must be five years.

Q. 9. We are talking about the cigarettes now, and not the scrap tobacco.

694 A. Oh, about two years.

Q. 10. Do you sell the Beech-Nut chewing gum?

A. Yes.

Q. 11. Do you know whose product that is, or what concern makes it?

A. Well, I don't know,—I know it is not made by the Lorillard people. I think it is the Beech-Nut Packing Food House, or some organization like that. I have never looked at a package to see who it is. (Witness examines package of Beech-Nut gum.) I know it is not made by the Lorillard people. The Beech-Nut Packing Company, it says on here. (Witness looking at a pack-
695 age of Beech-Nut chewing gum.) I suppose it is made by the Beech-Nut Packing Company.

Q. 12. Were you ever under the impression that the cigarettes and the scrap tobacco,—the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco,—was made by the same people who make the gum?

A. No.

Q. 13. State whether or not you ever heard any customers make any comment, or inquiries, or remarks, which would lead you to believe that they were under the impression that the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes were made by the Beech-Nut
696 gum people?

A. I never had anybody question the brand. If they come in and want Beech-Nut cigarettes they specifically specify cigarettes, and if they want chewing gum they ask for chewing gum. They never make any inquiries about it; they don't care who it is made by.

Mr. Hinton: The last part of the answer is objected to as a conclusion of the witness.

Mr. Cavanagh: That is all.

Cross Examination. 697

X-Q. 1. (By Mr. Hinton.) You say the people come in and ask for Beech-Nut cigarettes, and others come in and ask for Beech-Nut gum?

A. Yes, sir.

X-Q. 2. Did you ever have anybody ask for just "Beech-Nut"?

A. I don't believe I ever did; I can't recall it.

X-Q. 3. Do you spend all your time here?

A. The biggest part of the time here.

X-Q. 4. This is a one-room store, and you run a pool room in addition to it in back? 698

A. Yes.

X-Q. 5. And a lunch counter?

A. Yes; a little bit of everything.

X-Q. 6. Now, you have been selling these Beech-Nut cigarettes approximately for two years?

A. Yes, sir; I would say two years. In fact ever since they were put on the market.

X-Q. 7. And you don't remember any customer ever having asked you any questions about who made them, or anything of that kind?

A. No, they never did.

X-Q. 8. When you say they never did, you mean you don't remember it? 699

A. I think I can truthfully say that they never did.

X-Q. 9. Would you make any special effort to remember it,—did anybody ever ask you to make a note of such questions?

A. No, they didn't.

X-Q. 10. Or anything of the kind?

A. No. Of course when the salesman comes in selling them, of course, they are naturally interested in knowing who made the cigarettes,—at least I was, and I found who made them, the Lorillard people.

700 X-Q. 11. When you put in the Beech-Nut cigarettes, did the jobber, or the Lorillard agent come in and get you to put them in?

A. I believe the agent came in first.

X-Q. 12. He came in first and told you they were coming out with a new kind of cigarettes and that you better put them in?

A. Yes, he asked me if I would put in some at the time.

X-Q. 13. And of course you knew who made them?

A. Yes; I presume that everybody knew who made them.

701 X-Q. 14. That is not based on anything anybody told you?

A. No; that is just my supposition.

X-Q. 15. You knew yourself?

A. Yes, sir.

X-Q. 16. When a man comes in to buy Camel cigarettes, or other brands of cigarettes, he comes in and puts his money down and takes the goods and walks out?

A. Yes.

X-Q. 17. And you don't have any discussion with him as to who makes the Camel cigarettes?

A. I don't know who makes them. I give him the
702 brand he calls for. I am interested in making the sale, that is all I am interested in, the sale of them.

X-Q. 18. Do you know who makes the Camel cigarettes?

A. Yes.

X-Q. 19. Who makes the Camels?

A. The American Tobacco Company.

X-Q. 20. Who makes the Fatimas?

A. Why, I don't know; I think they are made by the ame house, I wouldn't say; I don't know exactly.

X-Q. 21. Do you know who makes the Lucky Strike?

A. No; I was under the impression that the American Tobacco Company did. 703

X-Q. 22. You are not sure who makes some of these most popular brands?

A. Yes. I know some of them, but there are some I don't know.

Mr. Hinton: That is all.

Re-direct Examination.

R-D. Q. 14. (By Mr. Cavanagh.) When customers come in and want chewing gum, do they have any discussion with you as to who makes the gum? 704

A. No; they never ask; they just come in and say chewing gum,—a package of Beech-Nut chewing gum, or Spearmint Chewing gum. They always use the words "chewing gum."

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 23. (By Mr. Hinton.) How many of these Beech-Nut cigarettes do you suppose you sell a week, approximately,—of course you don't know exactly? 705

A. Oh, I should say 600 cigarettes,—about 60 packages.

R-X. Q. 24. About 60 packages?

A. Yes, sir.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

706 JOHN J. LECOLST, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answers to interrogatories by Mr. Cavanagh:

Q. 1. What is your full name?

A. John J. LeColst.

Q. 2. Where is your place of business?

A. Right here.

Q. 3. What is the address?

A. 747-½ Western Avenue, West Lynn.

707 Q. 4. What line of business is this, what do you sell?

A. Well, cigars and tobacco and periodicals and stationery, and different things.

Q. 5. How long have you been in business?

A. Well, going on 30 years.

Q. 6. How long have you been in this store?

A. In this store, it will be six years next month; but I have been in business around West Lynn longer than that.

Q. 7. This store is in West Lynn, is it?

A. Yes, sir.

Q. 8. You sell Beech-Nut Scrap tobacco and the
708 Beech-Nut cigarettes?

A. Yes.

Q. 9. Do you know who those are made by, the manufacturer?

A. Well, I suppose—I know the Beech-Nut cigarettes are made by the Lorillard Company, and the tobacco, the Scrap tobacco, the Lorillard man was around, he was the first man that brought it around.

Q. 10. Do you sell Beech-Nut chewing gum?

A. Yes, sir.

Q. 11. Do you know who makes that?

A. Well, the Beech-Nut gum—I don't know exactly

who makes it,—the Beech-Nut Company, I suppose. I don't know the name of the company. 709

Q. 12. Can you state whether or not you were ever under the impression or thought that the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco were made by the same people that make the gum?

A. No; I was always of the impression that Lorillard made the tobacco and cigarette, and the Beech-Nut people made the gum.

Q. 13. Did you ever hear any remarks, or comments, or inquiries from any of your customers here that would lead you to the impression that they thought that the Beech-Nut cigarettes and Beech-Nut Scrap tobacco were made by the same people who make the Beech-Nut chewing gum? 710

A. I never heard that remark, no.

Q. 14. Approximately how many customers do you serve a day or week here, just as a general thing?

A. Well, between three and four hundred.

Q. 15. A day?

A. Yes; according to my register there, between three and four hundred. Sometimes there is more,—some particular Saturday it runs probably up to five hundred. That is the sales. Of course I take the register every night. . 711

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) Mr. LeColst, you have been in the tobacco selling business for 30 years?

A. Going on 30 years. . There were two years that I was out. I was in the wholesale liquor business at the time they had a license here; two years I was out.

X-Q. 2. And you have in the course of that time dealt in a great many Lorillard products?

712 A. Yes.

X-Q. 3. And you say that you supposed the scrap tobacco was a Lorillard product because it was brought in here by a Lorillard agent?

A. Yes.

X-Q. 4. And did the Lorillard man bring around the Beech-Nut cigarettes when they first came out?

A. Yes; it was a Lorillard man,—that is, he said he was from Lorillard's. In fact I knew him by sight. I knew all the old timers, but they are changing all the time, and the new fellows I don't know.

X-Q. 5. And there was no doubt in your mind after
713 that that the Beech-Nut cigarette was a product of the Lorillard Company?

A. No. In fact before I ever had any Beech-Nut cigarettes Donahue told me that Lorillard was putting out the cigarette. Donahue is a dealer, a jobber in Lynn, the biggest jobber in Lynn. He gets the bulk of my business; him and I are old friends, we were old friends. Mr. Donahue is dead now.

X-Q. 6. Now, when you say you never heard any remark made by your customers, you mean you don't remember any?

A. I don't remember any.

714 X-Q. 7. How long have you been selling Beech-Nut cigarettes?

A. Well, I couldn't tell exactly the day when they came around. I was the first one that had it, but I never paid any attention to the date.

X-Q. 8. About a year and a half ago?

A. Yes; when they first introduced them in Lynn.

X-Q. 9. You never made any special effort to remember any discussion you might have had about them with customers?

A. No.

Mr. Hinton: That is all. 715
Mr. Cavanagh: That is all.
Deposition closed.
Signature waived.

Stipulation in re THOMAS E. BLAKE'S Deposition.

It is hereby stipulated by and between counsel for the parties that if Thomas E. Blake of 625 Boston Street, West Lynn, Massachusetts, was called as a witness in this case, he would testify as follows:

My name is Thomas E. Blake, address 625 Boston 716
Street, West Lynn, Massachusetts; of lawful age; occupation, grocer, and I also sell tobacco products, confectionery, candies and gum. I sell the Beech-Nut cigarettes and also the Beech-Nut chewing gum. I know the Beech-Nut cigarettes are a product of the P. Lorillard Co., and the same have been advertised by posters placed in my windows. I never had any customers or persons ask me whether the Beech-Nut cigarettes were made by the same people as make the gum, and I never heard any comments or inquiries made by a customer in this respect. My store is directly across the street 717
from the store of Mr. C. A. Wilkins.

On cross-examination the witness will testify: I do not sell many Beech-Nut cigarettes and I do not make a practice of discussing with customers the question of who makes the various products I sell. . I have been selling Beech-Nut cigarettes ever since they came out, and when I say that I have had no comments, remarks or inquiries about them, I mean that I do not remember any at the present time There was no reason for me to make any attempt to remember such comments, remarks, or inquiries, nor have I made any such attempt

718 to remember them in the ordinary course of business. My store is a small one-room store, operated by myself with the assistance of my wife and a boy. It is a residential store.

It is stipulated by and between counsel that the C. A. Wilkins store mentioned in the above stipulated deposition of Thomas E. Blake, as the store directly across the street from the Blake store is the C. A. Wilkins who was called as a witness in behalf of the plaintiff in the above entitled case.

719 Salem, Mass., 2.30 p. m.

EDWARD ADELMAN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your full name, Mr. Adelman?
A. Edwin Adelman.
Q. 2. Address?
A. Home address?
Q. 3. Yes.
A. 247 Lafayette Street, Salem, Mass.
720 Q. 4. And your occupation?
A. Proprietor.
Q. 5. Proprietor of what kind of a store?
A. Cigar store.
Q. 6. Where is this store located?
A. 127 Washington Street, Salem, Mass.
Q. 7. How long have you owned this store here?
A. This store,—I have owned it since the first of April, 1922.
Q. 8. How long have you been in the tobacco business, approximately?

A. Well, I have been in the tobacco business since 1903. 721

Q. 9. Do you sell the Beech-Nut cigarette, like that exhibit package which I show you?

A. Yes, sir.

Q. 10. And do you also sell the Beech-Nut scrap tobacco?

A. Yes, sir.

Q. 11. Do you know who manufactures those two products?

A. The Lorillard Company.

Q. 12. Do you sell the Beech-Nut chewing gum?

A. Yes, sir. 722

Q. 13. Do you know whose product that is?

A. The Beech-Nut Packing Company.

Q. 14. Were you ever under the impression, or did you ever think that the Beech-Nut cigarette or the Beech-Nut Scrap tobacco was made by the same people who make the gum?

A. No, sir.

Q. 15. In your experience in the tobacco business in stores have you ever heard any comments or any inquiries from customers or others which would lead you to believe that they were under the impression that the same concern that made the gum made the Beech-Nut cigarettes? 723

A. No. I have had people ask me, "Is it made by the same company?" But they were not impressed that it was. In fact the name on the cigarette, or in the advertising I have seen always had the name Lorillard on it.

Mr. Hinton: The witnesses' statement as to the impression of the people who asked him the question referred to is objected to as a conclusion of the witness, and the last part of the answer objected to as volunteered.

724 Q. 16. State whether or not you ever sold the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco to customers as the product of the Beech-Nut Packing Company?

A. No.

Q. 17. State whether or not you have ever had any customers ask you for Beech-Nut cigarettes or Beech-Nut Scrap tobacco made by the Beech-Nut Packing Company?

A. No, sir.

Q. 18. So far as you know, what reputation has the Lorillard Company in the tobacco business?

725 A. One of the best; they have as good a reputation as any of them and, personally, I like the Lorillard Company to do business with better than any of the others.

Q. 19. Mr. Adelman, did you ever know a young man by name of Edward Moscovitz?

A. Yes, sir.

Q. 20. Did he ever work in this store?

A. He worked in this store, but he didn't work for me; he worked in this store before I took charge.

Q. 21. Who owned this store before you took charge?

A. The Bieringer-Hanauer Company; it ran under

726 the name of "Schryver's Segar Store",—it was run by Bieringer-Hanauer, and then they changed the name to the Schryver Segar Store.

Q. 22. Did you work in the store at that time?

A. No, I worked in this store before the Beech-Nut cigarette came out.

Mr. Cavanagh: I think that is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton) You say you have been in the tobacco business some time before you took this store?

A. Yes, sir. 727

X-Q. 2. Where were you located?

A. Well, I went to work for the United Cigar Stores Company, I believe it was 1903, and I was with them about five or six years, and then I was with the American Tobacco Compnay in 1910-11, and then I was with the United Cigar Stores again for, I don't remember the year exactly, but for another year, and then I went back with the American Tobacco Company again, and after that I went with Bieringer-Hanauer Company, and I was with them about four years, until I took charge of this stand on the corner of Essex and Washington Street, Salem, Mass. I ran that stand for 728 myself, the Cigar end of it, until we sold out to Shulte Co., and then I bought this store.

X-Q. 3. This is a United Cigar Store that you are operating here?

A. No, sir; this is my own store, operating the United agency; I have the agency for the United Cigar Stores, selling their brands.

X-Q. 4. And you have been in the tobacco business and intimately associated with the various big companies in the business for a great many years, haven't you?

A. Yes; a great many years. 729

X-Q. 5. That is either employed by big tobacco companies or—

A. Yes; in the tobacco business practically all my life.

X-Q. 6. Did you handle the Beech-Nut cigarettes prior to the time you came to this store?

A. Yes.

X-Q. 7. Where were you then?

A. On the corner.

X-Q. 8. Did you put them in there yourself?

A. What do you mean?

730 X-Q. 9. Did you buy them, introduce them in the store?

A. Did I introduce them? They were introduced to me.

X-Q. 10. And who did that?

A. As near as I can remember, the jobber salesman.

X-Q. 11. He came around and told you that it was a new cigarette, and he wanted you to put them in, and you took some of them?

A. No. I don't put in any cigarette that comes along, I want to know who makes them, and if I know that there is a reliable company back of them, I buy some.

731 X-Q. 12. Yes; and he told you at that first interview about the Beech-Nut cigarettes, that the Lorillard Company was putting them out?

A. Yes.

X-Q. 13. Of course you were in doubt about them up to that time?

A. No, I was not in doubt about them. In fact Mr. Belt was here and told me about them.

X-Q. 14. Who is Mr. Belt?

A. I don't know what position he holds with the Lorillard Company.

X-Q. 15. But he is one of their men, one of their vice

732 presidents?

A. I don't know what position he holds.

X-Q. 16. A very high position he holds in that company, doesn't he?

A. Yes, I think so, but that was two or three months after I had them in; I guess he was making a trip through this part of the country, and I had known about them before,—put them in before I had met him.

X-Q. 17. Now, how many customers do you suppose ever asked you whether the Beech-Nut cigarettes were made by the gum people?

A. I don't think there was over one or two that I had any talk with about them. 733

X-Q. 18. That is, you didn't have any discussion on that subject with any of your customers except perhaps one or two?

A. That is all. In getting a new cigarette to sell, of course you introduce a new cigarette to a customer, or you will never sell them,—do you know what I mean? A new product, Beech-Nut gum, for instance, if it is something new, you would have to tell them about it, how good it was; and so with the Beech-Nut cigarette, you would have to introduce them to the customer, and in the general talk a great many times they asked: "who makes them?" But there was never any doubt in the customer's mind, so far as I know, that it was not the Beech-Nut Packing Company that made them, because I would never think of the Beech-Nut Packing Company making cigarettes, because I know that they are not in the cigarette game. 734

Mr. Hinton: The last part of the answer is objected to as volunteered testimony.

A. (Continued.) Of course that is my experience, being in the tobacco business, knowing the sales as I do. 735

X-Q. 19. That is, being so intimately acquainted with the business that you have followed all your life you would not think that, naturally?

A. Yes; I don't mean a stranger in that line,—I don't know anything about what they might think, but I don't think they would.

X-Q. 20. You don't know what someone not connected with the tobacco business might think?

A. Yes.

X-Q. 21. All you know is what you think yourself?

A. Yes.

736 X-Q. 22. Now, I wonder if you can tell me what is printed on that Lucky Strike package (indicating a package of Lucky Strike cigarettes) underneath the red panel with the words "Lucky Strike", under the name "Lucky Strike"?

A. "It is toasted." "The American Tobacco Company." I can't tell now whether it says, "Manufactured by", or not, but I know that the American Tobacco Company's name is on there.

X-Q. 23. On the front?

A. Yes.

X-Q. 24. What is printed on the Camel cigarettes
737 underneath the picture of the Camel, on the front, do you know?

A. It is the R. J. Reynolds Co.

X-Q. 25. That is, underneath the picture of a Camel on front of the package?

A. Yes.

X-Q. 26. As a matter of fact you knew that the American Tobacco Company made the Lucky Strike cigarette, and that the R. J. Reynolds Company made the Camel cigarette.

A. Yes.

X-Q. 27. And that is why you assume that those
738 names are printed on the front of the packages?

A. Yes.

X-Q. 28. But you have no definite picture in your mind of what might be there?

A. No.

X-Q. 29. For instance, I call your attention to a package of Camel cigarettes, and you find, do you not, that the name you mentioned is not in the place you thought it was?

A. Well, I said that because I thought it was. I really would not gamble on it, on that particular thing.

X-Q. 30. Now, how many packages of Camel cigarettes do you hand out in the course of a week, do you suppose,—just a rough guess? 739

A. Well, me, personally, do you mean?

X-Q. 31. Yes.

A. I will tell you: We wait on about 400 customers on an ordinary day, and I don't think that I wait on more than 150 of that 400, because I have two men; but I should say on the Camels that I might hand out 50, and I might hand out 10 packages a day.

X-Q. 32. And Lucky Strike about the same?

A. Yes, I should think so.

X-Q. 33. If I understand you, in introducing a new cigarette you find it a very pursuasive argument to the customer to tell him that it is made by some reputable concern, who makes other well-known brands, and you mention the name of the concern as a rule? 740

A. No, we don't mention any concern's name as a rule. We mention that it is a reputable concern, why you might say, "The same people that make—" mentioning another cigarette, saying, for instance, "Made by the same people who make the Turkish Trophies, or the same people who make the Murad".

X-Q. 34. In other words, if you can assure him that it is a reputable concern of high standing that makes the product, and mention another product made by the same concern, it helps the sale? 741

A. Yes, sir.

X-Q. 35. And he is apt to have a favorable opinion of this product of the concern that makes the other product?

A. Yes; we usually use that as an argument.

Mr. Hinton: That is all.

1122

742 *Re-direct Examination.*

R-D Q. 23. (By Mr. Cavanagh.) When you were introducing the Beech-Nut cigarette, what did you tell the customers as to the concern that made it and the brands that they made?

A. You mean what reputation they had?

R-D Q. 24. Yes; what concern did you tell them was making it?

A. I told them the Lorillard Company, because the Lorillard Company makes a great many brands that you might call popular brands, salable brands, high grade
743 brands. I might mention Helmars, Murads, and Mogals, —that the Beech-Nut cigarettes were made by the concern that makes those brands. They have been on the market so long that it has a lot of weight.

R-D Q. 25. Then you don't introduce a new cigarette brand, or a new tobacco product on the reputation of chewing gum people, do you?

A. No, sir.

Mr. Hinton: Objected to as leading.

R-D Q. 26. State whether or not in your business that you would introduce to your customer a new cigarett
744 brand, or chewing tobacco on any chewing gum concern's reputation?

A. No.

R-D Q. 27. Will you please state whether or not in your mind there would be any confusion between tobacco products, such as cigarettes and scrap tobacco, and chewing gum?

A. There would be no confusion in the mind.

R-D Q. 28. You sell the Beech-Nut chewing gum here, do you not?

A. Yes.

R-D Q. 29. State whether or not you have ever had any customer come in and ask you for Beech-Nut chewing gum, and on the strength of that inquiry you have given him Beech-Nut tobacco or Beech-Nut cigarettes, in the place of the gum? 745

A. No, sir.

Mr. Cavanagh: That is all.

Mr. Hinton: I have nothing further.

Deposition closed.

Signature waived.

JOHN T. POWERS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh: 746

Q. 1. What is your name, age residence, and occupation?

A. John T. Powers; 29 years; 79 Highland Avenue, Salem, Mass.; manager of this establishment.

Q. 2. What business is this establishment,—where is it located?

A. Cigar business, tobacco business, located at 222 Essex Street, Salem, Mass. 747

Q. 3. How far is it from the Adleman United Agency Store, Adleman's store, 127 Washington Street?

A. Oh, about 300 yards, I should think.

Q. 4. How long have you been in business here, Mr. Powers?

A. It is going on four years.

Q. 5. Do you sell Beech-Nut cigarettes and Beech-Nut Scrap tobacco?

A. We certainly do.

748 Q. 6. Who manufacturers the Beech-Nut cigarette and the Beech-Nut Scrap tobacco?

A. P. Lorillard Co.

Q. 7. Do you sell Beech-Nut chewing gum?

A. Yes. We had some mints, but they are almost gone now.

Q. 8. Who makes the Beech-Nut gum, if you know?

A. If I remember right, some packing company out in Canajoharie, New York.

Q. 9. State whether or not you ever thought or were under the impression that the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco was made by the gum
749 people?

A. No, I never was under that impression. They are two separate concerns, as I understand.

Q. 10. State whether or not you ever had any inquiries, or ever heard any comments or remarks made by customers or others that would lead you to believe that they were under the impression that the Beech-Nut Packing Company, or the gum company, made the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco?

A. Not to my knowledge.

Q. 11. You never heard of any such inquiry, did you?

A. No.

750 Q. 12. How many customers approximately do you serve a day here, in a general way?

A. About 600.

Q. 13. It is a pretty busy corner here?

A. Yes.

Q. 14. How long have you been selling Beech-Nut cigarettes?

A. Well, I have sold them for a long time, I guess ever since they came out. I can't just remember. I now we have handled them ever since they were manufactured, I guess.

Mr. Cavanagh: I think that will be all.

Cross Examination. 751

X-Q. 1. (By Mr. Hinton.) You are here by yourself in the store?

A. With a clerk.

X-Q. 2. And you make 600 sales a day?

A. Pretty nearly, approximately.

X-Q. 3. And I suppose in the ordinary course if a customer comes in to buy, for instance, cigarettes, and he asks for Camels, he takes the goods and puts down his money and walks out, and there is no conversation one way or the other; is that the case?

A. It depends on the customer. If I knew him quite 752
well I might talk with him, we might pass the time of day,—is that what you mean?

X-Q. 4. Yes. Of course you would pass the time of day. But in the ordinary course you would not discuss with the customer who manufactured Camel cigarettes,—he would ask for them and take the goods and pay for them and go out?

A. I imagine so; the average customer.

X-Q. 5. Did you make any special effort to make a note, or to remember any inquiries you may have had in connection with the Beech-Nut cigarette?

A. Why would I do that? 753

X-Q. 6. That is what I am asking you. Did you?

A. No.

X-Q. 7. Nobody asked you to make a note of any inquiries that you may have received and remember who asked you the questions?

A. What do you mean, regarding these here questions?

X-Q. 8. Yes.

A. No.

X-Q. 9. There is no reason why you should remember for a year and a half or two years any comments or re-

754 marks about the Beech-Nut cigarette that may have been made in the store?

A. I don't know of any reason why I should remember it; it had nothing to do with me.

X-Q. 10. You wouldn't have paid any attention to it one way or the other?

A. I don't imagine I would.

X-Q. 11. When you say that no such comments and remarks were made, what you mean is, you don't remember?

A. Not to my knowledge.

755 Mr. Hinton: That is all.

Re-direct Examination.

R-D. Q. 15. (By Mr. Cavanagh.) State whether or not if ten or fifteen people came in and asked you if Beech-Nut cigarettes were made by the same people that made the gum, you would not have remembered that?

A. Well, I suppose if they made it very plain and definite that I naturally would remember it. Anybody would remember it, I think.

R-D. Q. 16. If a stream of people had been coming in
756 and asking you if Beech-Nut cigarettes were made by the same people who made the gum, you would have remembered it?

A. I think I would; I think anybody with any sense of reason would have remembered anything of that description.

Mr. Cavanagh: That is all.
Mr. Hinton: Nothing more.
Deposition closed.
Signature waived.

757

DENNIS T. O'CALLAHAN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation?

A. Dennis T. O'Callahan; age 46; residence, 6 Larchmore Road, Salem.

Q. 2. Occupation?

A. Salesman.

Q. 3. For what concern are you a salesman? 758

A. W. P. Radford & Company.

Q. 4. What is the business address of that concern?

A. 159-163 Washington Street, Salem.

Q. 5. How far is that from the United Cigar Stores?

A. Oh, I should say 100 yards. They are right up the street, you see.

Q. 6. Do you know the name of the man who runs that store?

A. Yes, sir; Adelman.

Q. 7. And that is 127 Washington Street?

A. Yes.

Q. 8. How long have you been in the tobacco business? 759

A. 20 years.

Q. 9. Does this Radford store here handle the Beech-Nut cigarette and Beech-Nut Scrap tobacco?

A. We do, sir.

Q. 10. Do you know what concern is the manufacturer of the Beech-Nut cigarette and the Beech-Nut Scrap tobacco?

A. P. Lorillard Co.

Q. 11. Do you handle Beech-Nut gum in this store?

A. We do not, sir.

Q. 12. You don't sell anything but tobacco?

760 A. Well, we handle some other gums, but no Beech-Nut gum.

Q. 13. Do you know who makes the Beech-Nut gum?

A. No; I suppose it is that Beech-Nut Packing Company, so far as I know.

Q. 14. Can you state whether or not you were ever under the impression that the Beech-Nut cigarette or the Beech-Nut Scrap tobacco were made by the same people that make the Beech-Nut gum?

A. Never under that impression, sir; I always knew who made them.

Q. 15. In your experience can you state whether or
761 not you have to your own knowledge ever heard any inquiries, remarks or comments by customers that would lead you to the impression that they thought the Beech-Nut gum people made the Beech-Nut cigarette?

A. I have heard people make inquiries into that you know, whether or not the Beech-Nut cigarettes and tobacco and the gum and the other Beech-Nut fruit products were all one and the same, and I tried to tell them the difference.

Q. 16. Well, can you give us an incident of that talk? Did you have any conversation with any one about it?

A. I can tell you one incident, one particular incident
762 I remember. A man employed by the Beech-Nut Food Products, and who was in conversation with Mr. Radford, and they conferred with me relative to this same question, whether or not people had the impression that their goods and our goods were lined up with one another.

Q. 17. Did you take part in that conversation?

A. Yes.

Q. 18. What did you say?

Mr. Hinton: Objected to as irrelevant.

A. So far as I know I told them at the time, any one I had conversation with that the Beech-Nut Food Products and the Beech-Nut cigarettes and tobacco were different and separate products, made by separate firms. I told them there was no confusion about it. 763

Mr. Hinton: Objected to as conclusion.

Q. 19. You told them that?

A. I told them that, the parties that were in the store talking. That was some time back.

Mr. Cavanagh: I think that is all. 764

Cross Examination.

X-Q. 1. (By Mr. Hinton.) You have been in the tobacco business 20 years?

A. Yes, right here.

X-Q. 2. Wholesale and retail?

A. Yes, sir.

X-Q. 3. And you don't sell the Beech-Nut gum, never sold it

A. No. I know I have often had calls for it on the outside, and I guess we have tried to get it.

X-Q. 4. Now, how many people do you suppose you have discussed this question with as to who makes the Beech-Nut cigarette and the Beech-Nut chewing gum? 765

A. I think about a half a dozen. It would be only in conversation, you know. Sometimes some one would be talking and the question would be brought up, and they would leave it to me as a tobacco man to decide, and I would try to tell them, so far as I knew, that there was a distinction between the parties who made the food products and the Beech-Nut tobacco products.

X-Q. 5. And you would settle the matter for them?

A. I would as best I could to their satisfaction.

766 X-Q. 5. And that is all the discussion you ever had on this question, with half a dozen people, who left it to you to decide that question?

A. Yes; and, as I told Mr. Madden the other day, I have eaten Beech-Nut bacon, and it is good stuff, and I always have a good word for it at any time.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 20. (By Mr. Cavanagh.) State whether or not you ever told anybody that the Beech-Nut gum was
767 manufactured by the same people that made the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco?

A. No.

R-D Q. 21. What concerns did you tell them made the Beech-Nut cigarettes and the Beech-Nut Scrap tobacco?

A. I told them that the P. Lorillard Co. made them.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 7. (By Mr. Hinton.) Do you remember, Mr.
768 O'Callahan, whether you ever had the impression that the Beech-Nut people and the Lorillard people were a part of the same crowd?

A. No. When the Beech-Nut cigarettes first came on the market,—and of course you would—and I took a package and looked at it to see who it was made by, and when I saw "P. Lorillard Co." on the package that satisfied me, and I never confused them. I could see their name on the cigarettes, and on the tobacco, and I could see the name of the Beech-Nut Packing Company on the Beech-Nut products. I know I ate that bacon a great many years ago, before we

handled Beech-Nut cigarettes, or Beech-Nut chewing gum; I would see those products in the store, and I would try them, and I would buy them again. 769

R-X Q. 8. You never were under the impression or told anybody that the two companies had some sort of a connection with each other?

A. Never; and those who inquired about it, I tried to tell them the difference,—I tried to tell them that the Beech-Nut Packing Company and P. Lorillard Company were two different and distinct companies, that one made the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes and that the other made food products.

770

Mr. Hinton: That is all.
Mr. Cavanagh: That is all.
Deposition closed.
Signature waived.

(Adjournment taken to Friday, August 11, 1922, to meet at Room 401, Exchange Building, Boston, Massachusetts, at 10.00 a. m.)

Lawrence, Mass., August 12, 1922.

The further taking of depositions resumed at Lawrence, Mass., at 10 a. m.

Present as before. 771

THOMAS J. MAGUIRE, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. (By Mr. Cavanagh.) What is your name?
A. Thomas J. Maguire.
Q. 2. And your occupation?
A. Well, news dealer and tobacconist.
Q. 3. Where is your place of business located?

772 A. 24 Amesbury Street, Lawrence, Mass.

Q. 4. Are you the proprietor of this store?

A. Yes, sir.

Q. 5. How long have you been in the business?

A. 17 years the first of this October.

Q. 6. How long have you been located at this place?

A. 17 years.

Q. 7. Been here ever since you opened up business?

A. Yes, sir.

Q. 8. Do you sell the Beech-Nut cigarette?

A. I do.

Q. 9. Do you also sell the Beech-Nut Scrap tobacco?

773 A. No.

Q. 10. Do you know what concern makes the Beech-Nut cigarette?

A. Yes.

Q. 11. What concern?

A. Lorillard.

Q. 12. And do you also sell any Beech-Nut gum?

A. Yes.

Q. 13. Do you know what concern makes that?

A. Yes.

Q. 14. What concern?

A. The Beech-Nut Packing Company.

774 Q. 15. Were you ever under the impression that the Beech-Nut cigarette was made by the same people that made the Beech-Nut gum?

A. No.

Q. 16. Will you state whether or not you are constantly on duty here in the store?

A. Practically 16 hours every day, seven days every week.

Q. 17. Would you state whether or not you ever had any customers or others ask any questions, or make any comments or inquiries which would lead you to believe

that they thought that the Beech-Nut cigarette was made by the same people that made the gum? 775

A. No; never had any suggestions in regard to that.

Q. 18. What, so far as you know in your business, is the reputation of P. Lorillard Co.?

A. Why, the very best.

Q. 19. Mr. Maguire, do you know who keeps the grocery right across the alley here?

A. Yes.

Q. 20. Who?

A. M. J. Bailey.

Q. 21. And about what is the number of that Bailey store? 776

A. It would be 34 Amesbury Street.

Q. 22. About how many yards from your place of business is the Bailey store?

A. 25 at the most,—between 20 and 25, 25 at the most.

Q. 23. Practically the next door?

A. Practically the next door,— only three doors below.

Q. 24. Will you state whether or not you ever knew a party named Craven working for M. J. Bailey, grocer, of Lawrence?

A. Yes; James Craven,—I know him well. 777

It is stipulated between counsel that James Craven referred to by the witness is working in the Bailey grocery store, next door to witness' place of business, that he is the same James Craven of Lawrence who testified as a witness on behalf of the Beech-Nut Packing Company.

Mr. Cavanagh: That is all.

778 *Cross Examination.*

X-Q. 1. (By Mr. Hinton.) You work alone in your store, do you, Mr. Maguire?

A. I am alone while I am here.

X-Q. 2. You sometimes have someone to help you?

A. My wife comes in the afternoon at 3 o'clock.

X-Q. 3. Do you have, Mr. Maguire, people come in and ask just for "Beech-Nut", without saying whether they want the gum or cigarettes?

A. No, sir.

X-Q. 4. You remember that they do not?

779 A. No, they do not.

X-Q. 5. When did you first put in the Beech-Nut cigarettes?

A. So far as I know, it was when they first came on the market; I don't remember just when it was.

X-Q. 6. And that was about a year ago?

A. It was fully a year ago.

X-Q. 7. Who put them in for you, do you remember?

A. Well, I can't recollect whether — I know I ordered them through Mr. Hayes, my jobber. I would not put them in until I had constant call for them. That is my rule, not to put in any goods until I have a call for

780 them.

X-Q. 8. But they were brought to you by the jobber before you put them in?

A. I couldn't say about that, sir; I have no recollection of anything of that kind.

X-Q. 9. Now, were you asked to make an attempt to make a note of or remember any comments, remarks, or inquiries that may have been made by customers?

A. No, sir.

X-Q. 10. There is no reason why you should try to remember any incidental remarks that customers made to you when they purchased the goods, is there?

A. No, not particularly.

X-Q. 11. And you made no effort to do so? 781

A. No; they would ask for the goods, and I would sell them to them.

X-Q. 12. In other words they would ask, for instance, for Camel cigarettes, and they would get Camel cigarettes and walk out?

A. Yes, sir.

X-Q. 13. Or they would come in and ask for Beech-Nut cigarettes, and get them, and walk out, without having any conversation with you, in regard to who made them?

A. Yes.

X-Q. 14. You can't remember any such conversation? 782

A. No.

X-Q. 15. Mr. Maguire, you are acquainted with Mr. Craven?

A. Yes.

X-Q. 16. He is an honest man, so far as you know, and you would believe him under oath?

A. Yes.

Mr. Hinton: I think that is all.

Re-direct Examination.

R-D. Q. 25. (By Mr. Cavanagh.) Mr. Maguire, will 783 you state whether or not if daily or weekly customers had come in and inquired whether or not the Beech-Nut cigarette was made by the same people that made the Beech-Nut gum, you would have remembered such inquiries?

Mr. Hinton: Objected to as leading.

A. I think that I would remember it.

Mr. Cavanagh: That is all.

784 *Re-cross Examination.*

R-X Q. 17. (By Mr. Hinton.) Mr. Maguire, how many of these Beech-Nut cigarettes do you sell here a week, approximately?

A. Probably about 20 cartons a week, 200.

R-X Q. 18. Twenty cartons a week?

A. Yes, sir.

R-X Q. 19. Is that about what you have been selling since they came out, about 20 cartons a week to your customers?

A. Yes.

785 R-X Q. 20. About how many Camels do you sell a week, approximately?

A. Oh, I sell 2,000 camels a week. Camels, of course, are the best sellers in the market.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 26. (By Mr. Cavanagh.) About how many customers do you serve here in a day, approximately?

A. At a very low estimate, 700.

786 R-D Q. 27. This store is near one of the main streets of Lawrence?

A. Yes, sir; it is near the main street.

Mr. Cavanagh: That is all.

Mr. Hinton: That is all.

Deposition closed.

Signature waived.

787

PETER PETERS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. (Mr. Cavanagh) What is your full name?

A. Peter Peters.

Q. 2. Your age, Mr. Peters?

A. About 42.

Q. 3. What is your occupation, your business?

A. Store keeper.

Q. 4. What sort of goods do you sell?

A. Candy, tobacco and fruit, groceries, tonic, you know—soft goods. 788

Q. 5. Do you sell the Beech-Nut cigarettes?

A. Yes, sir.

Q. 6. Do you sell any Beech-Nut scrap tobacco?

A. No, not now. I used to sell it before.

Q. 7. Do you know who makes the Beech-Nut cigarettes?

A. Yes.

Q. 8. Who makes it?

A. Leroyd or Alroyd, or Ralroid,—I don't know how to spell the name.

Q. 9. You don't know how to spell the name? 789

A. I don't know how to spell the name, but it is right on the package, anyway.

Q. 10. Do you know who makes the Beech-Nut gum?

A. Sure.

Q. 11. Who?

A. Beech-Nut Packing Company; their name is all marked on the package.

Q. 12. Will you state whether or not you were ever under the impression that the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum?

A. No; it is a different company, anyway.

790 Q. 13. Will you state whether or not you ever had any questions asked you by customers which would lead you to think that they believed the cigarettes were made by the same people that made the gum?

A. No.

Q. 14. You never had any such questions asked you?

A. No.

Q. 15. How long have you been in business here?

A. A little over six years.

Q. 16. How many customers do you serve a day, approximately,—in a general way?

A. That is something I could not tell.

791 Q. 17. Well, I mean in a general way, is it ten, or fifty, or a hundred?

A. Well, about fifty,—I think a little more than fifty, —perhaps,—small sales.

Q. 18. Do you know where M. J. Bailey's grocery store is located in Lawrence?

A. No.

Q. 19. How far is 34 Amesbury Street from here?

A. The street runs this way (indicating). It is way up across Essex Street anyway.

Q. 20. About how far, about how many blocks?

A. Two, I guess,—about two blocks.

792

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton). What is the size of your store, about, do you know?

A. What?

X-Q. 2. How big is your store?

A. What do you mean, how big?

X-Q. 3. The number of feet, how long or how wide, approximately?

A. I didn't measure it, I don't know.

X-Q. 4. About 20 feet, by 10, something like that? 793

A. Of course I didn't measure it. If I said, maybe it would be wrong, see. Why, what is the idea? You can measure it now if you want to.

Mr. Cavanagh: Put it down in a general way, if you want to.

X-Q. 5. It is a one-room store?

A. Yes, one room, and one room in back.

X-Q. 6. Another room in the back that you put things in?

A. Yes. 794

X-Q. 7. You sell some kinds of groceries here?

A. Yes, sir.

X-Q. 8. Candies and tobacco?

A. Candies, tobacco and fruit.

X-Q. 9. You are the proprietor, running the store?

A. Yes.

X-Q. 10. Any other help?

A. No help.

X-Q. 11. How many of these Beech-Nut cigarettes do you suppose you sell a day?

A. I couldn't tell you; sometimes we sell just a few, and sometimes we sell more. 795

X-Q. 12. How many do you buy a week?

A. I am buying nothing last week; the week before I bought two cartons,—a week before last.

X-Q. 13. And none since?

A. No, none since.

X-Q. 14. And that is about the way it goes?

A. That is about the way it goes, slow, you know.

X-Q. 15. You say you sell the Beech-Nut gum here?

A. Yes, sir..

X-Q. 16. Who makes the Fatima cigarettes, do you know?

796 A. I didn't look to see.

X-Q. 17. Can you tell me out of your head who makes the Fatima cigarettes?

A. Of course I don't handle much of them.

X-Q. 18. How about the Camels, do you know who makes them?

A. The Camels?

X-Q. 19. Yes.

A. No,—the American Tobacco Company, I think..

X-Q. 20. Who makes the Lucky Strike, do you know?

A. Meyers, or Miles,—I don't know.

X-Q. 21. And who makes the Moguls?

797 A. I don't handle them.

X-Q. 22. Did you ever handle the Murads?

A. Yes, sir.

X-Q. 23. Who makes those?

A. I don't know; I didn't look on the packages.

X-Q. 24. Who makes the Helmars?

A. I couldn't remember who makes them, but of course when I look at the package I can tell.

X-Q. 25. But in the ordinary course you would not look on the package, unless somebody asked you?

A. No.

X-Q. 26. Now, did they ever ask you to look on the
798 package, and ask you who made the Beech-Nut cigarettes?

A. No.

X-Q. 27. Or the Beech-Nut gum?

A. No. You can see it on the package.

X-Q. 29. Who put in the Beech-Nut cigarettes, Mr. Madden?

A. No; Mr. Casey. I buy from Mr. Casey.

X-Q. 30. Who is he, a jobber?

A. Yes, a jobber,—Mike Casey.

X-Q. 31. Now, you say that you never had any dis-

cussion with your customers about who makes the Beech-Nut cigarettes? 799

A. No.

X-Q. 32. Nobody ever asked you, and you never told anybody?

A. No; because, as you ask me now, I would have to look. I could tell if I looked who made the cigarette. If anybody asked me who makes it, I would say, see the package, that is all.

X-Q. 33. Did you ever try to remember, say a year ago—if people would ask about that, would you try to remember, if you could, any of those questions?

A. What questions? 800

X-Q. 34. About who made the Beech-Nut cigarettes?

A. If they asked me the question?

X-Q. 35. Were you asked to try and remember whether you were asked in regard to who made them?

A. Oh, about a year ago, you mean?

X-Q. 36. Yes.

A. Nobody ever asked me, no.

X-Q.37. You didn't pay any attention, but so far as you remembber now nobody asked you, but you don't know definitely.

X-Q. 38. Nobody asked me who made then. They asked for the Beech-Nut cigarette. 801

X-Q. 39. And you sold them, and they walked out?

A. Yes, sir.

X-Q. 40. And so far as you know you had no talk with anybody about it?

A. No.

Mr. Hinton: That is all.

Mr. Cavanagh: That is all.

Deposition closed.

Signature waived.

802 LOUIS SCHEIPERS, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. Will you please state your name, age, residence and occupation?

A. Louis Scheipers; my residence is 28 Oakwood Avenue, Lawrence, Mass.; age 37; occupation tobacconist and confectionery business. I run a tobacco store down below here, and a candy store here.

803 Q. 2. How many stores have you?

A. Two.

Q. 3 Are you the proprietor of these stores?

A. Yes, sir.

Q. 4. The present store, where this testimony is being taken, is located where?

A. 541 Essex Street, Lawrence.

Q. 5. Is that the main street of the town?

A. Yes, it is the main street.

Q. 6. And do you sell tobacco in this store?

A. Yes.

Q. 7. What else?

804 A. Candy, Beech-Nut products of both kinds.

Q. 8. Do you sell the Beech-Nut cigarettes here?

A. Yes.

Q. 9. And do you also sell Beech-Nut gum?

A. Beech-Nut gum, and Beech-Nut marshmallow.

Q. 10. Do you sell any Beech-Nut scrap in your store?

A. Yes.

Q. 11. Who, if you know, makes the Beech-Nut cigarette and the Beech-Nut scrap tobacco?

A. P. Lorillard.

Q. 12. Who makes the Beech-Nut gum and the Beech-Nut Marshmallow?

A. Why, the Beech-Nut Food Products Company, whoever they are. 805

Q. 13. About how many customers a day do you serve in this store, at 541 Essex Street,—the candy store?

A. Five or six hundred.

Q. 14. And about how many at the tobacco store?

A. Down below?

Q. 15. Yes.

A. Oh, I probably sell more than that down there.

Q. 16. Do you wait on customers in both stores?

A. Well, I am not putting in much time down at the other store now, but I wait on customers there sometimes when they go to lunch. 806

Q. 17. But you wait on customers here?

A. Yes, sir.

Q. 18. Do you know where M. J. Bailey's grocery store is located?

A. Yes; right around the corner from me; their store is right around the corner on Amesbury Street.

Q. 19. How far is the Bailey store from the present store, here?

A. About two blocks.

Q. 20. Will you state whether or not you were ever under the impression that the Beech-Nut cigarettes or the Beech-Nut scrap tobacco were made by the same people that made the Beech-Nut gum, and the Beech-Nut candies? 807

A. No; I always thought they were two different concerns, one was a tobacco and the other a food product company.

Q. 21. State whether or not you ever had any inquiries for or questions from your customers which would lead you to believe that they thought the Beech-Nut cigarette or the Beech-Nut scrap tobacco was made by the Beech-Nut Food Products people?

A. No.

808 Q. 22. You never had any such inquiries?

A. No; we have always sold the two products, we have sold the cigarettes and the gum.

Q. 23. How long have you had the Beech-Nut cigarettes?

A. Why, ever since they came out. I have been in the tobacco business 19 years. The same with the scrap.

Q. 24. What, so far as you know, is the reputation of the P. Lorillard Co.?

A. Why, A No. 1; they have always used me all right.

809 Mr. Cavanagh: I think that will be all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) The store in which you work is a candy store, soda, and confectionery?

A. Yes; and a tobacco counter too.

X-Q. 2. A tobacco counter in it, and that is where you spend most of your time?

A. Yes; since last December.

X-Q. 3. You wait on the counter steadily?

A. On the tobacco counter all the time.

810 X-Q. 4. Were you asked, say a year ago, when the Beech-Nut cigarettes first came out, to make a note of any remarks of customers, any remarks that customers may have made to you about those cigarettes?

A. No, not that I remember.

X-Q. 5. You don't remember?

A. I don't remember being asked, really.

X-Q. 6. Were you making any effort to remember at that time, if you were asked?

A. No; I don't remember being asked at all.

X-Q. 7. I understand that, but did you make any

effort to remember at that time; was it something you would watch out for at the time? 811

A. No.

X-Q. 8. I suppose customers come into your store, and ask for Camel cigarettes, or Beech-Nut cigarettes, or whatever they want, and take the goods and go out usually, and they don't tell you, or they don't have any talk with you about who they think makes them, do they?

A. Not very often, no.

X-Q. 9. It would not be an ordinary thing for a man to walk into your store and say, " I know who makes the Camel cigarettes," or "I don't know who makes the Camel cigarette." 812

A. No.

X-Q. 10. He buys them as Camel cigarettes? A. Yes.

X-Q. 11. Did you ever have anybody come in and ask for just "Beech-Nut" without specifying?

A. No.

X-Q. 12. You don't remember that?

A. No.

X-Q. 13. Do you know what is printed on a package of Camel cigarettes underneath the picture of a camel? 813

A. I guess there is a name underneath, but I can't think of it.

X-Q. 14. The manufacturer's name?

A. Yes.

X-Q. 15. And who is the manufacturer?

A. I know it is Reynolds.

X-Q. 16. That is printed underneath the picture of the camel on the front?

A. Yes.

X-Q. 17. What is printed on the front near the bottom on a package of Lucky Strike, do you know?

814 A. It is marked, "P. Lorillard Co." I don't know whether it is front or back.

X-Q. 18. Is it on the front or back?

A. I mean American Tobacco Company.

X-Q. 19. If you will take my word for it, the names that you mention do not appear on either of the two packages in the place mentioned. Now you said if a customer comes in to buy for instance, Camel cigarettes, in the ordinary course he takes the goods and walks out?

A. Yes.

X-Q. 20. He does not discuss with you who makes
815 them?

A. No.

X-Q. 21. Of course you don't know what he thinks about that, not being a mind reader?

A. No.

X-Q. 22. You don't know anything about that?

A. No.

Mr. Hinton: That is all.

Re-direct Examination.

R-D Q. 25. (By Mr. Cavanagh.) Will you state
816 whether or not if you had any inquiries, or repeated inquiries as to whether the cigarettes were made by the same people that made the gum you would recall those inquiries?

A. What do you mean?

R-D Q. 26. If you had people come in, one after another, and they made repeated inquiries whether the cigarettes were made by the same people that make the Beech-Nut gum, would you recall those instances?

A. Why, yes; I would know that there were two concerns that made the different products, all the time.

Mr. Cavanagh: That is all.

Re-cross Examination. 817

R-X Q. 23. (By Mr. Hinton.) You would know that it was the Beech-Nut Packing Company that made the gum?

A. Yes, because I passed the Beech-Nut factory one time, on my way to New York, and I know where the factory is, and I always know that P. Lorillard Co. made the cigarettes.

Mr. Hinton: That is all.
Mr. Cavanagh: That is all.
Deposition closed. 818
Signature waived.

ARAM GULIAN, a witness called in behalf of the defendant, being first duly sworn, deposes and says, as follows, in answer to interrogatories by Mr. Cavanagh:

Q. 1. What is your name, age residence and occupation?

A. Aram Gulian.

Q. 2. Age?

A. 20. 819

Q. 3. Residence?

A. 201 Jackson Street, Lawrence.

Q. 4. Occupation?

A. Drug clerk.

Q. 5. Where are you a drug clerk?

A. Liggett's drug store.

Q. 6. Where is that located?

A. Corner of Amesbury and Essex Street, — 361 Essex Street.

Q. 7. Is it a corner drug store?

A. Yes; corner Amesbury and Essex Street.

820 Q. 8. Do you know where the store of M. J. Bailey, grocer, is located?

A. Yes.

Q. 9. How far away is that from where you work?

A. 20 or 30 feet, right across the street.

Q. 10. The Liggett store is in the business section of the city, a corner store?

A. Yes.

Q. 11. In that store do you sell Beech-Nut cigarettes?

A. Yes.

Q. 12. Do you sell scrap tobacco?

A. No, we don't; just the cigarettes.

821 Q. 13. Do you sell any Beech-Nut chewing gum?

A. Yes.

Q. 14. Do you know what concern makes the Beech-Nut cigarette?

A. Lorillard.

Q. 15. And do you know who makes the Beech-Nut gum?

A. The Beech-Nut Packing Company, so far as I know.

Q. 16. Will you state whether or not you were ever under the impression that the Beech-Nut cigarettes were made by the same concern that makes the Beech-Nut

822 gum?

A. No; I never was.

Q. 17. How many customers do you serve a day in that store, approximately,—that is, in a general way?

A. Oh, a couple of hundred, possibly.

Q. 18. How long have you been selling the Beech-Nut cigarettes?

A. About a year, I guess, or a year and a half.

Q. 19. Will you state whether or not in your experience you ever had any customers inquire or make any remark which would lead you to think that they thought the cigarettes were made by the same people that made the gum?

A. No, sir. 823

Q. 20. You never had any such instances?

A. No; I don't remember of any.

Mr. Cavanagh: That is all.

Cross Examination.

X-Q. 1. (By Mr. Hinton.) Are you behind the tobacco counter in that store?

A. Yes; a part of the time, not always.

X-Q. 2. You are the general clerk of the store, and you do everything? 824

A. Yes.

X-Q. 3. How many clerks are there in the store?

A. I should think about 8 or 9,—that is regularly.

X-Q. 4. Do you do the tobacco buying?

A. Ordering it; yes.

X-Q. 5. Are you acquainted with Mr. Madden of the Lorillard Company?

A. No, sir. You see we do it direct from New York, and we have no way of getting in contact with the salesmen.

X-Q. 6. This man here, (referring to Mr. Madden), you don't know him? 825

A. Of course I saw him in the store when he came in before,—of course I have seen him.

Q. 7. You put in the Beech-Nut cigarettes over in that store yourself, did you?

A. Myself?

X-Q. 8. Or did you do it on instructions from New York?

A. I had nothing to do with that. That comes in the candy department.

X-Q. 9. Did you receive any advance notice before you put in the Beech-Nut cigarettes that the Lorillard Company was coming out with the Beech-Nut cigarettes?

826 A. I don't think so.

X-Q. 10. How did you come to put them in?

A. We got instruction letters from New York, saying that the Beech-Nut cigarettes have just come out and you can order if you want, and when we have them on the standard list we can order.

X-Q. 11. You knew before you ever got the Beech-Nut cigarettes who made them?

A. I didn't know they were made by Lorillard until I received them.

X-Q. 12. When you received them you looked on the package?

827 A. Yes.

X-Q. 13. And you didn't know before you got the goods?

A. No.

X-Q. 14. All you knew, it was "Beech-Nut cigarettes?"

A. Yes.

X-Q. 15. Were you making any effort, Mr. Gulian, a year ago, to make a note of or remember any comments or remarks that your customers might make about these Beech-Nut cigarettes when they bought any?

A. No.

828 X-Q. 16. You paid no particular attention to it?

A. I didn't pay attention to it, no.

X-Q. 17. You can't remember any particular case now when you discussed the matter of who they were made by with any particular customer?

A. No, I don't think anybody passed a remark; they came in and bought it and went out.

X-Q. 18. They didn't ask any questions about them, so far as you are concerned?

A. No, not as far as I am concerned.

Mr. Hinton: That is all.

Re-direct Examination. 829

R-D Q. 21. (By Mr. Cavanagh.) Will you state whether or not if you had had any remarks addressed to you, or inquiries, or questions asked you as to whether the cigarettes were made by the gum people, would you be likely to recall that?

Mr. Hinton: Objected to as calling for a conclusion of the witness.

A. Would I recall it?

R-D Q. 22. Yes; if you had had a lot of questions asked you about it? 830

A. I suppose I would.

Mr. Cavanagh: That is all.

Re-cross Examination.

R-X Q. 19. (By Mr. Hinton.) That would depend on how many you had ask you, I suppose?

A. Yes.

Mr. Hinton: That is all.

Deposition closed. 831

Signature waived.

832 WHITMAN W. COLLINS, on oath says: I am a Court Reporter located at Room 706 Barristers Hall, Pemberton Square, Boston, Massachusetts; that I took the foregoing testimony stenographically at Boston, Lynn, Salem and Lawrence, Massachusetts and reduced it to writing under the supervision of Daniel T. O'Connell, Notary Public, acting as Special Examiner by consent of counsel, before whom the foregoing depositions were taken; that I have been paid the sum of for taking in shorthand and transcribing the foregoing testimony, and that the same is a fair, just and reason-
833 able charge.

WHITMAN W. COLLINS.

I, Daniel T. O'Connell, a Notary Public within and for the Commonwealth of Massachusetts, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Ferdinand Bieringer, Haskell Sharf, Eleazer Lebewohl, L. G. Cauto, Harry Klein, Benjamin Hurvitz, John A. Ratto, Max Dublin, Harry Stone, Benjamin Lescovitz, Hugh
834 F. Wallace, George O. Adams, George C. Smith, Aaron Ansel and George Dougall, (Taken at Boston, Mass.) of Martin O. Connors, Timothy James Dumas, Philip H. Moran and John J. LeColst, (Taken at Lynn, Mass.) of Edward Adelman, John T. Powers and Dennis T. O'Callahan, (Taken at Salem, Mass.) and of Thomas J. Maguire, Peter Peters, Louis Scheipers and Aram Gulian (Taken at Lawrence, Mass.), were taken in behalf of P. Lorillard & Co., defendant, pursuant to agreement and notice before me at Room 401 Exchange Building, 53 State Street, Boston, Massachusetts, and

at the place of business of the above named witnesses 835
in Lynn, Salem and Lawrence, Mass., beginning on the eighth day of August, A. D., 1922, and ending on the twelfth day of said August, that each of the above named witnesses was by me duly sworn; that the testimony of said witnesses was taken in shorthand, under my supervision, by Whitman W. Collins, a court reporter, well known to me, and thereafter reduced to typewriting; that the opposing party was represented by Sebastian Hinton during the taking of said testimony; that by agreement of counsel the signature of each witness was waived as indicated on the deposition. 836

I am not connected by blood or marriage with either of the parties hereto or interested directly or indirectly in the matter in controversy.

DANIEL T. O'CONNELL,
Notary Public.

837

838

DEPOSITIONS.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Company, Defendant.
} In Equity

839

Worcester, Massachusetts,
August 16, 1922.

Testimony taken on behalf of the defendant, P. Lorillard Company at Worcester, Massachusetts, at two o'clock P. M., August 16, 1922, pursuant to notice and by agreement of counsel before Penelope Comberbach, a Notary Public in and for the County of Worcester, acting as Examiner by consent of counsel.

Present: Sebastian Hinton, Esq., of Offield, Poole Hinton & Scott, attys. for Beech-Nut Packing Company;
840 Richard B. Cavanagh, Esq., of Meyers, Cavanagh & Whitehead, attys. for P. Lorillard Co.

SAMUEL S. BROADBENT, a witness called on behalf of the Defendant, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Richard B. Cavanagh, Esq., as follows:

(By Mr. Cavanagh).

Q. 1. What is your full name?
A. Samuel S. Broadbent.

Q. 2. What is your occupation? 841

A. You ought to know without asking. I am a druggist.

Q. 3. Where is your store located?

A. It was located at 83 Maywood Street, Worcester.

Q. 4. How long have you been in this present location?

A. I am just working here. I have only been here a few weeks.

Q. 5. What is this address?

A. 24 Lincoln Square.

Q. 6. Where was your former place of business?

A. 83 Maywood Street. 842

Q. 7. How long were you there?

A. Six and a half years.

Q. 8. While at 83 Maywood Street, did you sell the "Beech-Nut" cigarettes?

A. Yes.

Q. 9. While at 83 Maywood Street, did you sell "Beechnut" scrap tobacco?

A. No, I didn't.

Q. 10. Do you know who makes the "Beech-Nut" cigarettes?

A. I knew that from the time you started to advertise them, because I saw the name. 843

Q. 10. What concern?

A. Lorillard.

Q. 11. And did you sell "Beech-Nut" gum?

A. Yes.

Q. 12. Please state whether or not you ever thought the "Beech-Nut" cigarettes were made by the same people that make "Beech-Nut" gum?

A. No, because I saw the advertisement when they first came out in the paper, saying they were made by Lorillard & Company.

Q. 13. Please state whether while you were at that

844 store selling cigarettes and gum, you ever had any comments or inquiries which would lead you to believe the gum people were putting out the "Beech-Nut" cigarettes?

A. Not as far as I remember.

Q. 14. You cannot recall any such?

A. I can't remember of having any.

Q. 15. Was the Maywood Market near your place of business?

A. Next door but one.

Q. 16. Do you know who ran the Maywood Market?

A. Well, at the present time, Bottomley; but before
845 that, Bullard & Kirby. I guess they were out of it before "Beech-Nut" cigarettes were on the market.

Q. 17. You knew Mr. Bottomley, Mr. Dorris Bottomley?

A. Yes.

(It is STIPULATED that the Dorris Bottomley referred to is a witness called by the plaintiff Beech-Nut Packing Co., in prima facie proof, and is the son of Bottomley referred to as owning the Maywood Market.)

846 *Cross Examination by Mr. Hinton:*

X-Q. 18. How long have you been selling tobacco products?

A. How long have I?

X-Q. 19. Yes.

A. Well, I have sold them ever since I have been in the drug business, and I have been in that about thirty years.

X-Q. 20. Have you sold other Lorillard brands besides "Beech-Nut?"

A. Of what? Cigarettes, cigars?

X-Q. 21. Cigarettes? 847

A. I don't remember. I don't know what other brands they make, really.

X-Q. 22. The only brand you can identify positively as a Lorillard brand is the "Beech-Nut?"

A. Yes.

X-Q. 23. Do you know who makes the "Camel" cigarette?

A. No, I don't know as I do.

X-Q. 24. Do you know who makes the "Fatima" cigarette?

A. I wouldn't have known about those only from reading their ad in the paper, and, seeing the name 848
"Beech-Nut," I looked to see if it was made by the "Beech-Nut" people and I saw that name "Lorillard," underneath, and that fixed it in my mind.

X-Q. 25. When you first saw the "ad," you thought it might be made by the "Beech-Nut" people, and you made a closer examination and found they were made by Lorillard?

A. I did. That is what fixed it in my mind.

X-Q. 26. If there had not been some question in your mind about it, you would not have made that close examination?

A. Well, I looked to see from curiosity, to see if it 849
was the Packing People putting out cigarettes also; that is why I looked it over.

X-Q. 27. Do you sell "Murad" cigarettes?

A. Yes, I think we have them.

X-Q. 28. Do you sell "Mogul" cigarettes?

A. Yes.

X-Q. 29. Do you sell "Helmar" cigarettes?

A. Yes.

X-Q. 30. Do you know who makes those cigarettes?

A. I do not.

850 X-Q. 31. And you cannot name any Lorillard brands at all of cigarettes?

A. No. As I told you, that was the only thing that fixed that in my mind, was reading the ad through to see—

X-Q. 32. Now, I want you to go back, if you please, o the period of a year and a half ago when "Beech-Nut" cigarettes first came out here. Were you making any special effort at that time to make a note of anything customers might say about these cigarettes?

A. No.

X-Q. 33. You were not paying any particular atten-
851 tion to that, one way or the other, were you?

A. No.

X-Q. 34. And there is no reason why you should have remembered all this time any remarks you would have heard?

A. Well, I would be apt to, if anything was said. I think I would have been apt to remember it. As far as I know, I never had anyone make any confusion between the two at all.

X-Q. 35. As far as you know?

A. As far as I remember.

X-Q. 36. As far as you know? As far as anybody
852 has told you?

A. No, as far as I can remember.

X-Q. 37. How many packages of "Beech-Nut" cigarettes were you selling?

A. Oh, I don't know; they were not a big seller over there.

X-Q. 38. Well, how many would you sell?

A. I don't think I would average a carton a week.

X-Q. 39. That is, twenty packages a week?

A. It wouldn't average that; say probably two cartons in three weeks.

X-Q. 40. How are they going now?

A. They are not selling very fast here. I am talking about the store over where I was. 853

X-Q. 41. And they are going at about the same speed here?

A. Yes, not any faster than that.

X-Q. 42. Do you remember whether you ever had anybody come in your store and ask just for "Beech-Nut?"

A. I don't think so. I think they usually said whether they wanted gum or mints or cigarettes.

Signature waived.

HENRY FREEMAN, a witness called on behalf of the defendant, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Richard B. Cavanagh, Esq., as follows: 854

By Mr. Cavanagh:

Q. 1. What is your full name?

A. Henry Freeman.

Q. 2. What is your residence?

A. 7 Beaconsfield Road, Worcester.

Q. 3. What is your occupation?

A. That cigar store down there.

Q. 4. Where is that located? 855

A. 198 Front Street, Worcester.

Q. 5. That is the business section of Worcester?

A. Yes.

Q. 6. How long have you been in the cigar business in Worcester.

A. Twenty years next February since I have been down there.

Q. 7. What kind of goods do you sell in that store besides tobacco? Tobacco products? Do you sell anything else?

856 A. Why, gums a little, Arrowmints.

Q. 8. Do you sell the "Beech-Nut" cigarette in your store?

A. Yes.

Q. 9. Do you sell the "Beech-Nut" Scrap tobacco?

A. Yes.

Q. 10. Who if you know makes the "Beech-Nut" cigarette?

A. The Lorillard Company.

Q. 11. And, if you know, who makes the scrap tobacco?

A. Lorillard is who we buy it from.

Q. 12. Do you also sell "Beech-Nut" gum?

857 A. No.

Q. 13. How long have you been selling "Beech-Nut" cigarettes?

A. (After referring to Mr. Madden as to how long it had been in this section) says: About two years.

Q. 14. What is the reputation of the Lorillard Company in the tobacco business, if you know?

A. Well, they are known to be of a pretty good reputation. I have always known them to have a pretty good reputation in the tobacco line.

Q. 15. Please state whether you were ever under the impression the "Beech-Nut" cigarettes were made by the
858 same people that make the "Beech-Nut" gum?

A. Never.

Q. 16. Will you please state whether you ever had any customers make any inquiries, comments or remarks which would lead you to believe that they thought the Gum people were putting out "Beech-Nut" cigarettes?

A. I don't remember any.

Cross Examination by Mr. Hinton:

X-Q. 17. Did you put in the "Beech-Nut" cigarettes since they came out in this section?

A. Yes. 859

X-Q. 18. So you remember how you came to put them in? Did Lorillard's man come around and sell them to you?

A. Lorillard's man.

X-Q. 19. Of course you knew before you put them in they were a Lorillard product?

A. I did. I know they were sold in other sections. I have seen them up thru Western New York before they ever came here.

X-Q. 20. How many clerks work in your store?

A. Why, two or three there, at different times.

X-Q. 21. You do a wholesale business? 860

A. Yes.

X-Q. 22. What percentage of your business is wholesale, approximately?

Mr. Cavanagh: Just in a general way.

A. Ninety per cent.

X-Q. 23. How much of your time do you spend behind the counter?

A. My time?

X-Q. 24. When you are in the store?

A. Oh, two or three hours a day, perhaps. 861

X-Q. 25. You were not making any effort to make a note or remember any comments or remarks or inquiries that the customers may have made about this "Beech-Nut" cigarette, were you?

A. What?

X-Q. 26. Question read to witness.

A. Nothing more than some people were smoking it; that is all. That is, you know what I mean—people who would smoke the cigarette telling me about how good a cigarette it was.

X-Q. 27. Question again read, and explained to witness.

862 A. No.

X-Q. 28. When you say that you had heard no such comments, remarks or inquiries, what you mean is you do not remember any?

A. No, sure I don't.

X-Q. 29. What are the leading brands of cigarettes that sell in this section and which are made by the Lorillard Company—do you know?

A. "Beech-Nut" is one. That wouldn't include the others, would it?

X-Q. 30. I want to find out.

A. I mean Turkish cigarets.

863 X-Q. 31. Just mention any.

A. Helmar, if you call it their brands; Murad, and "Beech-Nut".

X-Q. 32. Mogul?

A. Yes. Deities.

X-Q. 33. Can you think of any other Lorillard brand of cigarets?

A. Ziras are sold a little here.

X-Q. 34. Do you think of any others?

A. (Enumerating): Helmars, Moguls, Murads, Beech-Nut, Ziras, Deities—that is about the only ones.

X-Q. 35. You carry a pretty full line in your store
864 don't you?

A. Pretty much.

X-Q. 36. You try to carry everything in demand?

A. As a rule.

Re-direct Examination by Mr. Cavanagh:

R-D Q. 37. Can you state whether or not if the number of customers who had been coming into your store daily was any large number, coming in and asking if the gum people were making the cigarettes, whether you would have remembered that fact?

Objected to by Mr. Hinton as leading and calling for conclusion of the witness. 865

A. They never did.

R-D Q. 38. If they did, you would have remembered it?

A. I would remember it.

Signature waived.

ANDREW J. WRIGHT, a witness called in behalf of the Defendant, being first duly sworn, deposes and says, in answer to interrogatories propounded by Richard B. Cavanagh, Esq., as follows:— 866

By Mr. Cavanagh:

Q. 1. What is your full name?

A. Andrew J. Wright.

Q. 2. What is your address?

A. 500 Park Avenue, Worcester.

Q. 3. What is your occupation?

A. I am out of a job at present; I have just sold out.

Q. 4. Well, what line of business were you in, recently?

A. This line here. 867

Q. 5. You kept this store, did you?

A. Yes.

Q. 6. What kind of a store?

A. Call it a variety store, we call it; some call it department.

Q. 7. What do you sell? What do you sell in this store?

A. Why, groceries, notions, confectionery, ice cream, soda and tobacco.

Q. 8. "And tobacco"?

A. Yes.

868 Q. 9. How long did you keep this store?

A. I sold out a week ago last Monday (about August 7th).

Q. 10. And you kept here for how long?

A. Eleven years ago the first day of June I owned the place.

Q. 11. You kept the store for eleven years?

A. A little over.

Q. 12. While you were keeping this store, did you sell "Beech-Nut" cigarettes?

A. Yes.

Q. 13. Did you sell "Beech-Nut" scrap tobacco?

869 A. No.

Q. 14. Did you sell the "Beech-Nut" chewing gum?

A. Yes.

Q. 15. Will you state whether or not you were ever under the impression that the Beech-Nut Gum people made the "Beech-Nut" cigarettes?

A. No, I never was.

Q. 16. Do you know who makes the "Beech-Nut" cigarets?

A. Yes.

Q. 17. What concern?

A. Lorillard.

870 Q. 18. Will you please state whether or not you ever heard any customers ask any questions and make any inquiries from you which would lead you to believe they thought the Beech-Nut cigarettes were made by the same people that made the Beech-Nut gum?

A. Never did that I remember.

Q. 19. About how many customers a day did you serve in this store?—approximately; in a general way?

A. Well, I don't know; that is pretty hard to say.

Q. 20. Just in a general way—whether one, or fifty, r a hundred?

A. Well, probably two or three hundred.

Q. 21. Do you know where the Maywood Market is located around here? 871

A. Yes.

Q. 22. How far is it from here?

A. Across the street.

Q. 23. Right across the street?

A. Well, it is on the other street, that block over there (indicating).

Q. 24. Do you know the name of the proprietor or person running it?

A. Yes.

Q. 25. Who is it?

A. J. T. Bottomley. 872

Q. 26. Do you know a Dorris Bottomley?

A. Yes.

Q. 27. Did he work in the market?

A. Yes. He is in the company now.

It is stipulated that the Dorris Bottomley is the same party heretofore called as witness for plaintiff.

Cross Examination by Mr. Hinton:

X-Q. 28. How many packages of those "Beech-Nut" cigarettes do you suppose you sell, a day? 873

A. Why, probably at the present time one of those little 20 package cartons—a carton a week.

X-Q. 29. About twenty a week?

A. Yes; not over that.

X-Q. 30. When they first came out, how many did you sell, approximately?

A. Well, probably the most I have sold would not average over double that.

X-Q. 31. Forty (40) packages a week would be your biggest sale?

874 A. When they first came out and during the campaign of doing the advertising, I had a show window in there; I would probably double that. I don't think it would be more than that.

X-Q. 32. That would be your biggest sale,—forty packages?

A. I should say so.

X-Q. 33. How many people work in your store?

A. Four.

X-Q. 34. It is your family?

A. No, two outsiders.

X-Q. 35. And these hundred customers a day come
875 in for newspapers and all the various goods you sell?

A. Yes.

X-Q. 36. What are the leading Lorillard brands of cigarettes you sell?

A. I would have to look at the packages to tell you who makes them.

X-Q. 37. Can you name any other Lorillard brand of cigarettes except the "Beech-Nut" without looking at the packages?

A. Very doubtful.

X-Q. 38. Do you know the name of the makers of the "Camel" cigarettes?

876 A. I couldn't say, without looking.

X-Q. 39. Do you know who makes the "Fatima" cigarettes?

A. Again, I wouldn't say without looking.

X-Q. 40. Or Chesterfields?

A. No.

X-Q. 41. Or Deities?

A. No, I don't handle them.

X-Q. 42. Murads?

A. The Greek,—I don't know what his name is; I don't know how you pronounce it.

X-Q. 43. Or Moguls? 877

A. Why—

X-Q. 44. Some Greek makes the Moguls?

Mr. Cavanagh: Anargyros.

A. Yes, I guess that would be it. I was trying to make it begin with an "S."

Mr. Cavanagh: S. Anargyros.

X-Q. 45. You have been selling Deities and Moguls?

A. Deities I haven't handled for a long time.

X-Q. 46. You still sell Moguls? 878

A. Yes.

X-Q. 47. You sell Helmars?

A Yes.

X-Q. 48. Do you know who makes Helmars?

A. Well, let's see. Isn't that by the same people that makes Moguls?

X-Q. 49. Do you know? Whether you know or not?

A. If I was going to say I should say it was the same people that make the Mogul. I wouldn't swear to it.

X-Q. 50. So the only cigarettes of which you can name the manufacturer definitely is "Beech-Nut?"

A. Why, let's see. No, I guess "Sweet Caps" (Cap- 879
orals)—isn't that the American? Well, I wouldn't undertake to name them accurately.

X-Q. 51. Can you name any other except "Beech-Nut?"

A. Because I never pay any attention to those things. Most of these cigarettes have been manufactured by somebody and have been consolidated with other concerns; without paying any particular attention I know they have been but who the originators are and who owns them, I wouldn't be sure.

880 XQ. 52. When the "Beech-Nut" cigarettes were put in your store, did a Lorillard salesman get you to take them?

A. Yes.

X-Q. 53. You knew, of course, he was a Lorillard man?

A. Oh, yes.

X-Q. 56. You knew the cigarettes were a Lorillard product before you ever saw them because he told you about them?

A. I knew it because I had to sign a paper when I got them. I know if there hadn't been a specialty man
881 around I would never probably have put them in without having a sufficient knowledge of them.

X-Q. 57. Do you know what is printed on a package of Camel cigarettes underneath the camel, without looking?

A. It seems as tho the word "Camel" is there, but I wouldn't swear to it.

X-Q. 58. I mean, underneath the picture of the camel?

A. Not without looking. I couldn't. You mean in lettering?

X-Q. 59. Yes.

882 A. No, I couldn't.

X-Q. 60. Do you know whether there is anything there or not?

A. No.

X-Q. 61. You sell lots of Camels?

A. More than anything else, perhaps, with the exception of Lucky Strike.

X-Q. 62. When you say you haven't heard any comments, remarks, or inquiries from customers, you mean you do not remember any at this moment?

A. No. I don't remember any.

X-Q. 63. Were you interested enough at the time those cigarettes came out to make a note of or remember any such remarks and did you make any such note? 883

A. I never gave it any consideration at all.

X-Q. 64. You didn't try to remember or pay any attention to it?

A. No.

X-Q. 65. Do you know what is on a package of "Beech-Nut" cigarettes? Do you know if there is anything printed on there?

A. Somewhere it says, "Beech-Nut" on there; I couldn't tell where, I don't know whether there is any name printed on there or not; I mean, without looking. 884 I presume there is.

X-Q. 66. But you do not remember ever having seen it?

A. No.

Re-direct Examination by Mr. Cavanagh:

R-D. Q. 67. I show you a package of "Beech-Nut" cigarettes. Can you read that name on the front of it?

A. Yes.

R-D. Q. 68. What is the name?

A. P. Lorillard Company. Of course, I knew that 885 was on the package somewhere. I haven't my glasses with me, but I can read that.

R-D Q. 69. Will you state whether or not if you had had customers coming in here daily, asking if the cigarettes were made by the gum people, whether you would have remembered that or not?

Objected to by Mr. Hinton as leading.

A. Sure.

R-D. Q. 70. If they had been, you would have remembered it?

A. Yes.

886 *Re-cross Examination by Mr. Hinton*:

R-X-Q. 71. You mean, you knew they were not made by the Beech-Nut people?

A. Yes, sir.

Re-redirect Examination by Mr. Cavanagh:

R-R-D. Q. 72. You would have remembered such inquiries—is that what you mean?

Objected to by Mr. Hinton as leading.

887 A. Yes, I would.

Signature waived.

888

889

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff.
vs.
P. Lorillard Company,
Defendant.
In Equity No. 3056.

Commonwealth of Massachusetts,
County of Worcester,
District of Massachusetts,
ss.:

890

I hereby certify that on the 16th day of August, 1922, before me, Penelope Comberbach, a Notary Public, in and for the County of Worcester, Commonwealth of Massachusetts, acting as Special Commissioner, by consent and agreement of counsel, personally appeared, pursuant to notice, between the hours of nine o'clock A. M. and six o'clock P. M., at Worcester, Massachusetts, the following witnesses: SAMUEL S. BROADBENT, HENRY FREEMAN, and ANDREW J. WRIGHT, of said Worcester, and also Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, appearing for Plaintiff, and Richard B. 891
Cavanagh, Esq., of Meyers, Cavanagh & Whitehead, appearing for Defendant; and each and all of the said witnesses, being by me first duly cautioned and sworn to testify the whole truth, and being carefully examined, deposed and said as in the foregoing annexed depositions of each of them, set out.

I further certify that all of said depositions were begun and completed on the 16th day of August, 1922.

I further certify that each of said depositions was reduced to typewriting under my personal supervision, and that each of said depositions, after it had been re-

duced to typewriting, was read over and signatures waived, and that each and all of said depositions have been retained by me for the purpose of sealing up and directing the same to the Clerk of Court as required by law.

I further certify that the reason why these depositions were taken was that the respective witnesses making same all reside at Worcester, County of Worcester, Commonwealth of Massachusetts, more than one hundred (100) miles from Trenton, New Jersey, the place where this cause is to be tried.

I further certify that I am not the counsel or attorney of the parties, or related by blood or marriage to either of the parties, nor am I interested in the event of the cause.

WITNESS my hand and Official Seal at Worcester, Massachusetts, this 16th day of August, 1922.

PENELOPE COMBERBACH,
Notary Public.

(Acting by consent of counsel
Special Commissioner).

895

Springfield, Mass.,
August 17th, 1922.

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Beech-Nut Packing Company
v.
P. Lorillard Company
In Equity No. 3056

896

Testimony taken on behalf of defendant P. Lorillard Company, pursuant to notice and agreement of counsel, before Walter C. Ross, Notary Public in and for the County of Hampden, Commonwealth of Massachusetts, acting as Special Examiner, by consent of parties. This testimony is taken pursuant to notice and agreement, formal notice of the production of the witnesses being waived.

Present Sebastian Hinton, Esq., of Offield, Poole, Hinton & Scott, attorneys for Beech-Nut Packing Company.

Richard B. Cavanagh, Esq., of Meyers, Cavanagh and Whitehead, attorneys for P. Lorillard Company. 897

August 17th, 1922.

MR. HERBERT R. HOOPER, a witness called on behalf of P. Lorillard Company, defendant herein, being first duly sworn, deposes and says as follows in answer to the interrogatories propounded to him by Mr. Cavanagh, counsel for P. Lorillard Company:

Q. 1. By Mr. Cavanagh: What is your full name?
A. Herbert R. Hooper.

898 Q. 2. And what is your residence and occupation?

A. 48 Chase Avenue, Springfield.

Q. 3. Occupation?

A. Manager here just now.

Q. 4. What kind of a store is this?

A. F. W. Nash Company, combination stationery, cigars and tobacco.

Q. 5. Located at?

A. 371 Main Street, Springfield.

Q. 6. It is in the business section of the city is it not?

A. Yes.

Q. 7. How long have you been located at this store?

899 A. Two years.

Q. 8. How long have you been in the tobacco business?

A. Well, since 1889 I believe.

Q. 9. Is this store located in the same neighborhood as the Springfield Public Market?

A. Springfield Public Market is right next door.

Q. 10. Do you know who runs that market?

A. Man by the name of Isenburg.

Q. 11. Have you ever sold the Beech-Nut cigarettes and Beech-Nut scrap tobacco?

A. Sell now.

Q. 12. Beech-Nut chewing gum?

900 A. Yes.

Q. 13. Any other products of the Beech-Nut people that make the gum?

A. No, I think not, nothing else.

Q. 14. Do you know who makes the Beech-Nut cigarettes?

A. Sure.

Q. 15. What concern?

A. Lorillard.

Q. 16. How long have you been selling Beech-Nut cigarettes?

A. As long as they have been making them.

Q. 17. How long have they been making them? 901

A. About a year and a half.

Q. 18. How long were you selling the Beech-Nut scrap tobacco?

A. That dates back quite a while.

Q. 19. Before you ever sold the cigarettes?

A. Yes.

Q. 20. Were you ever under the impression that the Beech-Nut cigarettes were made by the same people that make the chewing gum?

A. No.

Q. 21. Will you please state whether or not in your business here you ever had any comments or questions 902 or inquiry from customers which would lead you to believe that they thought the Beech-Nut cigarettes were made by the same people that make the chewing gum?

A. I don't remember hearing the question put. I don't remember having it put or hearing it discussed.

Q. 22. Are you working here in the store regularly every day?

A. Yes.

Q. 23. And waiting on customers?

A. Yes.

Q. 24. In a general way about how many customers do you have in this store a day, just in a general way? 903

A. I would say an average of 700. I guess it would go up more than that, but that is safe.

Q. 25. Can you state whether or not you handle any other Lorillard brands?

A. Oh yes, we handle nearly all of them?

Q. 26. Can you name some of them?

A. Cigarettes?

Q. 27. Cigarettes.

A. We handle their Helmars, Moguls, Murads and nearly everything that they make I guess.

Q. 28. So far as you know what reputation has the

904 Lorillard Company in business, what has been your experience in that direction?

A. It has always been good, good reputation in a business way.

Cross Examination.

X-Q. 29. By Mr. Hinton: You do the buying here do you?

A. In the tobacco line, yes.

X-Q. 30. How long have you been in the tobacco game?

905 A. Since 1888, 88 or 89.

X-Q. 31. You have been a retail salesman of tobacco all that time?

A. No.

X-Q. 32. What were you doing?

A. I was out for the American as Division man.

X-Q. 33. For the American Tobacco Company?

A. Yes, quite a while.

X-Q. 34. At the time the American Tobacco Company and the Lorillard Company were the same company?

A. No; I went out after they split.

X-Q. 35. Were you ever employed by the American
906 Tobacco Company when the Lorillard Company was a part of that company?

A. I don't think so, no.

X-Q. 36. When were you employed by the American Tobacco Company?

A. I went to work for the American Tobacco Company in January 1912 I think and quit two years ago, quit in July 1920.

X-Q. 37. As a salesman?

A. Yes.

X-Q. 38. And before 1912 what were you doing?

A. I was with Barnett.

X-Q. 39. What do they do? 907

A. They were retail and wholesale tobacco business.

X-Q. 40. So you have been intimately associated in the tobacco business since 1888?

A. Yes.

X-Q. 41. When these Beech-Nut cigarettes came out a year and a half ago could you give me an approximation of how many packages you sell a day here?

A. No; I couldn't.

X-Q. 42. Don't they sell like Camels for instance?

A. No.

X-Q. 43. Ten packages or five or what?

A. Ten would probably be putting it strong enough 908 when they first started.

X-Q. 44. Do you work at the front of this store where the tobacco counter is all by yourself?

A. Most of the time, yes.

X-Q. 45. And wait on several hundred people a day?

A. Yes.

X-Q. 46. Were you trying at the time to make a note of or remember any discussion that you might have heard about the Beech-Nut cigarettes?

A. No.

X-Q. 47. You made no effort to remember any casual conversations? 909

A. No; had no occasion to.

X-Q. 48. You were very busy, had no occasion to, and you see lots of customers every day?

A. Yes.

X-Q. 49. And your memory is not infallible?

A. Certainly not.

X-Q. 50. What is written on the front of a package of cigarettes, on the Camel cigarettes besides a Camel?

A. What is written on it? Nothing especially that I know.

910 X-Q. 51. What is printed on a package of Lucky Strike cigarettes underneath the red panel Lucky Strike?

A. I don't even know that, might be the factory number, but it is more likely on the reverse side.

X-Q. 52. You have sold lots of Camels over the counter?

A. Yes.

X-Q. 53. And thousands of packages?

A. Yes.

X-Q. 54. And many thousands of packages of Lucky Strike cigarettes, but never noticed it?

A. No.

911 X-Q. 55. When these Beech-Nut cigarettes were put in Mr. Hooper, do you remember whether the Lorillard agent came around and got you to put them in?

A. I don't remember, but undoubtedly we bought them because we very seldom take on a new brand without a fellow coming in and seeing us.

X-Q. 56. You knew it was a Lorillard product before you saw it?

A. Sure.

X-Q. 57. Did you ever examine a package of Beech-Nut cigarettes closely?

A. I don't know as I ever examined any package of
912 cigarettes closely.

X-Q. 58. What is printed on the front of a package of Beech-Nut cigarettes?

A. Name is on there I know.

X-Q. 59. The name of the cigarette?

A. Yes.

X-Q. 60. The name Beech-Nut?

A. Yes.

X-Q. 61. What else is on the front of the package? Ever notice anything else on the front of the package?

A. No.

X-Q. 62. During this whole, practically the whole of

this examination a package of Beech-Nut cigarettes with 913
the glaze paper removed has been lying right in front of you hasn't it?

A. Yes, but I haven't taken the trouble to look at it.

Re-direct Examination.

R-D. Q. 63. (By Mr. Cavanagh.) Would you look at that package of cigarettes and tell me whose name was on it?

A. Sure. The Lorillard Company.

R-D. Q. 64. What would that indicate to you?

A. Indicate it is made by the P. Lorillard Company.

R-D. Q. 65. Who makes the Lucky Strike? 914

A. American Tobacco Company.

R-D. Q. 66. Who makes the Camel cigarette?

A. Reynolds.

R-D. Q. 67. What is the name?

A. R. J. Reynolds Company.

R-D. Q. 68. What company manufactures or puts out the Murad?

A. Lorillard Company.

R-D. Q. 69. Will you please state whether or not you have had numerous inquiries made to you, or inquiries made as to whether or not the gum people were putting 915
out this cigarette, would you remember those inquiries or that fact?

Objected to.

By the Witness: Oh sure, would have been apt to.

R-D. Q. 70. It would have impressed itself upon your mind?

A. Sure.

R-D. Q. 71. State whether or not you ever knew any customer to be confused into making—have you ever

916 had any customer ask you was the Beech-Nut cigarette made by the gum people?

A. I don't think I ever had that question put to me.

R-D. Q. 72. State whether or not you would ever sell a customer a package of cigarettes for gum or a food product?

A. Not unless I was foolish.

Re-cross Examination.

R-X. Q. 73. (By Mr. Hinton.) You have been manager here two years?

917 A. Yes.

R-X. Q. 73. Who is the owner of this store?

A. Mr. Nash. He is down there if you want to see him.

R-X. Q. 75. And you came direct here from the American Tobacco Company?

A. Yes, quit them one week and came here the next.

R-X. Q. 76. Did they have anything to do with your getting this position here?

A. Absolutely nothing.

R-X. Q. 77. You left them voluntarily?

A. Yes.

918 R-X. Q. 78. On good terms with them?

A. Yes.

R-X. Q. 79. Were with them over ten years?

A. No. I was with them from 1912.

R-X. Q. 80. Nine years?

A. Only about eight years, seven years and a half.

R-X. Q. 81. Now when a man comes in to buy a package of Camels, Camel cigarettes, he asks for his Camels, put down the money and picks up the goods, walking out and unless he tells you you have no means of knowing what is on his mind?

A. No.

Re-direct Examination. 919

R-D. Q. 82. (By Mr. Cavanagh.) And likewise when they come in and get a package of Beech-Nut gum?

A. Certainly not.

R-D. Q. 83. It is the same proposition, you don't have time to discuss—

A. I wait on from 300 to 500 people a day, figure the minutes and you notice a fellow don't have a great deal of time for discussion.

MR. WILLIAM W. PROVOST, a witness called on behalf of P. Lorillard Company, defendant herein, being first duly sworn, deposes and says, as follows, in answer to the interrogatories propounded to him by Mr. Cavanagh, counsel for P. Lorillard Company: 920

Q. 1. (By Mr. Cavanagh.) Will you please state your name, age, residence and occupation?

A. William W. Provost.

Q. 2. Age?

A. 32.

Q. 3. Residence?

A. 20 Scott Street. 921

Q. 4. Springfield, Mass. Occupation?

A. Cigar and periodical business, candy.

Q. 5. Do you have charge of this store here?

A. Yes, all of them.

Q. 6. All of the stores?

A. Yes.

Q. 7. What concern do you work for?

A. Roberts Smoke Shop.

Q. 8. And how many stores have they here in Springfield, about?

A. Have ten here in town. They are not all cigar stores.

922 Q. 9. Where is this present store we are in now?

A. 785 Main, corner Main and Marble.

Q. 10. Did you ever handle the Beech-Nut cigarettes in the store?

A. Yes; handled them, had them practically ever since they were out, that is, here in town.

Q. 11. About how long ago?

A. I couldn't tell you that, two years I should say.

Q. 12. Did you ever handle this Beech-Nut Scrap tobacco?

A. Yes.

Q. 13. About how long were you handling that in a
923 general way?

A. I should say longer than that.

Q. 14. Before you had the cigarettes?

A. Before we had the cigarettes.

Q. 15. When the Beech-Nut cigarette was first put in your store who did you think made it?

A. Lorillard.

Q. 16. What led you to that belief?

A. Well, the name is on the package on the bottom.

Q. 17. You also handle the Beech-Nut chewing gum?

A. Yes.

Q. 18. Do you know the name of the concern that
924 makes that?

A. Yes; the Beech-Nut Packing Company. I think that's the name of the company, the people that make the Beech-Nut brands.

Q. 19. What Beech-Nut brands?

A. Bacon and such things.

Q. 20. Food products?

A. Yes.

Q. 21. Were you ever under the impression that this Beech-Nut cigarette was made by the same people that make the gum?

A. No.

Q. 22. State whether or not in your experience in 925
the stores you have ever heard of any questions or comments or inquiries from customers which would lead you to believe that they thought the gum people made the cigarettes?

A. No.

Q. 23. Did you ever have any such questions at all?

A. No one ever asked me that, no customers coming in.

Q. 24. Never had any discussion about the matter at all?

A. No.

926

Cross Examination.

X-Q. 25. (By Mr. Hinton): How long have you been selling tobacco over the counter?

A. 17 years.

X-Q. 26. Who did you work for before you worked for your present employer?

A. I started in with him.

X-Q. 27. You have been working in these smoke shops 17 years?

A. Yes.

X-Q. 28. And have been in this store two years?

927

A. No. I have been down here about a year and—I have been down here about six months, in this store here.

X-Q. 29. Where have you been?

A. I have been with him in all of his stores for 16, 17 years. Of course this is our headquarters now. At one time our headquarters was up the street about four blocks and five years ago I had Chestnut Street.

X-Q. 30. Do you people put out any brands of cigars of your own?

A. No.

928 X-Q. 31. You don't put out any?

A. No.

X-Q. 32. Do you remember when you put this Beech-Nut cigarette in, whether the Lorillard man came around and got you to put it in?

A. He did.

X-Q. 33. Did he come around and sell it to you?

A. Yes, a salesman came in and we put the brand in through a salesman.

X-Q. 34. And of course you knew he was a Lorillard man?

A. Yes.

929 X-Q. 35. You knew they were Lorillard goods before you opened the first carton because he told you?

A. Yes.

X-Q. 36. Have you made any effort to make a note of or remember any comments or inquiries that might be asked you by customers.

A. In regards to who it was made by? No, I never have. People might have but I never run—no one ever asked me that. No, I have never been asked that.

X-Q. 37. You don't remember it, in other words?

A. No; I have never been asked that.

X-Q. 38. Do you know what is written on a package
930 of Camel cigarettes?

A. I don't mean by that, people might have asked, people might have asked, but never have asked me.

X-Q. 39. No. What is printed on a package of cigarettes underneath the picture of the Camel?

A. The name of the people that manufacture it.

X-Q. 40. And how about Lucky Strikes underneath the red panel front and back?

A. I think that comes on the side of those.

X-Q. 41. Underneath the red panel?

A. I don't know as I could tell you exactly. You will find the name of the manufacturers of cigarettes some-

times on the front, sometimes on the sides or sometimes 931
on the back. I couldn't tell every cigarette on every package. If I wanted to find who made it it is usually on there somewhere.

X-Q. 42. On there somewhere?

A. Somewhere.

X-Q. 43. How many of these Beech-Nut, how many packages would you sell a day here, do you suppose?

A. Well, I couldn't tell you that, how many we sell a day because we don't take daily inventories and I'm not behind the counter in any one store. Probably use around 10,000 Beech-Nuts a month.

X-Q. 44. I mean in this one store? 932

A. That I couldn't tell you.

X-Q. 45. Five packages a day?

A. Might be five, might be one, might be none. I couldn't tell you how they sold in each individual store per day.

X-Q. 46. How many in this store?

A. I couldn't tell about this store because I'm not behind the counter.

X-Q. 47. How long has it been since you gave up working behind the counter?

A. When I work behind the counter it is to fill in in an emergency. I haven't worked behind the counter 933
steady for ten years.

X-Q. 48. Just except occasionally for a short time?

A. The only way I could tell the number of Beech-Nuts per day is an estimate, I can tell you about what we use that goes through the stock room, each store.

X-Q. 49. You spend very little time behind the counter?

A. Very little.

X-Q. 50. Many days you are not at all?

A. I am in the store, every day, every store every day, once a day, sometimes oftener than once a day.

934 X-Q. 51. You don't work behind the counter. How often are you behind the counter?

A. I couldn't tell.

X-Q. 52. Once a month?

A. Yes, and sometimes no. If the girl is busy waiting on people I would step behind and wait on them.

X-Q. 53. You don't work steady behind there as much as once a month?

A. No.

Re-direct Examination.

935 R-D. Q. 54. (By Mr. Cavanagh.) You have worked behind the counter in the store?

A. Yes.

R-D. Q. 55. And have sold Beech-Nut cigarettes behind the counter.

A. Yes.

MR. JOSEPH EQUI, a witness called on behalf of P. Lorillard Company, defendant herein, being first duly sworn, deposes and says, as follows, in answer to the interrogatories propounded to him by Mr. Cavanagh, counsel for P. Lorillard Company:

936

Q. 1. (By Mr. Cavanagh.) What is your name, age, residence and occupation?

A. My name is Joseph Equi.

Q. 2. Legal age I suppose and residence?

A. 1699 Northampton Street.

Q. 3. Occupation?

A. I am the manager of the business here.

Q. 4. This business is a confectionery and tobacco and soda water store?

A. Yes, sir; ice cream, soda water.

Q. 5. Address is? 937

A. 359 Dwight Street.

Q. 6. Holyoke, Mass. Did you ever sell the Beech-Nut cigarette here?

A. Yes.

Q. 7. How long have you been selling them in a general way?

A. I couldn't say. We had them when they came to Holyoke, must be over a year ago.

Q. 8. Ever sell the Beech-Nut Scrap tobacco?

A. Yes. We have it now.

Q. 9. Do you know who makes the Beech-Nut cigarettes? 938

A. I suppose the same people that make the tobacco.

Q. 10. Do you know the name of that concern?

A. Lorillard is it?

Q. 11. Lorillard. Do you sell Beech-Nut chewing gum here?

A. Yes.

Q. 12. Did you ever believe the Beech-Nut tobacco or Beech-Nut cigarette was made by the same people that made the gum?

A. No; I don't believe that.

Q. 13. State whether or not you ever had any questions asked you by customers or others that would lead 939 you to believe that they thought the gum was made by the tobacco people?

A. Never had customers inquiring about that, whether the gum or tobacco was made by the same people, never had that question made.

Q. 14. Thought it was made by the same people, Beech-Nut cigarettes, as made the scrap tobacco?

A. Yes.

940 *Cross Examination.*

X-Q. 15. (By Mr. Hinton.) How many of those Beech-Nut cigarettes would you sell here in a day?

A. I should say maybe a box or two a week, carton or two a week, that is about 200.

X-Q. 16. 40 packages a week?

A. About that, about 40.

X-Q. 17. This is mainly a soda fountain?

A. Yes, fountain, sell candy and fruit, cigars.

X-Q. 18. When the Beech-Nut cigarettes were put in did the Lorillard man come around and put them in do
941 you remember?

A. That I couldn't say. I don't know whether the jobber introduced the cigarette or the salesman, that I couldn't say. I don't recollect that.

X-Q. 19. How much of that scrap do you sell here, Beech-Nut scrap?

A. It's hard to say, sometimes it sells faster than others. Well, I should say possibly, well, a carton a month, maybe they wouldn't reach a month, the container, I think that is two dozen.

X-Q. 20. How many packages?

A. It varies, sometimes might sell—

942 X-Q. 21. The average would be one a month?

A. Little better than one a month, just a little better, varies all the time.

X-Q. 22. Did you make any effort to remember whether or not you heard any discussion about these cigarettes when they came out, pay any particular attention to it?

A. No.

X-Q. 23. You knew before you saw the goods that they were Lorillard goods?

A. Why, it was written on the package if I remember right, usually on the package who they were made by,

X-Q. 24. You saw it on the package? 943

A. Naturally, a new product, kind of curious to find out who put it out.

X-Q. 25. So you examined the package?

A. Ordinary way you know.

X-Q. 26. That's the way you remember. Who makes the Mogul cigarette, do you know?

A. Mogul? I think the American.

X-Q. 27. Who makes the Murads?

A. Same, American.

X-Q. 28. Who makes the Fatimas?

A. Reynolds.

X-Q. 29. Who makes the Camels? 944

A. Same, Reynolds.

X-Q. 30. Who makes the Helmars?

A. American.

X-Q 31. Who makes the Lucky Strike?

A. American.

X-Q. 32. Can you name any Lorillard brand of cigarettes except the Beech-Nut?

A. I think the Piedmonts, I wouldn't say for sure. No, I don't think Piedmont.

X-Q. 33. You can't name any other Lorillard brand of cigarettes except the Beech-Nut. Can you name any other Lorillard brands of tobacco except scrap? 945

A. Mechanic's Delight is made by them.

X-Q. 34. Any other?

A. We don't handle all their products. I guess that's about all we handle.

X-Q. 35. Do you know of any other Lorillard products?

A. Unless it is the Lorillard, this yellow snuff is put out by them.

X-Q. 36. That is a snuff, is it?

A. Yes, that is a snuff, think it is; I'm not sure.

946 X-Q. 37. You sell the Murads and Helmars and Moguls?

A. Yes.

X-Q. 38. Sell the Egyptian Dieties?

A. I wouldn't say yes or no. I think we are all out of them but we sell them.

X-Q 39. Who makes them do you know?

A. Don't remember. I couldn't say.

X-Q. 40. Can you name any Lorillard brands of cigars?

Objected to.

947 By the Witness: Not that I know of.

X-Q. 41. As far as you know they don't make any cigars?

A. Not that I know. If they do we don't carry them.

Re-direct Examination.

R-D. Q. 42. (By Mr. Cavanagh.) If you had had any inquiries from customers asking you if the cigarettes were made by the same people that made the gum, you would remember it wouldn't you?

948 Objected to as leading.

By the Witness: Yes, I think I would.

R-D. Q. 43. You wouldn't have any difficulty remembering inquiries along that line?

A. I could recollect them easy enough if I had anyone bring that matter up.

949

MR. FERDINAND RIGALI, Jr., a witness called on behalf of P. Lorillard Company, defendant herein, being first duly sworn, deposes and says as follows in answer to the interrogatories propounded to him by Mr. Cavanagh, counsel for P. Lorillard Company:

Q. 1. By Mr. Cavanagh: Will you plaese state your name, age, residence and occupation?

A. Ferdinand Rigali, Jr.

Q. 2. Age?

A. 25.

Q. 3. Residence?

950

A. 1616 Northampton Street.

Q. 4. Occupation?

A. Fruit dealer.

Q. 5. What store do you work in?

A. Right here. We only have one store.

Q. 6. Address?

A. 773 Dwight Street.

Q. 7. Do you know a store kept by a party by the name of Carlton here in Holyoke?

A. Yes, I do.

Q. 8. Where is that store?

A. Just about four streets from here.

951

(It is stipulated, the Carlton referred to, is a witness heretofore called for Plaintiff.)

Q. 9. Do you sell the Beech-Nut cigarettes in the store?

A. Yes.

Q. 10. Beech-Nut scrap tobacco?

A. Yes.

Q. 11. Do you know what concern makes those?

A. Yes.

Q. 12. What is it?

A. Lorillard.

952 Q. 13. Do you sell Beech-Nut chewing gum?

A. Yes.

Q. 14. Do you know what concern makes that?

A. Yes; Beech-Nut Packing Company.

Q. 15. Were you ever under the impression that the Beech-Nut cigarettes were made by the same people that make the gum?

A. Not the people.

Q. 16. Will you please state whether or not you ever had any customers ask any questions or make any inquiry which would lead you to believe that they thought the Beech-Nut cigarettes were made by the same people that
953 made the gum?

A. I have had to my, I think I had about two people ask me. I couldn't say who the people were, just people that came into the store.

Q. 17. How long ago was that?

A. Quite a while ago after they came out one party asked me who made the Beech-Nut cigarettes and went as far as to ask me if the Beech-Nut Packing Company made them. I told them certainly not, that's as far as the argument went. He didn't know probably.

Q. 18. Those are the only two occasions?

A. That's the only two occasions I have had unless
954 the other boys have had.

Q. 19. About how many customers do you serve a day in this store, in a general way how many coming in, in general?

A. I don't know.

Q. 20. Approximate it.

A. 700, 800, sometimes 500 a day coming in during the day, 500 people

Cross Examination. 955

X-Q. 21. By Mr. Hinton: You carry fruit and run a soda fountain here?

A. Yes.

X-Q. 22. Have tables behind?

A. Yes.

X-Q. 23. And carry candy and cigars?

A. Tobacco.

X-Q. 24. Do you do the buying here?

A. Yes; I do.

X-Q. 25. When these Beech-Nut cigarettes came out did a Lorillard salesman come and get you to put them in? 956

A. Yes; there was a salesman to get the trade.

X-Q. 26. You knew they were Lorillard goods before you put them in?

A. Certainly I know they were Lorillard goods. They told me who they were in fact. Naturally, all the boys do when anybody comes in we have a new cigarette such and such a concern, we have other goods that we sell.

X-Q. 27. Did you make any effort to remember, make a note of any comments or inquiries that you had about these cigarettes from your customers?

A. Only those occasions when a certain fellow come 957
in, that's what brought it to my mind. I never even stopped to think about the Beech-Nut Packing Company being in this proposition at all. I buy cigarettes from a concern, know they are made by a cigarette people, naturally they come in, I hadn't the least thing in my mind until this party come in and asked me if it was made by the Beech-Nut Packing Company or who it was made by, being Beech-Nut cigarettes just like other things are made by Lorillard, certain kind of tobacco same name as the other doesn't necessarily have to be the same concern make it We have different kind of

958 goods by the same name we have used too, in the George Washington coffee, a long time ago—

Answer objected to by Mr. Hinton as not responsive.

X-Q. 28. You were not paying any particular attention to this at the time, were you, you weren't trying to remember?

A. No.

X-Q. 29. Every time you had an inquiry?

A. I was in one way because I was interested in the
959 fact and this party asked me. I had no other inquiries outside of this person. I can't recollect you know.

X-Q. 30. You didn't make a note every time anybody asked you about that.

A. No.

X-Q. 31. You didn't try to remember?

A. No; I didn't make no notes only as to my mental—

X-Q. 32. Who makes the Mogul cigarette do you know?

A. Mogul cigarettes? No; I don't.

X-Q. 33. Who makes the Murads?

A. I don't know who makes the Murads. Murads and Helmars are made by the same people, made by the
960 Lorillard people aren't they?

X-Q. 34. Who makes the Helmars?

A. I think the Helmars are made by the same people.

X-Q. 35. Who makes the Camels?

A. Camels made by the Reynolds.

X-Q. 36. Who makes the Fatimas?

A. Fatimas by the Liggett & Myers.

X-Q. 37. Who makes the Lucky Strikes do you know?

A. American.

X-Q. 38. Name any other Lorillard brand of cigarettes?

A. Cigarettes?

X-Q. 39. Yes. 961

A. I don't believe I do know only those, the Beech-Nut, no I don't think I can name other Lorillard outside of that Beech-Nut. 111 I think it was.

X-Q. 40. Can you name any Lorillard brands of chewing tobacco?

A. I can't think of it now, Mechanics' chewing.

X-Q. 41. Any others?

A. No; not any chewing tobacco.

X-Q. 42. How about cigars?

Objected to.

962

X-Q. 43. How about cigars, can you name any Lorillard brands of cigars?

A. No; I don't think we handle any of their cigars at all.

X-Q. 44. You carry quite a lot of chewing tobaccos?

A. Yes.

X-Q. 45. Carry Climax?

A. No.

X-Q. 46. Polar Bear?

A. No.

X-Q. 47. Scrap? B. L.?

A. Yes, we carry B. L. 963

X-Q. 48. Murads, Moguls and Helmars?

A. Yes.

X-Q. 49. And Deities?

A. No.

Re-direct Examination.

R-D. Q. 50. By Mr. Cavanagh: You say you handle a George Washington coffee?

A. Yes; we used to handle it and a while ago—

964 R-D. Q. 51. Ever handle any tobacco of George Washington?

A. Tobacco compact? No, we had George Washington smoking tobacco, that's all.

R-D. Q. 52. If you had had inquiries as to whether one person thought the Beech-Nut cigarettes were made by the same people that made the gum you would remember that wouldn't you?

Objected to.

R-D Q. 53. If you had had inquiries?

965 A. On this occasion I remember it this one occasion, that's how you are always yourself.

STIPULATION

It is hereby stipulated by and between counsel that if GORDON MICHAELS were called as a witness on behalf of P. Lorillard Company, he would testify as follows:

My name is Gordon Michaels and I am of lawful age and keep a store at 1012 State Street in the City of Springfield, Mass. In this store I sell soda water, candy,
966 confectionery and tobacco products. I have sold Beech-Nut cigarettes since they first came out about a year and a half ago, and have handled the scrap tobacco some three or more years. I also sell Beech-Nut gum, Beech-Nut popcorn, and have handled Beech-Nut ginger ale. I have been at this place of business for about seven years. I knew that the Beech-Nut cigarettes were made by the Lorillard Company, or the same people that made Beech-Nut scrap tobacco, but never thought that the gum people had anything to do with either. I never had any persons ask if the gum people made the cigarettes so far as I

can remember. This store is located diagonally across 967
the street from 1083 State Street and is also located in the same neighborhood as drug store of Broughton.

On cross examination, witness would testify: I sell very little of the Beech-Nut scrap tobacco and would probably average not more than one carton, namely 20 packages, a week of Beech-Nut cigarettes. I made no effort to remember any comments, remarks or inquiries that customers may have made, nor was there any reason why I should do so. I knew the cigarettes were made by the Lorillard Company before I saw them because they were put in by a Lorillard agent who told me they were a Lorillard product. 968

ESTHER G. HALL,
Stenographer.

969

970

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Company, Defendant.
In Equity No. 3056.

CERTIFICATE.

971 Commonwealth of Massachusetts, County of Hampden. } ss.:

I, WALTER C. Ross, a Notary Public within and for the Commonwealth of Massachusetts, County of Hampden, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of Herbert R. Hooper, William W. Provost, Joseph Equi and Ferdinand Rigali, Jr., were taken in behalf of the defendant, P. Lorillard Company, pursuant to agreement and notice, before me, at Springfield and Holyoke, Massachusetts, beginning August 17th, 1922; that each of
972 the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand, under my supervision, by Esther G. Hall, stenographer, well-known to me, and thereafter reduced to typewriting; that the opposing party hereto was represented by Sebastian Hinton, Esq., of Counsel, during the taking of said testimony; that the testimony was taken at Springfield and Holyoke, Mass., beginning August 17th, 1922, and was completed the same day; that the said deposition of each witness was read by said witness before signing the same; except where the sig-

nature of witness was waived as indicated in the depo- 973
sition.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

IN WITNESS WHEREOF, I have hereunto set my hand and Official Seal, this 18th day of August, 1922.

WALTER C. ROSS,
Notary Public.

(SEAL.)

974

975

976

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.

In Equity
No. 3056.

December 11, 1922.

977 Depositions taken on behalf of P. Lorillard Company, defendant, in the above entitled action, pursuant to notice and by agreement of counsel, before Lafayette P. Temple, a Notary Public in and for the City of Baltimore, State of Maryland, acting as Special Examiner by consent of counsel, at his office, 110 East Lexington Street, Baltimore, Maryland, beginning on the 11th day of December, 1922, at 10:30 o'clock a. m.

Present in behalf of the plaintiff, Messrs. Offield, Poole, Hinton & Scott (by Mr. Sebastian Hinton).

Present in behalf of the defendant, Messrs. Meyers, Cavanagh & Whitehead (by Mr. Richard B. Cavanagh and Mr. Thomas L. Preston).

978

SAMUEL RACKMALES, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Samuel Rackmales; I am of legal age;

I reside at 856 West Lexington Street, Baltimore, Maryland; my place of business is 115 West Fayette Street; my occupation is that of merchant, specializing in tobaccos. 979

Q. 2. How long have you been engaged as a merchant in the tobacco business?

A. About fifteen years.

Q. 3. How long has your place of business been located at 115 West Fayette Street?

A. Six months.

Q. 4. This is the business section of Baltimore City, is it not?

A. Yes. 980

Q. 5. Approximately how many customers a day do you serve?

A. About five hundred.

Q. 6. And about how many clerks do you employ?

A. Just myself and my daughter.

Q. 7. Do you sell Beech-Nut cigarettes and Beech-Nut scrap tobacco?

A. Yes.

Q. 8. Do you know what company puts out those brands of tobacco?

A. Yes.

Q. 9. What company puts them out? 981

A. P. Lorillard Company.

Q. 10. Do you sell the Beech-Nut Chewing Gum?

A. Yes.

Q. 11. Will you please state whether or not you were ever under the impression that the same people who put out the Beech-Nut scrap tobacco and the Beech-Nut cigarettes also made the Beech-Nut chewing gum?

A. I have always known that they were two separate and distinct units. I have always known that.

Q. 12. That is that the cigarette and the tobacco were made by one concern and the chewing gum by another?

982 A. Yes, they are different concerns entirely.

Q. 13. Did you ever hear of the Lorillard Company putting out any Beech-Nut chewing gum or any food products?

A. I have never heard of their producing anything in the nature of food products, not to my knowledge.

Q. 14. Will you please state whether or not you ever had any questions asked you or ever heard any comments or inquiries from customers which would lead you to believe that they thought the same concern which put out the Beech-Nut cigarette and the Beech-Nut scrap tobacco also put out the Beech-Nut chewing gum and the Beech-
983 Nut food products?

A. In my experience of fifteen years in handling both products I have yet to find one customer to ask that question.

Q. 15. You have never had any such question asked you?

A. Never in the history of fifteen years merchandising have I ever had one person ask that question.

Q. 16. From your experience in the business, what would be your opinion of any customer who would confuse tobacco with chewing gum.

A. As far as opinions go, I would figure that the
984 average man has enough intelligence to realize that a tobacco is not a food. That is the way I look at it. A food product and a tobacco product I should figure are two different and separate items entirely, there is just as much difference between them as there is between a horse and an automobile.

Q. 17. You sell the Beech-Nut scrap tobacco, do you?

A. Yes.

Q. 18. Is that a good seller?

A. Fairly good.

Q. 19. I understand you also sell the Beech-Nut cigarettes?

A. Yes.

Q. 20. Have you ever had any person ask you for Beech-Nut scrap tobacco or Beech-Nut Cigarettes made by the Beech-Nut Packing Company? 985

A. Never.

Q. 21. You have never sold any goods under those conditions?

A. No, sir; no one has ever asked that.

Cross Examination.

By Mr. Hinton:

X-Q. 1. What were you doing before you opened this store? 986

A. I was in the same line of business. Previous to opening this store I was at 506 North Eutaw Street.

X-Q. 2. You had another tobacco store, had you?

A. Yes, I had another tobacco store.

X-Q. 3. Between what years did you have that?

A. Between 1918 and 1921.

X-Q. 4. Before that what did you do?

A. Before that I was with A. A. Brager.

X-Q. 5. What do they do?

A. That is a large department store here in Baltimore I was manager of that department for seven consecutive years. 987

X-Q. 6. That would be from 1911 to 1918?

A. Yes.

X-Q. 7. And before that, what did you do?

A. Before that I was with Bernheimer Brothers.

X-Q. 8. What do they do?

A. That is another department store here in Baltimore. I was general salesman for everything in the house.

X-Q. 9. Did you have any business connection with tobacco before 1911?

988 A. At the time I was with Bernheimer I don't believe I did.

X-Q. 10. Do you sell many of these Beech-Nut cigarettes?

A. I sell on an average of a thousand a week.

X-Q. 11. That is fifty packages?

A. Yes.

X-Q. 12. How many did you sell when they first came out, do you remember?

A. When they first came out I don't believe there was any difference as far as the sales went; it has not been an extremely big seller with me. I should judge
989 that is about an average of what I have been selling.

X-Q. 13. Do your customers ever ask you who makes the Camel cigarettes?

A. No, sir..

X-Q. 14. Do they ever ask you who makes the Fatima cigarettes?

A. No, sir.

X-Q. 15. Are they in the habit of discussing with you who makes the cigarettes, or telling you who they think makes the cigarettes?

A. I doubt if I have had one customer since I have been in business to ask questions as to who makes the
990 products.

X-Q. 16. Do they talk to you on other subjects?

A. We converse on nearly every subject as far as that is concerned, but I have yet to find a person to start a conversation with reference to the manufacture.

X-Q. 17. You say that you have been selling this scrap tobacco for fifteen years, is that correct?

A. Approximately. To count back, there is eight and four, that would be twelve years, to be exact, although I have had lines of tobacco and cigarettes for myself previous to that, on my own hook, off and on, maybe

for a year or so after I left Bernheimer's. To come right down to the real years, I have been handling that brand for eleven years. 991

X-Q. 18. That is this package of Beech-Nut scrap which Mr. Cavanagh showed you and which is marked as an exhibit in this case?

A. Yes.

X-Q. 19. You have been handling that eleven years, you say?

A. Yes.

X-Q. 20. How long have you been handling the Beech-Nut cigarettes?

A. Since they first put them on the market. 992

X-Q. 21. When was that?

A. About nine months ago, I guess.

X-Q. 22. That would be about the spring of 1922?

A. I think that is when they started. I am not familiar with just when they did put them out. Such things as that do not lie on my brain but I figure about nine months, maybe a month or two longer.

X-Q. 23. Do you think you got them as soon as they came in this territory?

A. Yes.

X-Q. 24. You know that you did, don't you?

A. Yes. 993

X-Q. 25. Your relations with the Lorillard Company have always been very satisfactory, have they?

A. Sometimes we have had a little disqute or two, but it does not amount to anything. You know how it is in business, you will have your little troubles.

X-Q. 26. You carry a full line of their goods, do you?

A. Almost.

X-Q. 27. How long have you done that?

A. Ever since I have been in business.

994 *Re-direct Examination.*

By Mr. Cavanagh:

R-D Q. 1. What is the general reputation of the Lorillard Company in their line of business, so far as you know?

A. Their reputation is that I think they are open and above-board, clean.

R-D Q. 2. They are very large tobacconists, aren't they?

A. Yes.

995 R-D Q. 3. You do not know exactly the date when you first sold the Beech-Nut Scrap Tobacco, do you?

A. I can get the exact date when I started in with Brager. They have the records of it up there. The years come and go and I can not run back to the exact date myself.

R-D Q. 4. You can tell the difference at a glance between a package of Beech-Nut Cigarettes and a package of Beech-Nut Scrap Tobacco and a package of Beech-Nut Chewing Gum, can't you?

A. Absolutely.

R-D Q. 5. They each have an individuality of their
996 own, haven't they, as to form and shape?

A. Positively. This is a cigarette package and if you offer this to a man as chewing gum he would tell you right away that those were cigarettes. You could not confuse them in a thousand years. The gum has an individual packing, ninety-nine out of every hundred packages of gum are packed in that way. I have yet to see one package of chewing gum packed that way (indicating cigarette package).

R-D Q. 6. Does the same apply to the scrap tobacco?

A. Yes, the difference is so vast that a child could discern the difference.

Re-cross Examination. 997

By Mr. Hinton:

R-X Q. 1. You are quite sure, then, that no customer would ever mistake a package of chewing gum for a package of cigarettes?

A. No customer would ever confuse either the packing or anything else.

R-X Q. 2. You mean that he would know that one was cigarettes and the other was gum?

A. Yes.

(Signature of witness waived by consent of counsel.) 998

MORRIS J. GOODMAN, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and occupation. 999

A. My name is Morris J. Goodman; my place of business is 31 East Baltimore Street; my home address is 3100 Holmes Avenue, Baltimore, Maryland; occupation, proprietor of Goodman & Miller; I am of lawful age; my business is that of confectioner and tobacconist.

Q. 2. In your store here what sorts of goods do you handle?

A. Candies, cigars and sodas.

1000 Q. 3. Do you sell Beech-Nut Scrap Tobacco?

A. We do.

Q. 4. How long have you sold it?

A. Ever since I have been in business, about seven years.

Q. 5. Do you sell the Beech-Nut Cigarettes?

A. Yes.

Q. 6. Do you sell Beech-Nut Chewing Gum?

A. I do.

Q. 7. Do you sell any other Beech-Nut products?

A. Beech-Nut mints.

Q. 8. Were you ever under the impression that the
1001 Company that makes the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes also made the Beech-Nut Gum and the Beech-Nut Mints?

A. No, I was not.

Q. 9. You always knew what company made the Beech-Nut Tobacco?

A. I did.

Q. 10. Did you ever hear any comments or inquiries or remarks from any of your customers which indicated that they thought that the same company made the food products and also the tobacco products?

A. No, I did not.

1002 Q. 11. You never heard any comment of that sort?

A. No, sir.

Q. 12. Do you think that a customer could confuse any one of those three packages (exhibiting to witness package of Beech-Nut Scrap Tobacco, Beech-Nut Cigarettes and Beech-Nut Gum)?

A. No.

Q. 13. Do you think any customer could mistake the gum package for the cigarette package or the gum package for the scrap tobacco package?

A. Do you mean in package form?

Q. 14. Yes.

A. No.

Q. 15. The cigarette package has a personality of its own, isn't that true?

A. I don't know whether it has or not, but I guess it will have in course of time. I can not tell yet. It is selling pretty fair.

Q. 16. I do not mean particularly that cigarette package, but any package of cigarettes has an individuality of its own, has it not?

A. Yes, individual wrappers. We can generally tell by the box what kind of cigarettes they are. We never look at the names of any cigarettes, practically. Any man in the business does not look at the name Piedmont or Chesterfield or Murad or Lucky Strike or Sweet Caporal. We tell them from the back, like this; we never look at the front mark.

Q. 17. Do you sell Chesterfield pipes here?

A. Yes.

Q. 18. And you also sell Chesterfield cigarettes?

A. Yes.

Q. 19. Are they made by the same company?

A. That I do not know, but I do not think so. I think they are made by the W. D. C. Company.

Cross Examination.

By Mr. Hinton:

X-Q. 1. Do the W. D. C. Company make the pipe?

A. Yes, but I don't know whether they make the Chesterfield or not.

X-Q. 2. What is written on the front of this package of Beech-Nut cigarettes, do you know?

A. I never took that much interest to know.

X-Q. 3. Did you ever see the manufacturer's name written on it anywhere?

A. Yes, P. Lorillard's name is on the back of it.

1006 X-Q. 4. Who put in these Beech-Nut Cigarettes for you, what salesman, do you remember?

A. That I can not remember; that was too far back.

X-Q. 5. Was it some Lorillard salesman?

A. I am quite sure it was.

X-Q. 6. Some Lorillard salesman who came around and introduced them?

A. Yes, but I don't know exactly who it was.

X-Q. 7. You knew before you saw the goods that they were Lorillard's products?

A. Yes, the minute he showed me the cigarette I knew it was a Lorillard man.

1007 X-Q. 8. The tobacco salesman brought them in?

A. Yes.

X-Q. 9. How much of a sale do you have for the Beech-Nut Chewing Gum?

A. A very big demand, one of the biggest demands we have on gum.

X-Q. 10. What were you doing before you operated this store?

A. I was connected with the Jaffe Company in the same line of business.

X-Q. 11. What office?

A. I had charge of Washington Hotel Cigar Store, in
1008 Washington, D. C.

X-Q. 12. What does that company do?

A. They are out of existence right now.

X-Q. 13. What did they do when they were in existence?

A. Sold cigars and cigarettes and tobacco. I was one of the firm of Jaffe & Company.

X-Q. 14. During what period was that?

A. During 1917 to 1920.

X-Q. 15. What were you doing before that?

A. I used to work with the Globe Cap Company, selling hats and caps.

X-Q. 16. Did you make any special effort to make a 1009
note of or remember anything that customers might say about this question of who made the Beech-Nut Cigarette?

A. No, I don't remember anybody asking me that question.

X-Q. 17. There is no reason why you should have remembered it, is there?

A. No. Nobody asked me that I can recollect.

X-Q. 18. And there is no reason why you should have remembered it if there had been?

A. No.

X-Q. 19. When did the cigarettes come out, do you 1010
remember?

A. I don't think they have been out very long; I guess about a year, isn't it?

X-Q. 20. That would be December, 1921.

A. If it is about a year it would be then, yes.

X-Q. 21. How long have you been handling the Beech-Nut Scrap Tobacco?

A. I have been handling it here for about four years.

X-Q. 22. What sort of demand do you have for the scrap tobacco?

A. A bigger demand than for any scrap tobacco we have. 1011

X-Q. 23. How do you sell scrap here in comparison to plug tobacco?

A. This is not a big tobacco section around here, but we sell more scrap than we do plug.

X-Q. 24. Is that true of this territory generally?

A. We do not have the class of trade in this section for the chewing tobacco that we have for the plug tobacco.

X-Q. 25. Who makes the Lucky Strike Cigarette?

A. The American Tobacco Company.

1012 X-Q. 26. Do you know who makes most of the brands of cigarettes that you sell?

A. That is pretty hard to tell, because some of the bigger sellers are made by Liggett & Myers, and R. J. Reynolds and the American Tobacco Company and the P. Lorillard Company. I think they are pretty well divided, myself. What one has not a demand for the other one has in the way of brands. The Liggett & Myers Company has the biggest selling brands and the American Tobacco Company has the most brands. P. Lorillard & Company has a great many brands, so I think it is pretty well divided myself.

1013 X-Q. 27. How many brands do you sell?

A. Of tobacco?

X-Q. 28. Of cigarettes.

A. I couldn't tell you offhand. I know there are a good many of them.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. Did you ever see a package put out by the Beech-Nut Packing Company that looked like that cigarette package?

1014 A. No. I am not acquainted with the Beech-Nut products. I have only handled the gum and I could not tell what other packages they put out. We handle the Beech-Nut gum and Beech-Nut Mints, and they are nothing like the package of the Beech-Nut Cigarette.

R-D Q. 2. Is the demand for the gum as good now as it was before the Cigarette came on the market?

A. It is as good as ever we had it.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1015

CARL W. JACOBSON, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. State your name, age, residence and occupation.

A. My name is Carl W. Jacobson; I am of lawful age; my business address is 3311 Pennsylvania Avenue; Occupation; delicatessen merchant.

1016

Q. 2. Do you sell tobacco here in your delicatessen store?

A. Yes.

Q. 3. Do you sell Beech-Nut Scrap Tobacco?

A. No.

Q. 4. Do you sell Beech-Nut Cigarettes?

A. Yes.

Q. 5. Do you sell Beech-Nut Chewing Gum?

A. Yes.

Q. 6. Do you sell any of the other Beech-Nut products?

A. Beech-Nut Peanut Butter.

1017

Q. 7. Did you ever think that the same company that manufactured both the Beech-Nut Cigarette and the Beech-Nut Scrap Tobacco also made the Beech-Nut Chewing Gum?

A. No, never, it is a different kind of business altogether.

Q. 8. Did you ever hear any comments or inquiries or remarks from any of your customers which indicated that they were under the impression that the same Company made both the cigarette and the chewing gum?

A. No, I never did.

1018 Q. 9. About how many customers do you have here a day?

A. Between two hundred and fifty and three hundred.

Q. 10. Do you think those packages look alike (displaying to witness a package of Beech-Nut Gum and Beech-Nut Cigarettes)?

A. No, I do not.

Q. 11. A cigarette package has an appearance of its own which in no way resembles the appearance of a gum package isn't that so?

A. I would answer that by saying no, they are two
1019 different looking packages altogether.

Q. 12. Do you know what company makes the Beech-Nut Cigarette?

A. After I had a conversation with you I do, but I didn't know it before.

Q. 13. What would you think of a man who came into your store wanting to buy Beech-Nut Cigarettes and would take a package of Beech-Nut Gum in place of it?

A. It could not happen.

Q. 14. You sell Del Monte Butter here, do you not?

A. No, I used to handle it.

1020 Q. 15. At the same time that you sold Del Monte Butter, did you sell other products called Del Monte?

A. Yes.

Q. 16. And they were made by different companies, were they?

A. Yes, entirely different.

Mr. Hinton: This line of testimony is objected to unless the labels involved are produced.

Cross Examination. 1021

By Mr. Hinton:

X-Q. 1. How many of these Beech-Nut Cigarettes do you sell in a week?

A. Very little.

X-Q. 2. How many do you buy?

A. A carton at a time only, ten packages.

X-Q. 3. How often do you buy a carton of the Beech-Nut Cigarettes?

A. I have not bought any since I have been here, three months.

X-Q. 4. Then your sales in the Beech-Nut Cigarettes 1022
are negligible?

A. Very slow.

X-Q. 5. Have you any on sale now?

A. Yes, I have a few packages.

X-Q. 6. How long have you had them?

A. About three months.

X-Q. 7. And one carton of ten packages lasts you three months?

A. Yes.

X-Q. 8. Ten packages of the cigarettes supplies your call for them for three months?

A. Yes, it is a very slow seller with me. 1023

X-Q. 9. And you have no fixtures here to display your cigarettes?

A. They are displayed the same as any other cigarette.

X-Q. 10. But they are up on the wall, nobody would notice them particularly?

A. No.

X-Q. 11. What Beech-Nut products do you say you sell?

A. Peanut Butter and Chewing Gum.

1024 X-Q. 12. Is that all?

A. That is all.

X-Q. 13. Will you please look around your store and tell me what those bottles are up there?

A. Catsup.

X-Q. 14. You sell Beech-Nut Catsup, do you?

A. That is the same people that make the Peanut Butter.

X-Q. 15. Do you sell any other product that you can think of that is made by the Beech-Nut people?

A. Not that I know of; I know there is a Beech-Nut Tobacco, but I don't handle it.

1025 X-Q. 16. Who makes that, do you know?

A. If I handled it I would know, but I imagine it is the same people who make the cigarettes.

X-Q. 17. But you don't know who they are?

A. I know now, the P. Lorillard Company, but I did not know it before. I never expected that the Chewing Gum people manufactured cigarettes.

X-Q. 18. Do you see any resemblance between the oval device on the package of gum and that on the package of cigarettes?

A. None whatever.

X-Q. 19. Absolutely different?

1026 A. Absolutely different.

X-Q. 20. No similarity of any kind?

A. Not to my eye. If I had looked close maybe there would be, but I don't see any.

X-Q. 21. They are totally different?

A. Totally different, package and wrapper and everything.

X-Q. 22. I am not talking about the wrapper.

A. The wrapper has got the oval mark on it, you see. If you take the oval off you see nothing but the silver paper on there.

X-Q. 23. I am talking about the oval device that appears on the package of gum and on the package of cigarettes?

A. It is different altogether, no similarity at all.

X-Q. 24. No suggestion of similarity?

A. No.

X-Q. 25. And it is impossible to think that one resembles the other in any way?

A. Yes.

X-Q. 26. Just as different as night and day?

A. As different as a can of tomatoes of one kind and a can of tomatoes of another kind with a different label on.

X-Q. 27. Now regarding this Del Monte products, will you show me those packages that you are talking about?

A. I haven't got the Del Monte butter here now; I don't handle it any more, but I had it here. My brother-in-law packs it.

X-Q. 28. He made the Del Monte butter?

A. He is incorporated under the name of the Del Monte Company.

X-Q. 29. Is he still making it?

A. Yes, you can get it right up the street.

X-Q. 30. How long has he been making it?

A. About a year. Before that he packed under a different name.

X-Q. 31. You do not know why he took the name of Del Monte for the butter, do you?

A. No, sir, just having a well advertised name, nothing else.

X-Q. 32. He thought the advertising of the name Del Monte would sell it?

A. Yes, it is a good name and he just picked that name.

X-Q. 33. And it is widely advertised?

1218

1030 A. Yes, there are Del Monte fruit packers and the Del Monte fish packers and they are different people altogether. The Del Monte people are in California, and it is absolutely a different concern. That has nothing to do with the Del Monte Fruit Packing company at all.

Mr. Hinton: The answer is objected to as not responsive to the question, and as voluntary on the part of the witness.

X-Q. 34. Did you ever display any placards or posters
1031 or signs about these Beech-Nut Cigarettes, do you remember?

A. I displayed it, but not in this store. I displayed it in the store I had before.

X-Q. 35. How long ago was that?

A. About two years ago.

X-Q. 36. You never sold the scrap tobacco, you say?

A. No.

X-Q. 37. During the time that you have testified a package of these Beech-Nut Cigarettes has been lying on the table in front of you and you have been handling it, have you not?

1032 A. Yes.

X-Q. 38. I wonder if you can tell me what is written on that package?

A. No, sir. I don't know what is written on any package.

X-Q. 39. You would not notice that?

A. No, I do not have time to read anything like that.

X-Q. 40. I show you this name through the wax paper on the front; can you see that?

A. Yes.

X-Q. 41. What is that name?

A. P. Lorillard Company.

X-Q. 42. But you had not noticed it before I showed it to you? 1033

A. As I told you before, I never took time to read any packages. I do not bother with who packs them. What business man thinks about looking at a package of cigarettes? I only wish I sold enough of them. I could sell a thousand packages a week without knowing who packs them.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. Do you sell much of the Beech-Nut Chewing Gum? 1034

A. No, I don't sell much of that, either. You could find maybe a box or a box and a half in here.

R-D Q. 2. Do you sell Sunshine Biscuits?

A. Yes.

R-D Q. 3. Do you sell Sunshine Cigarettes?

A. No.

R-D Q. 4. Do you sell Blue Ribbon Salmon and Blue Ribbon Tuna Fish?

A. Yes, the Blue Ribbon fish.

R-D Q. 5. Do you sell Blue Ribbon Playing Cards? 1035

A. No.

R-D Q. 6. Do you sell Blue Ribbon Tobacco?

A. No, sir.

Mr. Hinton: All this line of testimony is objected to unless the labels involved are produced. It is objected to as irrelevant and immaterial and also as entirely outside of the line of cross examination.

R-D Q. 7. Were you ever under the impression that the Company that makes Beech-Nut Gum and Beech-Nut Peanut Butter made the Beech-Nut Cigarettes?

1036 A. No, I was never under that impression, because it is a different line altogether.

Re-cross Examination.

By Mr. Hinton:

R-X Q. 1. What were you doing before you opened this store?

A. I was a salesman in the same line.

R-X Q. 2. Delicatessen line?

A. Yes.

1037 R-X Q. 3. How long were you a salesman in the delicatessen line?

A. I have been in that business on the street for the last fifteen years. I have not done anything else but selling, traveling and city salesman.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel).

THEODORE HAVELMAN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

1038

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Theodore Havelman; my address is 957 Pennsylvania Avenue; my business and home address are the same; I am of lawful age; my occupation is that of clerk in a general store. This is my brother's place.

Q. 2. What sort of goods do you sell in your store here?

A. I have tobacco, ties and leather goods, almost anything of that kind.

Q. 3. Do you sell stationery here?

A. Yes.

Q. 4. And you sell playing cards?

A. Yes, sir.

Q. 5. Postals?

A. Yes, anything in the stationery line.

Q. 6. Baseballs and toilet articles?

A. Yes, baseballs and gloves and toilet articles.

Q. 7. And flash lights?

A. Yes.

Q. 8. And cuff buttons?

A. Yes, a little of everything. This is a general store.

Q. 9. Do you sell Beech-Nut Scrap Tobacco here?

A. Yes.

Q. 10. How long have you handled that?

A. I guess two or three years or more; I couldn't say exactly; I have handled it ever since it has been on the market.

Q. 11. Do you handle the Beech-Nut Cigarette?

A. Yes.

Q. 12. Do you handle the Beech-Nut Chewing Gum?

A. Yes.

Q. 13. Do you handle any other Beech-Nut products?

A. Not outside of the cigarettes and the Scrap Tobacco.

Q. 14. Did you ever think that the company that makes the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarette also makes the Beech-Nut Chewing Gum?

A. No, I have no such idea.

Q. 15. Did you ever hear any remarks or inquiries or comments from your customers which indicated that they were under the impression that the same company

1042 made the Beech-Nut Tobacco that makes the Beech-Nut Chewing Gum?

A. No, I have not.

Q. 16. About how many customers do you have in and out of your store a day?

A. A hundred or a hundred and fifty and sometimes two hundred.

Q. 17. Is the Beech-Nut Scrap Tobacco a good seller with you?

A. No, not here.

Q. 18. Is the Beech-Nut Gum a good seller?

A. Not much. I don't believe I sell a package in a
1043 month.

Q. 19. How long have you handled the Beech-Nut Chewing Gum?

A. I could not say that exactly. I guess for years, since it has been on the market. But as a rule the colored people all they know is Wrigley's Chewing Gum. Of course a white person now and then will call for Beech-Nut Gum, but it is very seldom called for among the colored people.

Q. 20. (Displaying to witness package of Beech-Nut Scrap, Beech-Nut Cigarettes and Beech-Nut Gum): Do you think that the Beech-Nut Cigarette package that I
1044 now show you looks like the Beech-Nut Chewing Gum package?

A. No, only in the name, that is all I can see. I do not see any similarity there. One has a red band and the other is just plain white.

Q. 21. What would you think of any one who would take this chewing gum package as a substitute for the cigarette package?

A. I do not think a man who wants cigarettes would take gum, nor do I think the man that wanted gum would take cigarettes.

Q. 22. If he wanted cigarettes he could not possibly think he was getting them if he got this package, could he? 1045

A. No. If I went in for a package of chewing gum I am not going to let them give me cigarettes, and if I want cigarettes I don't want chewing gum.

Q. 23. Do you handle Mogul playing cards?

A. Yes.

Q. 24. And do you sell Mogul cigarettes?

A. Yes.

Q. 25. Do you sell Sunshine Cigarettes?

A. Yes.

Q. 26. And do you sell Sunshine Biscuit? 1046

A. No, we don't handle them.

Mr. Hinton: This line of testimony is objected to unless the labels involved are produced.

Q. 27. Will you give me a package of the Mogul playing cards and a package of Mogul cigarettes, if you please?

(Packages produced by the witness and handed to counsel.)

Q. 28. Did you ever suppose that the same company made the playing cards and the cigarettes? 1047

A. No, I would not think so.

Q. 29. Why is that, why would you not think so?

A. I never gave the cigarette people or these people credit for making cards. I imagine that they only handle certain stuff in their line.

1048 *Cross Examination.*

By Mr. Hinton:

X-Q. 1. How many of these Beech-Nut Cigarettes do you sell here in a week?

A. Sometimes one, two or three or four packages.

X-Q. 2. How much of the Scrap Tobacco do you sell?

A. About a dozen a week. There is not much scrap sold in this neighborhood.

X-Q. 3. About how much of it do you buy?

A. About two or four dozen.

1049 X-Q. 4. How often do you buy the cigarettes?

A. The cigarettes I generally buy a thousand of at a time. I guess six hundred will last for some time.

X-Q. 5. That is you buy ten cartons?

A. Five cartons, two hundred in a carton. And other times I mix them up and only buy one carton.

X-Q. 6. You say this store is in the colored section of the City?

A. Yes, it is all colored through here.

X-Q. 7. Most of your customers are colored people?

A. Yes, mostly all colored.

X-Q. 8. You would not call it a prosperous or wealthy

1050 section of town, would you?

A. No, not exactly. It is all working people that come here, laboring people.

X-Q. 9. And you sell very little Beech-Nut Chewing Gum?

A. Very little.

X-Q. 10. You never paid any particular attention to any comments or remarks that your customers might have made, did you?

A. No, sir.

X-Q. 11. There was no reason why you should, was there?

A. No.

X-Q. 12. Do you know who makes the Camel Cigarettes? 1051

A. I think Reynolds makes them.

X-Q. 13. Do you know who makes the Fatimas?

A. I think the Liggett & Myers people make them, but I am not sure. I never went that close to look at the name.

X-Q. 14. Do you know what is written on the package of Beech-Nut Cigarettes?

A. I know the name Lorillard is on there.

X-Q. 15. When did you first notice that?

A. I have noticed that at times on account of ordering them through different jobbers. 1052

X-Q. 16. Who brought the cigarettes in here at first, some Lorillard salesman?

A. I could not say. My brother was here at that time.

X-Q. 17. You do not remember?

A. No, sir.

X-Q. 18. Your store consists of one room about fifteen feet wide, would you say, and about twenty-five feet deep?

A. I imagine so.

X-Q. 19. And you live over the store?

A. Yes. 1053

X-Q. 20. How many people work here in the store?

A: Just us two brothers. Now and then my mother or sister may come in the store while we are eating, or something like that.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. If there had been a considerable number of remarks which indicated confusion as to the maker of

1054 the Beech-Nut Tobacco and the Beech-Nut Gum, would you or not have remembered it?

A. I should think so, if I heard it. But there is not one out of a thousand who would ever think of looking at a name on any package.

Mr. Hinton: That is objected to as an opinion of the witness.

The Witness: I am only giving my opinion now. If they want Beech-Nut Tobacco or Beech-Nut Gum, they are not worrying about who makes it, as long as they see the name on there. It is just like a new
1055 firm coming along and putting tobacco on the market, they don't ask you who makes it, or who is putting it out, they will buy it and if they like it they will buy it again, otherwise they will not buy it. If a man wants a pack of chewing gum, in my estimation, he doesn't want a pack of cigarettes, and if he wants cigarettes he don't want chewing gum.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1056 ELMER C. KAISS, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Elmer C. Kaiss; my business address is 1121 Light Street, Baltimore, Maryland; res-

idence, 1131 William Street; my occupation is that of 1057
manager of J. F. Obrecht, wholesale and retail tobacco.

Q. 2. In addition to tobacco, what sorts of stuff do you sell in your store?

A. Pipes, leather goods, Eversharp pencils, Wahl pens and razors, razor blades, smoking sets.

Q. 3. Playing cards?

A. Yes, playing cards, in fact, anything that you would find in this kind of business.

Q. 4. Do you sell Beech-Nut Scrap Tobacco?

A. Yes.

Q. 5. How long have you sold it?

A. I don't know how long it has been on this market. 1058
We have handled it as long as it has been on this market.

Q. 6. Do you sell Beech-Nut Cigarettes?

A. Yes.

Q. 7. Have you sold them since they have come out on this market?

A. Yes.

Q. 8. Do you sell Beech-Nut Chewing Gum?

A. Yes.

Q. 9. Do you sell any other Beech-Nut products?

A. Not that I know of, no.

Q. 10. Were you ever under the impression that the Company that makes the Beech-Nut tobacco and the 1059
Beech-Nut Cigarette also made the Beech-Nut Chewing gum?

A. No, sir.

Q. 11. Did you ever hear any comments or inquiries or remarks from any of your customers which indicated that they were under the impression that the same company that makes the Beech-Nut Cigarette and the Beech-Nut Scrap also made the Beech-Nut Chewing Gum?

A. No.

1060 Q. 12. Do you think that the cigarrette package and the gum package look alike?

A. No, I can not say I do.

Q. 13. What would you think of a man who can be so confused as to take Beech-Nut Gum if he wanted Beech-Nut Cigarettes?

A. He could not do anything like that, I am sure.

Q. 14. You think a man would be crazy who could confuse those things, don't you?

A. Certainly I should think he would be.

Q. 15. Do you sell Chesterfield pipes?

A. Yes.

1061 Q. 16. And do you sell Chesterfield Cigarettes?

A. Yes.

Q. 17. Do you sell Velvet pencils?

A. Yes.

Q. 18. And Velvet tobacco?

A. Yes.

Q. 19. Did you ever hear of anybody thinking that the Chesterfield pipe and the Chesterfield cigarettes were made by the same company?

A. No, sir.

Q. 20. Or that the Velvet pencils and the Velvet tobacco were made by the same company?

1062 A. No, sir.

Q. 21. About how many customers do you have here a day?

A. About three hundred and fifty on an average.

Cross Examination.

By Mr. Hinton:

X-Q. 1. How long have you been in this store?

A. About ten or eleven years.

X-Q. 2. What did you do before that?

A. I was in a general house furnishing store. 1063

X-Q. 3. What did they sell there?

A. Anything pertaining to the household, cooking utensils, china ware, bricabrac and so forth.

X-Q. 3. For the past ten or twelve years you have been in the tobacco lines, selling tobacco at this store?

A. Yes.

X-Q. 4. How are the Beech-Nut Cigarettes going, are you selling many of them now?

A. At the present time they are a little slow in sales around here. Of course you can not always blame that on the brand, because it is due to prices at times.

X-Q. 5. Do you remember when you put them in? 1064

A. I think it has been over a year ago. I guess about a year and a half.

X-Q. 6. You are not making any effort to make a note of or remember instances where people may have made remarks to you or inquiries about the cigarettes, are you?

A. I do not quite understand you. Remarks about the cigarettes?

X-Q. 7. Yes, about the Beech-Nut cigarettes and who made them?

A. No.

X-Q. 8. You did not make any effort to remember 1065 whether there were any such remarks or not, did you?

A. Remarks about who makes the goods?

X-Q. 9. Yes.

A. No, they can see that plain enough; it is on the front of the package.

X-Q. 10. As a matter of fact, when those cigarettes were put in some Lorillard man came and put them in, didn't he?

A. Yes.

X-Q. 11. And you knew before you saw the goods who they were made by?

1066 A. Yes.

X-Q. 12. I suppose you had been handling the scrap tobacco so long that you do not remember about when that came out?

A. No, I can not remember how long ago it was, but it must have been ever since it was on this market, I am quite sure.

Re-direct Examination.

By Mr. Preston:

1067 R-D Q. 1. If there had been a considerable number of remarks among your customers about who made the Beech-Nut Gum or who made the Beech-Nut Cigarettes, you would have remembered it, wouldn't you?

A. Yes, I am quite sure I would, but I don't know of any one making any remark to me in regard to that.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

(The taking of depositions was thereupon adjourned until to-morrow morning at ten o'clock.)

1068

1069

December 12, 1922.

The taking of depositions was then adjourned to this 12th day of December, 1922, at ten o'clock a. m., at the same place, at which time and place I attended, and, in the presence of counsel for the respective parties, proceeded to take the following depositions, that is to say:

JOSEPH H. NELSON, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows: 1070

Direct Examination.

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is Joseph H. Nelson; I live at 907 Harlem Avenue and have my business at that address also; my occupation is that of merchant, candy, stationery, handkerchiefs and so forth. I also have a branch office of the post office located in the store. My 1071 store is situated in West Baltimore out of the central business section.

Q. 2. Do you sell Beech-Nut Scrap Tobacco?

A. Yes.

Q. 3. How long have you sold that?

A. A couple of years, I judge.

Q. 4. Is it a good seller?

A. Fairly good seller as a scrap tobacco.

Q. 5. Do you sell Beech-Nut Cigarettes?

A. Yes.

1072 Q. 6. How long have you sold those?

A. Since they have been on the market.

Q. 7. Do you sell Beech Nut Chewing Gum?

A. Yes.

Q. 8. How long have you sold that?

A. I guess five or six years. It has been many years I know.

Q. 9. Do you know what company makes the Beech-Nut Scrap Tobacco?

A. P. Lorillard Company.

Q. 10. Were you ever under the impression that the same Company made the Beech-Nut Gum and the Beech-
1073 Nut Cigarette?

A. No, sir.

Q. 11. About how many customers a day do you have here?

A. About seven hundred or seven hundred and fifty.

Q. 12. Did you ever hear any comments or inquiries or remarks of any kind from your customers which indicated that they thought the same company made both the tobacco and the gum?

A. No, sir.

Q. 13. If there had been any considerable number of remarks of that sort, would you have remembered it?

1074 A. Yes, I am sure I would.

Q. 14. Do you think the cigarette package and the gum package look alike?

A. No, sir.

Q. 15. That name, P. Lorillard, on the front of the package, can that be easily read?

A. I believe so.

Mr. Hinton: The question is objected to as leading, and further objected to on the ground that it calls for the opinion of the witness and is secondary evidence.

Q. 16. Would you prefer to have tobacco made by a straight tobacco company, or by a company which was engaged in the manufacture of food products and also in the tobacco business? 1075

A. As far as I am personally concerned, I guess it is natural that I am in business for myself and for the most profit and it does not matter to me who puts out the product.

Q. 17. Do you sell Piedmont matches?

A. No, but we did some years ago.

Q. 18. At the same time that you sold those Piedmont matches, were you also handling Piedmont cigarettes? 1076

A. Yes.

Mr. Hinton: This line of testimony is objected to unless the packages or labels referred to are produced and offered in evidence.

Mr. Preston: Samples of all these articles are in the possession of counsel for the P. Lorillard Company in New York and will be introduced in evidence at a later date.

Q. 19. Do you sell Ever-Ready pencils?

A. Yes. 1077

Q. 20. Do you sell Ever-Ready razor blades?

A. Yes.

Q. 21. Do you sell the Comet match?

A. No, sir.

Q. 22. Do you sell the Comet Tobacco?

A. Yes, sir, we sell the Comet Tobacco.

Q. 23. Do you sell the Pluto match?

A. Yes.

Q. 24. Do you sell Pluto Water?

A. We do.

Q. 25. The Piedmont matches and the Piedmont

1078 Cigarettes are not made by the same company, are they?

A. No, sir.

Q. 26. Nor the Ever-Ready pencil and the Ever-Ready razor blades?

A. No, sir.

Q. 27. Nor the Pluto match and the Pluto water?

A. No.

Q. 28. And you never heard of anyone who assumed that those articles were made by the same companies, did you?

A. No, sir.

1079

Cross Examination.

By Mr. Hinton:

X-Q. 1. How many people work at your store?

A. Just at the present time, two.

X-Q. 2. And you have seven hundred customers in here a day?

A. Yes.

X-Q. 3. How do you get that number, do you count them?

A. By the total of the cash register.

1080

X-Q. 4. You make seven hundred sales a day?

A. Yes. This is a post office station and I figure it in this way: We run about four hundred cash sales and we figure that the other three hundred would be postage stamp sales.

X-Q. 5. How much of this Beech-Nut Scrap do you buy?

A. When we buy, we buy about a gross at a time.

X-Q. 6. How often do you buy it?

A. I guess about once a month.

X-Q. 7. How many cigarettes do you buy?

A. We generally buy those by the thousand, too. 1081
That lasts us about the same length of time.

X-Q. 8. Waiting on four hundred customers a day, I suppose, keeps you pretty busy, doesn't it?

A. Yes.

X-Q. 9. Is it your usual condition to be actively jumping from one customer to another about as fast as you can wait on them?

A. Pretty much so.

X-Q. 10. You do not try to remember any causal remarks that they may make, do you?

A. As a general rule they do not make any remarks. If they make remarks then I, being the proprietor, would 1082
note the remarks, because we try to rectify all remarks. What I mean by that is I try to keep people satisfied.

X-Q. 11. That is what you are interested in, whether they are satisfied or not?

A. Sure.

X-Q. 12. You do not start conversations with them?

A. No, sir.

X-Q. 13. You are in business for profit and to supply the demand and that is where your interest begins and ends, isn't it?

A. Yes.

X-Q. 14. Do you see any similarity between the oval 1083
device on the Beech-Nut Chewing Gum and that of the Beech-Nut Cigarette?

A. Now that you call my attention to it, I see that all of those are oval, and that lets it out. Then the name is similar.

X-Q. 15. There is some similarity?

A. Only in the oval shape. There is no similarity in the color of the package.

X-Q. 16. I am not talking about the package, I am talking about this brand on here.

1084 A. Only in the oval, just as I say. I noticed all three of them when you put them together.

X-Q. 17. You do not see *any further similarity than* that?

A. No.

X-Q. 18. Who put in these Beech-Nut Cigarettes for you?

A. The salesman for the P. Lorillard Company.

X-Q. 19. You knew they were a P. Lorillard product before you got the goods, didn't you?

A. I don't know about that. All their products are introduced by the missionary men.

1085 X-Q. 20. And the same with scrap tobacco?

A. Yes.

X-Q 21. Can you tell me what is printed on the front of a package of Camel's Cigarettes underneath the picture of a camel?

A. On the Camel Cigarettes it has a camel and I will not be sure whether it is the R. J. Reynolds Tobacco Company or not, but I think it is.

X-Q. 22. Underneath the camel in the front, you mean?

A. Yes.

X-Q. 23 What is printed on the bottom of a package
1086 of Fatima cigarettes, underneath the girl and the scimitar or half-moon?

A. I don't just remember unless it is Liggett & Myers Tobacco Comppany.

X-Q. 24. You just know it is made by them?

A. Yes.

X-Q. 25. What is printed on the front of this package of scrap tobacco except the name Beech-Nut?

A. We do not read that.

X-Q. 26. Did you ever notice the name of a manufacturer printed on the scrap tobacco anywhere?

A. On the front or on the back?

X-Q. 27. Front or back? 1087

A. I think so, yes.

X-Q. 28. Where is it?

A. On the bottom. On the scrap tobacco, do you mean?

X-Q. 29. Yes.

A. It is up at the top, just P. Lorillard.

X-Q. 30. On the front or back?

A. I don't know which you consider front and which you consider back.

X-Q. 31. How about the Beech-Nut Cigarettes, what is printed on them?

A. It is just Beech-Nut Cigarette and P. Lorillard on 1088
the bottom.

X-Q. 32. Did anybody ever call your attention to the P. Lorillard on the bottom?

A. No, sir.

X-Q. 33. You just happened to remember that?

A. From handling it, yes.

X-Q. 34. You would not remember what is on the bottom of a Camel cigarette package or a Fatima cigarette package, or any other package, but you do remember about this?

A. I can remember that because you showed it to me.

X-Q. 35. Who showed it to you? 1089

A. You did just then.

X-Q. 36. The other day?

A. No, right now.

X-Q. 37. That is the first time you noticed it?

A. I don't memorize anything unless my attention is drawn to it.

X-Q. 38. Then you would not have noticed it unless your attention had been drawn to it, as far as you can tell?

A. Probably not.

1090 *Re-direct Examination.*

By Mr. Preston:

R-D Q. 1. I show you a package of Beech-Nut Scrap Tobacco; whose name is written across the top of the front of that package?

A. P. Lorillard, if you call that the front of the package.

R-D Q. 2. Seeing that name would mean what to you? State whether or not seeing that name would indicate to you that P. Lorillard was the maker of that tobacco?

1091 A. Yes.

R-D Q. 3. Whose name appears written on the front of the cigarette package underneath the label?

A. P. Lorillard.

R-D Q. 4. That is easily read, isn't it?

A. Yes.

R-D Q. 5. State whether or not seeing that name would indicate to you that P. Lorillard was the manufacturer of that product?

A. Sure.

R-D Q. 6. Do you think that that name P. Lorillard Company on the Cigarette Package is more conspicuous

1092 than on any other cigarette package that you know of?

A. I believe it is.

Mr. Hinton: I object to that question as leading.

R-D Q. 7. (Exhibiting to witness package of Beech-Nut Gum): Has the sale of the Beech-Nut Chewing Gum fallen off any since the cigarette came on the market?

A. I don't know. We never did sell very much of it. We sell about a box a week and that lets us out.

R-D Q. 8. Has that been the case pretty much ever since you put the gum in?

A. Yes.

Re-cross Examination. 1093

By Mr. Hinton:

R-X Q. 1. What is printed on the bottom of the package of Lucky Strike Cigarettes underneath the red panel?

A. I could not tell you.

R-X Q. 2. Is it "American Tobacco Company"?

A. I know from this (indicating). It may be "American Tobacco Company, Successor."

R-X Q. 3. But it is the name of the manufacturer?

A. I don't know whether it is Patterson or what. 1094

R-X Q. 4. Why do you say that this name P. Lorillard Company behind the glazed paper is more conspicuous than that on any other cigarette package?

A. It is. I will produce those cigarettes that you mention and I will show you that P. Lorillard is more conspicuous.

R-X Q. 5. I wish you would.

(Witness produces packages of Camels, Chesterfields and Lucky Strikes.)

A. On the front of the Lucky Strike package it has no name whatever, so I don't know who it is made by. 1095 On the Camel, no name whatever. On the Chesterfield it is Liggett & Myers, and it is about, I judge, not one-eighth of an inch high, the letters. I doubt whether it is one-eighth of an inch. On the Fatima it is a little plainer.

R-X Q. 6. But you could not tell without looking at the packages what any of the lettering was printed on any of those packages, could you?

A. I don't scrutinize each package. All I look for is the name "Lucky Strike" or "Camel" or "Chesterfield" or "Fatima."

1096 R-X Q. 7. I want to call your attention to what is printed on the bottom of the front of the Lucky Strike package; you will see the word "Cigarettes" there?

A. Yes.

R-X Q. 8. Is that more or less conspicuous than the words "P. Lorillard" on the Beech-Nut Cigarettes? I call your attention to what is printed on the bottom of the front of the Camel Cigarette; is that more or less conspicuous than the "P. Lorillard" to your eye?

A. To my eye, yes, it is more conspicuous because the glazed paper sort of obscures it a little.

R-X Q. 9. Look at this Fatima package underneath
1097 the picture of the girl and the moon and there you will find "Turkish Blend Cigarettes, Cameron & Cameron, Richmond, Virginia," and so on. Is that inscription more or less conspicuous to your eye than the "P. Lorillard" on the bottom of the Beech-Nut Cigarette package?

A. The P. Lorillard is more conspicuous.

R-X Q. 10. Why do you say that?

A. It shows up better because there is not so much reading matter. Do you understand what I mean?

R-X Q. 11. It shows up better than this "Turkish Blend Cigarette"?

1098 A. Yes. There is so much reading matter there that your eye does catch it as quick as that.

R-X Q. 12. On the Chesterfield Cigarette package you find an inscription, "Cigarettes" at the bottom of the package and underneath that the name of the manufacturer; do you find that more or less conspicuous than the inscription on the Beech-Nut Cigarette package?

A. The "P. Lorillard" is in black letters and the other — I don't know what color it is.

R-X Q. 13. As a matter of fact, you never noticed any of these inscriptions and would not do so unless your attention had been called to them, would you?

A. No, sir.

R-X Q. 14. Therefore it does not make any difference how relatively conspicuous they are if you would not notice any of them? 1099

A. I do not know about that. No matter whether we are conscious of the fact or not, if it is conspicuous we will notice it even if we are not conscious of it. But, just as I say, if it is not conspicuous you give it the go-by.

Mr. Hinton: I am not interested in any unconscious effect the inscription may have. I think we understand each other. That is all.

1100

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. This package of Chesterfield cigarettes is wrapped in glazed paper, is it not?

A. Yes.

R-D Q. 2. Is this package of Lucky Strike Cigarettes which I show you also wrapped in glazed paper?

A. Yes.

R-D Q. 3, You know it to be a common thing for different brands of cigarettes to be wrapped in glazed paper? 1101

A. Yes, now it is.

R-D Q. 4. Do you know why that is done?

A. To keep the cigarettes in good condition.

R-D Q. 5. Do you think that is a good thing to do?

A. Yes.

R-D Q. 6. State whether or not you think that in spite of the fact that the Beech-Nut Cigarette package is wrapped in glazed paper that the name P. Lorillard & Company written on the front of the package is easily read?

A. Yes, it is.

1102 R-D Q. 7. And that name P. Lorillard Company is more conspicuous than the name Liggett & Myers Tobacco Company on the front of the Chesterfield pack, is it not?

A. Yes, because the black letters show up better than gold.

R-D Q. 8. State whether or not the name "P. Lorillard Company" on the cigarette package is more conspicuous than the name "Cameron & Cameron" on the front of the Fatima package?

A. I believe it is.

R-D Q. 9. State whether or not the name of the manu-
1103 facturer appears at all on the front of the Lucky Strike package?

A. It does not.

R-D Q. 10. State whether the name of the manufacturer appears at all on the front of the Camel cigarette?

A. It does not.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1104 J. T. WOODALL, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and occupation.

A. My name is J. T. Woodall; legal age; residence, over my store at 1901 Columbia Avenue; occupation, tobacco, candy and novelty merchant.

Q. 2. Will you please describe your store?

A. I have a ground floor room about twenty by twenty-five feet in an old building across from the General Electric Company's plant. I am my own clerk except that my wife helps me at times. 1105

Q. 3. In addition to tobacco, what sort of goods do you sell in your store here?

A. Candy and pie and stuff, drinks and confectionery.

Q. 4. Do you sell clocks?

A. No.

Q. 5. Do you sell Beech-Nut Scrap Tobacco?

A. Yes.

Q. 6. How long have you sold it? 1106

A. Going on six years.

Q. 7. Is that Scrap Tobacco a good seller with you?

A. Yes, it is here.

Q. 8. Do you sell Beech-Nut Cigarettes?

A. I have sold them; I haven't got any now. I am out of them just now.

Q. 9. Do you sell Beech-Nut Chewing Gum?

A. Yes.

Q. 10. Were you ever under the impression that the Company that makes the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes also made the Beech-Nut Chewing Gum? 1107

A. No, sir.

Q. 11. Did you ever hear any comments, remarks or inquiries among your customers which indicated that they were under the impression that the same Company made the gum which made the tobacco?

A. No, sir.

Q. 12. You have a restaurant in the back of your store, haven't you?

A. No, sir.

Q. 13. Do you think the cigarette package looks like the gum package (displaying to witness Beech-Nut Cigarette package and Beech-Nut Gum package)?

1108 A. Not at all.

Q. 14. Do you think the Scrap Tobacco package looks like the Gum package?

A. No, sir.

Q. 15. What would you think of any one who, if they wanted cigarettes, would accept this gum package as a substitute?

A. He would have to be a blind man to do that.

Q. 16. I show you a package of Beech-Nut Scrap Tobacco; whose name appears on the top of the front of that package?

A. P. Lorillard.

1109 Q. 17. Would that indicate to you that Lorillard was the manufacturer of that tobacco?

A. According to all of the rest of the goods, yes, the goods that they manufacture.

Q. 18. Whose name appears on the front of that cigarette package underneath the oval design?

A. Lorillard.

Q. 19. Would that indicate that Lorillard is the manufacturer of that tobacco?

A. I should think so. I do not see why they would use that name if they did not manufacture it.

Q. 20. And that name is easily seen through the
1110 glazed paper covering, is it not?

A. Yes.

Q. 21. Do you know it to be a common custom to wrap cigarette packages in glazed paper?

A. Yes.

Q. 22. Would you prefer to have a tobacco product made by an out and out tobacco manufacturer, or one made by a company which makes tobacco in addition to a large line of food products?

A. I would rather deal with a regular tobacco manufacturer who absolutely makes nothing but tobacco.

Q. 23. I show you a package of Chesterfield Cigarettes; will you state whether or not the name "Liggett

& Myers Tobacco Company" on the bottom of the front of the cigarette package is more or less conspicuous than the name "P. Lorillard Company" on the front of the Beech-Nut package. 1111

A. It is; without that paper on it one is as visible as the other.

Q. 24. I show you a package of Camel cigarettes; does the name of the manufacturer appear on the front of the Camel cigarette package?

A. No, sir.

Q. 25. Does the name of the manufacturer of the Lucky Strike Cigarette appear on the front of the package? 1112

A. No, sir.

Q. 26. Is the name "P. Lorillard Company" on the front of the Beech-Nut Cigarette Package more or less conspicuous than the name "Cameron & Cameron Company" on the front of the Fatima cigarette package?

A. Yes, it is more conspicuous.

Q. 27. Because it is larger?

A. It is not as plain as what it is there on account of the glazed paper over it.

Q. 28. The Chesterfield Cigarette package is wrapped in glazed paper, is it not?

A. Yes. 1113

Q. 29. Is the Lucky Strike Cigarette package wrapped in glazed paper?

A. Yes.

Q. 30. Has the sale of the Beech-Nut Chewing Gum decreased since the Beech-Nut Cigarette appeared on the market?

A. No, not to my knowledge.

Q. 31. Do you sell more packages of Beech-Nut Scrap Tobacco than you do packages of Beech-Nut Chewing Gum?

A. By a hundred times.

1114 *Cross Examination.*

By Mr. Hinton:

X-Q. 1. How much scrap tobacco do you sell, the Beech-Nut Scrap Tobacco?

A. I sell about six or eight dozen a week.

X-Q. 2. How many packages of Beech-Nut Cigarettes do you sell?

A. I have not sold any lately. I never sold over one or two cartons a week.

X-Q. 3. That would be from ten to twenty packages?

1115 A. Yes.

X-Q. 4. When did you first notice the name P. Lorillard on the package of cigarettes?

A. When it was first introduced.

X-Q. 5. Who makes the Sweet Caporals, do you know?

A. The American Tobacco Company.

X-Q. 6. Who makes the Camels?

A. The same people, the American Tobacco Company —no, Reynolds. Reynolds makes the Sweet Caporals, don't they? Or is it the American Tobacco Company?

X-Q. 7. Who makes the Piedmonts?

A. Liggett & Myers.

1116 *Re-direct Examination.*

By Mr. Preston:

R-D Q. 1. Do you sell Sunshine cigarettes?

A. I do, or rather I did sell them.

R-D Q. 2. Do you handle Sunshine Biscuits?

A. No, sir.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1117

STIPULATION.

It is stipulated by and between counsel for the respective parties that if

ALBERT F. SCHUELER were called as a witness for the defendant in this case he would testify as follows:

On Direct Examination:

That I am the proprietor of the tobacco store at 231 West Camden Street, Baltimore, Maryland, and I have had this store for thirty-three years. In addition to 1118
tobacco I carry toilet articles, razors, clocks, gum and candy. I have handled the Lorillard Beech-Nut Scrap tobacco since 1915 and it sells well in this neighborhood. I have handled the Beech-Nut Cigarettes since 1921. I always knew that the Lorillard Company made both of these products and I never had any customers ask me who made the Beech-Nut Cigarettes or who made the Scrap Tobacco, and I never heard any remarks or inquiries from my customers in that regard. I think any man who would accept a package of Beech-Nut Gum in place of a package of Beech-Nut Cigarettes would be crazy. I sell Velvet pencils and Velvet Tobacco; 1119
Chesterfield pipes and Chesterfield cigarettes. The Velvet pencil and the Velvet tobacco are made by separate and distinct companies and the Chesterfield cigarette and the Chesterfield pipes are made by different companies and I never heard of any one who assumed that the case was otherwise.

On Cross Examination

In addition to operating a store I manufacture cigars, having a small cigar factory and employing a number of

men. I am very busy waiting on the trade and I made no effort to make a note of or remember any comments, remarks or inquiries that may have been made about the cigarettes or the scrap tobacco.

Re-direct Examination.

If there had been a great many of these remarks I think I would have remembered it.

STIPULATION.

It is further stipulated by and between counsel for the respective parties that if the witness.

WILLIAM D. LILLY, were called as a witness to testify for the defendant, he would, when interrogated, testify as follows:

Direct Examination.

I am forty-six years old and am the proprietor of a tobacco store at Howard and Baltimore Streets, the same being in the heart of the business district of Baltimore City. I have a thousand retail customers a day. I also am a tobacco jobber. I have been in the tobacco business for twenty-four years. I handle the Beech-Nut Scrap Tobacco. I found out that the P. Lorillard Company made this tobacco when it first came out; I learned it in the usual way that people find out those things. I have handled the Beech-Nut cigarettes since they came on the market and I was familiar with the Beech-Nut Scrap Tobacco and I assumed that they were made by the same people. When the cigarettes first came out I remember hearing a few questions from customers indicating that they thought that the same company made

1117

STIPULATION.

It is stipulated by and between counsel for the respective parties that if

ALBERT F. SCHUELER were called as a witness for the defendant in this case he would testify as follows:

On Direct Examination:

That I am the proprietor of the tobacco store at 231 West Camden Street, Baltimore, Maryland, and I have had this store for thirty-three years. In addition to 1118
tobacco I carry toilet articles, razors, clocks, gum and candy. I have handled the Lorillard Beech-Nut Scrap tobacco since 1915 and it sells well in this neighborhood. I have handled the Beech-Nut Cigarettes since 1921. I always knew that the Lorillard Company made both of these products and I never had any customers ask me who made the Beech-Nut Cigarettes or who made the Scrap Tobacco, and I never heard any remarks or inquiries from my customers in that regard. I think any man who would accept a package of Beech-Nut Gum in place of a package of Beech-Nut Cigarettes would be crazy. I sell Velvet pencils and Velvet Tobacco; 1119
Chesterfield pipes and Chesterfield cigarettes. The Velvet pencil and the Velvet tobacco are made by separate and distinct companies and the Chesterfield cigarette and the Chesterfield pipes are made by different companies and I never heard of any one who assumed that the case was otherwise.

On Cross Examination

In addition to operating a store I manufacture cigars, having a small cigar factory and employing a number of

1120 men. I am very busy waiting on the trade and I made no effort to make a note of or remember any comments, remarks or inquiries that may have been made about the cigarettes or the scrap tobacco.

Re-direct Examination.

If there had been a great many of these remarks I think I would have remembered it.

STIPULATION.

1121 It is further stipulated by and between counsel for the respective parties that if the witness.

WILLIAM D. LILLY, were called as a witness to testify for the defendant, he would, when interrogated, testify as follows:

Direct Examination.

I am forty-six years old and am the proprietor of a tobacco store at Howard and Baltimore Streets, the same being in the heart of the business district of Balti-
1122 more City. I have a thousand retail customers a day. I also am a tobacco jobber. I have been in the tobacco business for twenty-four years. I handle the Beech-Nut Scrap Tobacco. I found out that the P. Lorillard Company made this tobacco when it first came out; I learned it in the usual way that people find out those things. I have handled the Beech-Nut cigarettes since they came on the market and I was familiar with the Beech-Nut Scrap Tobacco and I assumed that they were made by the same people. When the cigarettes first came out I remember hearing a few questions from customers indicating that they thought that the same company made

the cigarettes and the gum. I do not think that the 1123
gum package and the cigarette package look alike and nobody would have any difficulty in distinguishing between a package of Beech-Nut cigarettes and a package of Beech-Nut Gum, nor would anybody accept one of these in place of the other.

Cross Examination.

It is quite natural that waiting on a thousand customers a day I have not time to have any discussion with any of the customers, nor did I make any effort to make a note of or remember what they said about 1124
the Beech-Nut Cigarettes. I merely happen to remember a few remarks that were made.

STIPULATION.

It is further stipulated by and between counsel for the respective parties that if SOL LEVIN were called as a witness to testify on behalf of the defendant that he would, upon interrogation, testify as follows:

Direct Examination.

1125

I am twenty-one years of age and I am a clerk at the cigar stand at the Southern Hotel at Baltimore, which position I have occupied for three years. This Hotel is located in the heart of Baltimore City. We do not handle the Beech-Nut Scrap tobacco, but we do handle the Beech-Nut Cigarettes, though we sell not more than two cartons a month of the Beech-Nut Cigarettes, which is twenty packages a month. I do not remember having heard any comments from customers or any questions asked as to who makes the Beech-Nut cigarettes, nor anything that would indicate to me that

1126 those customers thought that the cigarettes were made by the same people who manufactured the gum.

Cross Examination.

I made no particular effort to remember any comments that may have been made about the Beech-Nut cigarettes. Our sale of these cigarettes amounts to less than twenty packages a month and that would not satisfy the ordinary demands of one cigarette smoker.

STIPULATION.

1127 It is stipulated by and between counsel for the respective parties that if W. FRIEDMAN were called as a witness to testify for the defendant that, upon interrogation, he would testify as follows:

Direct Examination.

My name is W. Friedman and I operate a tobacco store at 632 South Broadway. I have run this store for seventeen years. I am assisted in running it by two daughters and one son. I estimate that we have a total of five hundred customers a day. We sell tobacco and
1128 candy and ties and knives, baseball gloves and so forth. I have handled the Beech-Nut Scrap tobacco since 1915 and have handled the Beech-Nut Cigarettes since they came on the market. The Beech-Nut Scrap tobacco is a good seller in this neighborhood. I knew that P. Lorillard made the scrap tobacco. I never was under the impression that the gum people made the tobacco products. The Beech-Nut Cigarette package and the package of Beech-Nut chewing gum are totally different in their appearance and no one would mistake one of these packages for the other. I do not remember having heard any comments or remarks or inquiries from cus-

the cigarettes and the gum. I do not think that the gum package and the cigarette package look alike and nobody would have any difficulty in distinguishing between a package of Beech-Nut cigarettes and a package of Beech-Nut Gum, nor would anybody accept one of these in place of the other. 1123

Cross Examination.

It is quite natural that waiting on a thousand customers a day I have not time to have any discussion with any of the customers, nor did I make any effort to make a note of or remember what they said about the Beech-Nut Cigarettes. I merely happen to remember a few remarks that were made. 1124

STIPULATION.

It is further stipulated by and between counsel for the respective parties that if SOL LEVIN were called as a witness to testify on behalf of the defendant that he would, upon interrogation, testify as follows:

Direct Examination.

1125

I am twenty-one years of age and I am a clerk at the cigar stand at the Southern Hotel at Baltimore, which position I have occupied for three years. This Hotel is located in the heart of Baltimore City. We do not handle the Beech-Nut Scrap tobacco, but we do handle the Beech-Nut Cigarettes, though we sell not more than two cartons a month of the Beech-Nut Cigarettes, which is twenty packages a month. I do not remember having heard any comments from customers or any questions asked as to who makes the Beech-Nut cigarettes, nor anything that would indicate to me that

1126 those customers thought that the cigarettes were made by the same people who manufactured the gum.

Cross Examination.

I made no particular effort to remember any comments that may have been made about the Beech-Nut cigarettes. Our sale of these cigarettes amounts to less than twenty packages a month and that would not satisfy the ordinary demands of one cigarette smoker.

STIPULATION.

1127 It is stipulated by and between counsel for the respective parties that if W. FRIEDMAN were called as a witness to testify for the defendant that, upon interrogation, he would testify as follows:

Direct Examination.

My name is W. Friedman and I operate a tobacco store at 632 South Broadway. I have run this store for seventeen years. I am assisted in running it by two daughters and one son. I estimate that we have a total of five hundred customers a day. We sell tobacco and
1128 candy and ties and knives, baseball gloves and so forth. I have handled the Beech-Nut Scrap tobacco since 1915 and have handled the Beech-Nut Cigarettes since they came on the market. The Beech-Nut Scrap tobacco is a good seller in this neighborhood. I knew that P. Lorillard made the scrap tobacco. I never was under the impression that the gum people made the tobacco products. The Beech-Nut Cigarette package and the package of Beech-Nut chewing gum are totally different in their appearance and no one would mistake one of these packages for the other. I do not remember having heard any comments or remarks or inquiries from cus-

tomers which would lead anyone to think that the Beech-Nut Cigarettes were made by the same people that made the Beech-Nut gum. I sell Everready safety razor blades and Everready matches and these two articles are not made by the same company. 1129

Cross Examination.

I made no particular effort to remember any comments or remarks or inquiries made by the customers. I do not sell many Beech-Nut Cigarettes. To the best of my recollection the scrap tobacco was put in by a Lorillard Salesman and the Beech-Nut cigarettes were put in by a Lorillard salesman, so that I knew before I saw the goods who they were manufactured by. 1130

Re-direct Examination.

If there had been a great number of remarks indicating confusion in the minds of the customers as to who made the Beech-Nut tobacco and who made the Beech-Nut gum I believe I would have remembered it.

(Taking of depositions in Baltimore concluded.)

1131

1132 IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Company, Defendant.
In Equity No. 3056.

City of Baltimore,
State of Maryland. } ss.:

I, Lafayette P. Temple, a Notary Public, in and for
1133 the City of Baltimore, State of Maryland, acting as Special Examiner, by consent of counsel, do hereby certify that the foregoing depositions of Samuel Rackmales, Morris J. Goodman, Carl W. Jacobson, Theodore Havelman, Elmer C. Kaiss, Joseph H. Nelson and J. T. Woodall, were taken on behalf of P. Lorillard Company, defendant, pursuant to notice and agreement, before me, at Baltimore, Maryland, beginning on the 11th day of December, 1922, and ending on the 12th day of December, 1922; that each of the above-named witnesses was by me duly sworn; that the testimony of said witnesses was taken by me, a Court Reporter, in short-
1134 hand, and thereafter reduced to typewriting; that the opposing party was represented by Sebastian Hinton, Esq., of Counsel, during the taking of said testimony, and that by agreement of counsel, the signature of each of the witnesses was waived as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto, or interested directly or indirectly in the matter in controversy.

LAFAYETTE P. TEMPLE,
Notary Public
And Examiner by Consent.
My commission expires May 5, 1924.

(Seal)

1135

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity No. 3056.

December 13, 1922.

1136

Depositions taken on behalf of P. Lorillard Company, defendant, in the above entited action, pursuant to notice and agreement of counsel, before Edward N. Legg, a Notary Public in and for the City of Philadelphia, State of Pennsylvania, acting as Special Examiner by consent of counsel, beginning on the 13th day of December, 1922, at two o'clock p.m.

Present in behalf of the plaintiff, Messrs. Offield, Poole, Hinton & Scott (by Mr. Sebastian Hinton).

Present in behalf of the defendant, Messrs. Meyers, Cavanagh & Whitehead (by Mr. Richard B. Cavanagh and Mr. Thomas L. Preston.)

1137

WILLIAM WASCHLER, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Will you state your name and address?

A. My name is William Waschler; address, 827 Chesnut Street, Philadelphia, Pennsylvania. I am located in the business section of the city.

1138 Q. 2. What sorts of goods do you sell here?

A. Tobacco and smokers' articles.

Q. 3. Do you sell gum?

A. Yes, we sell some gum.

Q. 4. Do you know of the Lorillard Company?

A. Yes.

Q. 5. What is the reputation of the Lorillard Company?

A. It is good, that is so far as I know.

Q. 6. Do you handle a full line of Lorillard products?

A. Yes. That is, all the stuff that sells with us. There are some things they make that do not sell with us,

1139 but we carry a full line of what we need.

Q. 7. Will you name a few of the products you sell?

A. Cigarettes, tobaccos, Murad Cigarettes, Melachrino, Helmars, Trophies and all those.

Q. 8. Do you sell Beech-Nut Scrap Tobacco?

A. Yes.

Q. 9. How long have you sold that?

A. Since five years ago when I went in business.

Q. 10. Is that a good seller?

A. Yes.

Q. 11. How much of that do you sell a week?

A. About a gross or so.

1140 Q. 12. How many packages are in a gross?

A. 144.

Q. 13. Do you sell Beech-Nut cigarettes?

A. Yes.

Q. 14. How long have you handled those?

A. Since they were put on the market.

Q. 15. Do you sell Beech-Nut gum?

A. Yes.

Q. 16. Do you know what company makes Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes?

A. Yes.

Q. 17. What company is it?

A. P. Lorillard Company. 1141

Q. 18. Were you ever under the impression that the same company that makes the Beech-Nut scrap tobacco and the Beech-Nut cigarettes also makes the Beech-Nut Chewing Gum?

A. Never.

Q. 19. Did you ever hear any comments or remarks or inquiries among your customers which indicated such a confusion on their part?

A. No.

Q. 20 Whose name appears on the front of this scrap tobacco package (Beech-Nut Scrap)?

A. Lorillard. 1142

Q. 21. Will you state whether or not that would mean to you that Lorillard was the maker of that package?

A. Surely.

Q. 22. Whose name appears on the Beech-Nut Cigarette?

A. The same, Lorillard.

Q. 23. Would that mean to you that Lorillard was the maker of that cigarette?

A. I would imagine so.

Q. 24. Do you think this cigarette package and the gum package bear any resemblance to one another? 1143

A. A trifling resemblance, yes, a slight resemblance in that egg-shaped part of it.

Q. 25. As a package, do you think the packages look alike?

A. No.

Q. 26. In regard to the label, in what respects do you consider that they look alike?

A. Just the shape and the letters in it, of course, the word "Beech-Nut."

Q. 27. You know the oval shape to be a very common device on all sorts of package goods, do you not?

1144 A. Yes.

Q. 28. What would you think of a man who, if he wanted Beech-Nut cigarettes, would allow anybody to give him a package of Beech-Nut gum?

A. I would say that he belonged in Norristown, our favorite insane asylum.

Q. 29. Do you consider chewing gum in the same class with tobacco products

A. No, they are far, far apart.

Q. 30. Is the sale of the Beech-Nut gum as good now as it was before the appearance of the Beech-Nut cigarette?

1145 A. It has not changed any on account of that.

Q. 31. You sell as much as you did before the cigarette appeared?

A. Just as much.

Q. 32. Would you prefer to handle a tobacco product put out by a straight tobacco firm, or would you prefer to have it made by a company which also manufactured food products?

A. A straight tobacco company, if possible, any time.

Q. 33. Is this Beech-Nut Scrap Tobacco the best scrap seller that you have?

A. It is.

1146

Cross Examination.

By Mr. Hinton:

X-Q. 1. What do you say the name of this store is?

A. Waschler & Sachs.

X-Q. 2. Is this one of a chain of stores?

A. No, sir.

X-Q. 3. Do you put out any of your own brands of cigars here?

A. No, sir.

X-Q. 4. Or cigarettes? 1147

A. No, sir.

X-Q. 5. You say you see some resemblance between these packages as far as that oval label goes?

A. Yes.

X-Q. 6. And of course the name, Beech-Nut?

A. Yes.

X-Q. 7. And the lettering?

A. Yes, that is all.

X-Q. 8. I suppose you are pretty busy here, are you not?

A. Generally, yes.

X-Q. 9. You do not make a practice of talking with 1148 customers about what they think?

A. Yes, when we are not very busy we sometimes do.

X-Q. 10. Do you discuss with your customers the question of who makes Camel cigarettes, for instance?

A. Once in a while.

X-Q. 11. That is a practice of yours, is it?

A. It is once in a while.

X-Q. 12. And your customers will talk about who makes the Camel Cigarettes?

A. Once in a while, yes.

X-Q. 13. You do not do that often, do you?

A. No, sir, we do not have time. 1149

X-Q. 14. How many times have you done that in the last year?

A. Too many times to mention.

X-Q. 15. How many times have you discussed with customers the question of who makes the Camel cigarettes?

A. A great many times; I didn't count them.

X-Q. 16. And the same with the Lucky Strike and Piedmont?

A. Yes.

X-Q. 17. And all the other goods that you sell?

A. Yes.

1150 X-Q. 18. Every once in a while, when you are not busy, you do discuss those matters with your customers?

A. A customer comes in and starts talking and we will answer and we will talk about it for a while.

X-Q. 19. In the ordinary course of business, doesn't he just come in and put his money down, take his package and walk out?

A. Yes.

X-Q. 20. And if you do talk about anything it is baseball, or something of that kind, isn't it?

A. Yes, but if they ask us we answer them.

X-Q. 21. You were not making any effort to remem-
1151 ber or making a note of any questions that you may have heard about these cigarettes, were you?

A. No, I have no reason to do that.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. About how many customers do you have in and out of your place here in a day?

A. On an average of 1800.

R-D Q. 2. If you had heard a considerable number of
1152 those remarks indicating confusion in the minds of your customers as to who made the Beech-Nut Scrap Tobacco and who made the Beech-Nut Gum, do you think you would have remembered it?

A. Yes, if I had heard a good many of them I would. I don't think I have heard anybody mention that there was any confusion in that regard at all.

Re-cross Examination

By Mr. Hinton:

R-X Q. 1. They all knew the difference between gum and cigarettes.

A. Yes, they all knew the difference between gum and cigarettes. They ought to. 1153

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

SAMUEL B. WELSH, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination

1154

By Mr. Preston:

Q. 1. What is your name and address?

A. My name is Samuel B. Welsh; my address is 703 Chestnut Street. I am occupied in the business district of Philadelphia.

Q. 2. What lines of goods do you carry?

A. Cigars, cigarettes and tobaccos, Beech-Nut gum, candies and Beech-Nut mints and so forth and so on.

Q. 3. Do you carry anything in the nature of dry-goods or any other class of goods except confections and tobacco? 1155

A. No, sir, confections and tobacco only.

Q. 4. Do you know of the Lorillard Company?

A. Yes, very well, for a good many years.

Q. 5. Is that company known in this neighborhood as a prominent tobacco company?

A. Very much so.

Q. 6. Do you handle a full line of the Lorillard products?

A. A full line.

Q. 7. Will you name a few of them that you carry?

1156 A. Beech-Nut cigarettes, Helmar cigarettes, Murad cigarettes, Union Leader tobaccos and several others, Sensation Tobacco and others.

Q. 8. Do you know whether the Lorillard Company has advertised its products extensively in Philadelphia and in this neigborhood?

A. I do not think they have. What do you mean by that?

Q. 9. I mean in the nature of window display?

A. Oh, window display, yes, they have always had very nice window display all around. I have noticed the window displays.

1157 Q. 10. Their window display and advertisements of that sort, how do they compare with those of other tobacco companies?

A. It is very much more so than other tobaccos, their window displays. Their newspaper advertisements are not as extensive as some others, but their window displays are good.

Q. 11. Do you sell Beech-Nut scrap tobacco like this package I now show you?

A. Yes.

Q. 12. How long have you handled that?

A. I guess we have handled that Beech-Nut Scrap
1158 for twenty or twenty-five years. Beech-Nut Tobacco has been on the market, I think, that long, hasn't it? It has been so commonly known that I can not remember.

Q. 13. Do you remember ever having seen a package of Beech-Nut tobacco with the picture of a squirrel on the front of it?

A. No, I don't remember ever seeing that.

Q. 14. But you have handled the tobacco put up in this sort of package for many years?

A. Yes, I think there has been a Beech-Nut Scrap Tobacco on the market — well, I can't recall how long back.

Q. 15. But as long as it has been on the market you 1159
have handled it

A. Yes. Didn't it use to be made by a Cincinnati concern before you got it?

Q. 16. I could not say for certain about that. Do you sell Beech-Nut cigarettes?

A. Yes.

Q. 17. And do you sell Beech-Nut chewing gum?

A. Yes.

Q. 18. And Beech-Nut mints?

A. Yes.

Q. 19. Do you know what company makes the Beech-Nut Tobacco products? 1160

A. Yes.

Q. 20. What company is it?

A. The Lorillard Company.

Q. 21. Did you ever think that the same company that made the Beech-Nut Tobacco Products also made the Beech-Nut chewing gum and the Beech-Nut mints?

A. No.

Q. 22. How many customers do you have in and out of your store in a day?

A. On an average of four thousand customers.

Q. 23. Did you ever hear any remarks or inquiries or comments among those customers which indicated that 1161
they were in any doubt as to whether the same company made the Beech-Nut Tobacco that made the Beech-Nut gum and mints?

A. Never in the world; I never heard it brought up. I have never heard that discussed.

Q. 24. Whose name appears across the front of the scrap tobacco, at the top?

A. Lorillard's.

Q. 25. Did you ever see a package of Beech-Nut Scrap Tobacco without Lorillard's name on it?

A. I don't think so, not in the latter years.

1162 Q. 26. And that would mean to you that Lorillard was the maker?

A. Yes.

Q. 27. Whose name appears on the front of the cigarette package?

A. Lorillard.

Q. 28. Is that name easily read through the glazed paper covering on that package?

A. Yes, to me it is.

Q. 29. Do you know it to be a common custom to wrap cigarette packages in glazed paper?

A. Very much so. They would not sell without it

1163 now. Those that do not do it are behind the times.

Q. 30. What would you think of any one, who if he wanted a package of Beech-Nut cigarettes, would accept a package of Beech-Nut chewing gum?

A. I would not know. Nobody who ever came in my store would do that.

Q. 31. You think those two packages look alike?

A. Not a particle, not as far as the gum is concerned. It never was confusing, I don't think. I have never found it so.

Q. 32. Do you regard gum and tobacco as in the same class?

1164 A. Different classes altogether.

Q. 33. Is your sale for Beech-Nut gum as good as it was before the Beech-Nut cigarette appeared on the market?

A. Yes, and for Beech-Nut mints much heavier, you can not get it half the time.

Q. 34. Would you prefer to handle a tobacco product put out by a straight tobacco concern, or tobacco put out by a company that also manufactures various sorts of food products?

A. I would rather buy it from the straight tobacco concern.

Cross Examination. 1165

By Mr. Hinton:

X-Q. 1. You do a strictly retail business here, do you not?

A. Yes.

X-Q. 2. No jobbing?

A. Not so much.

X-Q. 3. But you are a jobber, though, are you not?

A. We do some wholesale business, but we put ourselves out as strictly retail.

X-Q. 4. Do you do any wholesaling of confectionery, or just tobacco? 1166

A. Confectionery and gums.

X-Q. 5. How long have you been actually engaged in handling tobacco?

A. So long ago that I almost do not remember. About forty-seven years.

X-Q. 6. How long have you run this store?

A. This store has been running about fifteen years.

X-Q. 7. What were you doing before that?

A. The same line of work. The Scarlett Company, that is the name that this store operates under, has been running about fifteen years. Then before that we called ourselves the Progressive Cigar Store. That was long before the United came on the market. It was thirty-seven years ago. Here is a certificate that is thirty-seven years old (handing paper to counsel). 1167

X-Q. 8. You mean this is your picture here?

A. Yes.

X-Q. 9. Do you wait on the retail trade yourself, or do you have help for that purpose?

A. I wait on a great deal of it.

X-Q. 10. Did you ever try to remember any comments or remarks or inquiries that you had about this question of who made the cigarettes?

1168 A. I would remember it if there had been any comment on it.

X-Q. 11. How long do you say this Beech-Nut Scrap tobacco has been on sale here?

A. I can not remember that. I don't remember just when it came in.

X-Q. 12. You said twenty or twenty-five years ago, didn't you?

A. It has not been that long. I will tell you what I was thinking of. I was thinking of that Cincinnati concern. They manufactured some scrap tobacco. I can not quite remember when the Beech-Nut came in.

1169 Q. 13. How long have Beech-Nut cigarettes been out in this District?

A. About two years now, or a year and a half.

X-Q. 14. Do you remember any customer asking you who made Camel cigarettes?

A. No.

X-Q. 15. Or who made the Fatimas?

A. No.

X-Q. 16. Or any other brand of cigarettes?

A. No.

X-Q. 17. They never discuss that question with you, do they?

1170 A. No, They do not care who makes them.

X-Q. 18. They come in and put their money down, take their package and walk out?

A. Yes.

X-Q. 19. Not being a mind reader you do not know what they think about it?

A. No, I do not believe one out of a thousand would know who made Murad cigarettes, if you ask them right offhand.

X-Q. 20. They buy it on the brand, do they?

A. They buy it on the brand, yes.

Re-direct Examination. 1171

By Mr. Preston:

R-D Q. 1. When you say that your customers buy a product on the brand, do you mean that they buy it on the quality of the goods?

Mr. Hinton: That is objected to as leading.

A. Yes, the quality of the goods.

R-D Q. 2. What do you think is the prime concern of a customer in regard to the products that he buys? 1172

Mr. Hinton: The question is objected to as calling for a mere opinion of the witness.

A. I don't quite understand what that question means.

R-D Q. 3. State whether or not the quality of a product is the chief consideration that the customer goes by?

A. Of course. There is no other quality of scrap tobacco on the market that the customer likes as well as he does the Beech-Nut, I don't think, not in this market. 1173

R-D Q. 4. If you had heard any considerable number of remarks or comments or inquiries in connection with the Beech-Nut Cigarette and the Beech-Nut Scrap Tobacco and the Beech-Nut gum and mints, would you have remembered them?

A. Yes, I would remember it if I heard any.

R-D Q. 5. How many customers a day do you have?

A. About four thousand.

1174 *Re-cross Examination.*

R-X Q. 1. How much of the Beech-Nut cigarettes do you sell?

A. We sell a very limited amount of Beech-Nut cigarettes just at the present time.

R-X Q. 2. How many packages a week do you sell?

A. We may sell two or three thousand cigarettes a week of the Beech-Nut brand.

R-X Q. 3. That would be fifty packages?

A. About fifty packages.

R-X Q. 4. How do they compare with the Camels?

1175 A. That I don't know. We sell more Camels.

R-X Q. 5. A great many times more?

A. Yes.

Re-direct Examination.

By Mr. Preston:

R-D Q. 6. How much Beech-Nut Scrap Tobacco do you sell in a week?

A. We sell in the neighborhood of three or four gross a week.

1176 R-D Q. 7. How many packages are there in a gross?

A. 144.

R-D Q. 8. Have you any other scrap tobacco that sells as well as that Beech-Nut scrap?

A. No.

R-D Q. 9. Have you any other scrap tobacco that sells half as well as that?

A. Red Man sells next to it in this location. Of course in other locations there may be other scraps that sell better, but here it is almost all Beech-Nut.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1177

BENJAMIN NEWMAN, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Will you kindly give me your name and the address of your store.

A. My name is Benjamin Newman; the address of this store is 2241 North Front Street.

1178

Q. 2. Is this store located in what is known as the Kensington District?

A. Yes.

Q. 3. Is that a good distance from the business center of Philadelphia?

A. This is one of the business centers of Philadelphia.

Q. 4. How many customers do you have in and out of your store here in a day, about?

A. We average about fifty.

Q. 5. What sorts of goods do you handle?

A. Tobacco, cigarettes, cigars, candy, matches, razor blades, pipes and so forth.

1179

Q. 6. Do you sell toilet articles?

A. A few.

Q. 7. Do you sell playing cards?

A. Yes.

Q. 8. Do you sell tobacco pouches?

A. Yes.

Q. 9. Do you know of the Lorillard Tobacco company?

A. Yes, I have known of them since I have been in business.

Q. 10. What is the reputation of the Lorillard Company?

1180 A. It is one of the finest companies to deal with that I have ever dealt with since I have been in business.

Q. 11. Do you know whether the Lorillard Company has advertised their products extensively in this community?

A. Yes, they have, especially Beech-Nut Tobacco, they have advertised that, not all their brands.

Q. 12. Do you sell Beech-Nut Scrap Tobacco like the package I show you (exhibiting package of Beech-Nut Scrap)?

A. Yes, that is one of my biggest sellers.

Q. 13. Do you sell the Beech-Nut cigarette like this?

1181 A. Yes.

Q. 14. Do you know what company makes them?

A. The Lorillard Company.

Q. 15. Do you sell Beech-Nut chewing gum?

A. No, I do not.

Q. 16. Did you ever sell it?

A. Yes, but it lay on the shelves and so I discontinued selling it.

Q. 17. How long ago did you discontinue selling it?

A. Two years ago.

Q. 18. How long before that did you put in the Beech-Nut gum?

1182 A. I had it a short time. A salesman came in and sold me a box of Beech-Nut gum and gave me a discount and I thought I would work up a little trade, but I didn't work up any trade and I discontinued selling it. It is not a good seller and I could not do anything with it at the price.

Q. 19. You have seen this gum on the market, haven't you?

A. Oh, yes.

Q. 20. How long have you carried Beech-Nut Scrap Tobacco?

A. Since it was on the market.

Q. 21. Is that a good seller? 1183

A. It is my best seller; I do not sell anything as much as I do that.

Q. 22. Have you any other scrap tobacco that sells half as well?

A. No, sir. The Red Man sells next.

Q. 23. Whose name is written on the front of the Beech-Nut Tobacco?

A. P. Lorillard Company.

Q. 24. Is that easily read?

A. Yes, it depends upon the person, though, you know.

Q. 25. I mean this: You can read that readily through 1184
the glazed paper cover, can you?

A. I can see positively the P. Lorillard Company.

Q. 26. Have you ever heard in your store or anywhere else any remarks or inquiries or comments which indicated that any one was under the impression that the Beech-Nut gum was made by the same company that makes the tobacco?

A. No, I never did.

Q. 27. What would you think of a man who, if he wanted a package of Beech-Nut cigarettes, would accept a package of Beech-Nut gum in place of it?

A. Even at the present time if any one comes in and 1185
asks for Beech-Nut I always ask him whether he wants the cigarettes or the tobacco. I have to ask him what he wants, whether it is chewing gum, tobacco or cigarettes.

Q. 28. But what would you think of a man who would accept the Beech-Nut gum under the impression that he was getting Beech-Nut cigarettes?

A. If a man wants cigarettes he doesn't want chewing gum.

Q. 29. Do you think it would be possible for anyone to be confused to that extent?

1186 A. No, positively not.

Q. 30. How much of this Beech-Nut Scrap tobacco do you sell in a week?

A. Twelve gross.

Q. 31. How many packages are there in a gross?

A. 144 packages.

Q. 32. Do you regard tobacco and gum as in the same class?

A. Positively not. I know as a fact that anybody who wants to stay away from tobacco that he gets chewing gum. The chewing gum helps him to lay off the tobacco. I have several customers who say that is the
1187 only way to let tobacco alone, is to chew gum. So this is a different class entirely.

Q. 33. Would you rather handle a tobacco product produced by a straight tobacco company, or a tobacco product which is put out by a company that also manufactures food products of various sorts?

A. It stands to reason that people who are in the tobacco business—I would rather handle their goods because I know what they are making.

Q. 34. Do you sell Star Shaving Brushes?

A. Yes.

Q. 35. Do you sell Star tobacco?

1188 A. Yes.

Q. 36. Did you ever hear of anyone who was under the impression that those two articles were made by the same company?

Mr. Hinton: That is objected to as incompetent and irrelevant.

A. No, positively not.

Mr. Preston: It is certainly material in a case in relation to the identity of the names of two articles,

to show that it is a very common thing for various articles made by different companies to go under the same name, as this would indicate that people have not the right to assume that when the articles are in different classes, identity of name indicates identity of origin. 1189

Q. 37. Do you sell Uncle Sam Tobacco?

A. Yes.

Q. 38. Do you sell Uncle Sam pipes?

A. Yes.

Q. 40. Did you ever hear of anyone who thought that the Uncle Sam tobacco and the Uncle Sam pipes were made by the same people? 1190

Mr. Hinton: Objected to as incompetent and irrelevant.

A. No.

(Note: It is stipulated that this objection may apply to this entire line of examination without repetition. This line of examination is also objected to unless the packages or labels referred to are produced.)

Mr. Preston: Samples of all of the packages referred to are in the possession of the Lorillard counsel at New York and will be introduced in evidence at a later date. 1191

Q. 41. Do you sell Steamboat playing cards?

A. Yes.

Q. 42. Do you sell Steamboat matches?

A. Yes.

Q. 43. Did you ever hear of any one who thought that both of those articles were made by the same company?

A. No, never.

1192 Q. 44. Do you sell Gem matches?

A. Yes.

Q. 45. Do you sell Gem razor blades?

A. Yes.

Q. 46. Did you ever hear of any one who thought that the Gem matches and the Gem razor blades were made by the same people?

A. No, sir, I never did.

Cross Examination.

By Mr. Hinton:

1193 X-Q. 1. Do you do a jobbing business here, Mr. Newman?

A. Jobbing and retail both.

X-Q. 2. What proportion of your business is jobbing?

A. The jobbing is bigger than the retail.

X-Q. 3. Do you put out your own brands of cigars?

A. Yes.

X-Q. 4. What brands of cigars do you put out?

A. "Newman's Best," "Newman's Havana Smoker and "Newman's Special."

X-Q. 5. Do you make those three brands yourself, or do you have them made?

1194 A. I do not make them myself. I have them manufactured. I do not find time to make them, so a man makes them up for me.

X-Q. 6. And that is a common practice in the tobacco game, isn't it?

A. Yes.

X-Q. 7. It is a common practice to have tobacco products made up and sold under private brands?

A. Yes, exactly.

X-Q. 8. Are you here in the store by yourself most of the time?

A. Yes, with the exception of Monday and then I go out.

X-Q. 9. You made no effort to remember whether customers ever asked you about these Beech-Nut cigarettes, or who they were made by, did you? 1195

A. A customer never asks who makes them.

X-Q. 10. Not so far as you can remember?

A. They have never asked me. The average customer just buys without asking. Just stop anybody on the street, anybody you choose, and ask him who makes Beech-Nut tobacco and I am sure—

Mr. Hinton: I object to that as not responsive to the question.

The Witness: (Continuing) If he asks for something and I give him something else he would not accept it. He goes by the Beech-Nut because he knows Beech-Nut is good, and I am sure that if the Beech-Nut changed its package then I would have to keep explaining what it is. That is what I have found in my eleven years of business. He just goes by the looks of it. 1196

X-Q. 11. In other words they buy on the brand and by the make?

A. Yes.

X-Q. 12. And if they have a high opinion of other products under the same name they are apt to buy a new one. 1197

A. They have got to try it out first. It is a question of quality.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. Is it not a fact that the thing which induces a customer to buy a product is the quality of that product?

1198 A. Positively the quality.

R-D Q. 2. In your opinion, does a man buy the goods because he likes the name?

A. No, sir, not by the name, always the quality.

R-D Q. 3. Do you job anything except tobacco products?

A. Whatever you see here I job.

R-D Q. 4. Confections also?

A. Yes, confections, matches and so forth. The retail business I am just trying to build up and most of my business is jobbing.

R-D Q. 5. If you heard a considerable number of re-
1199 marks or comments in regard to who made the Beech-Nut tobacco and who made the Beech-Nut gum and whether they were made by the same Company, do you think you would have remembered them?

A. I would remember it positively. I knew who makes the Beech-Nut gum and who makes the Beech-Nut tobacco.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1200 HARRY S. SYLK, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. What is your name and what is the address of your store here?

A. My name is Harry S. Sylk; the address of this store is 3362 Kensington Avenue, Philadelphia.

Q. 2. This is located in what is known as the Kensington business district, is it not? 1201

A. Yes.

Q. 3. How many customers do you have here a day?

A. Six or seven hundred, on an average.

Q. 4. What sorts of articles do you sell?

A. Cigars, tobacco, cigarettes, toilet articles, stationery and patent medicines.

Q. 5. Do you sell thermos bottles?

A. Yes.

Q. 6. And do you sell candy and perfumery?

A. Candy and perfumery and clocks and novelties.

Q. 7. Games? 1202

A. Yes, and pipes and all that stuff. I sell perfumes of all kinds.

Q. 8. Do you handle Beech-Nut Scrap Tobacco like the Beech-Nut package I now show you?

A. Yes.

Q. 9. How long have you handled it?

A. In this store here I have handled it for the past two years.

Q. 10. Were you in a similar business prior to that?

A. I have always been in the tobacco business.

Q. 11. And you sold this before you came here?

A. Yes. 1203

Q. 12. How long have you been handling it altogether?

A. For the past six or seven years.

Q. 13. Do you know what company makes it?

A. P. Lorillard Company.

Q. 14. Is it a good seller?

A. Yes, the best we have in the chewing tobacco line.

Q. 15. Have you any other scrap tobacco that is half as good a seller as the Beech-Nut Scrap?

A. In this section we have the Red Man Tobacco.

Q. 16. Is that half as good a seller as the Beech-Nut?

A. Just about half as much.

1204 Q. 17. Do you sell Beech-Nut cigarettes such as those in this package I now show you?

A. Yes.

Q. 18. Do you know what company makes that?

A. Lorillard.

Q. 19. Whose name is written on that package just beneath the label?

A. P. Lorillard.

Q. 20. Can you read that easily beneath the glazed paper?

A. Yes.

Q. 21. Do you know whether or not it is the common
1205 custom to wrap cigarette packages in glazed paper?

A. Sure, I know it is.

Q. 22. Do you sell Beech-Nut chewing gum also?

A. Yes.

Q. 23. Do you know what company makes that?

A. The Beech-Nut Packing Company.

Q. 24. Were you ever under the impression that the same Company that made the Beech-Nut Scrap Tobacco and the Beech-Nut cigarettes also made the Beech-Nut gum?

A. No.

Q. 25. Did you ever hear any comments or inquiries
1206 or remarks among your customers which indicated to you that they were under the impression that the tobacco products were made by the same company that makes the chewing gum?

A. No.

Q. 26. Do you regard tobacco in the same class with gum or in a different class?

A. In a different class.

Q. 27. What would you think of any one who would accept Beech-Nut gum thinking it was a package of Beech-Nut cigarettes? In other words, what would you

think of any one who would allow a storekeeper to substitute a gum package for a cigarette package? 1207

A. I would think they were crazy, or something like that.

Q. 28. Whose name is written on the front of the Beech-Nut Scrap Tobacco?

A. Lorillard.

Q. 29. And that would mean to any one who saw it that Lorillard was the maker, would it not?

A. Sure.

Q. 30. Has the sale of your Beech-Nut Chewing Gum decreased since the appearance of the Beech-Nut cigarette on the market? 1208

A. No, I don't think so.

Q. 31. Will you state whether or not it is about the same, or whether it has increased?

A. It is about the same.

Q. 32. Would you rather handle a tobacco product put out by a straight tobacco company or a tobacco product put out by a tobacco company that also made various sorts of food articles?

A. I would rather have the tobacco made by a tobacco company altogether.

Q. 33. Do you sell Blue Ribbon Cigars?

A. Yes. 1209

Q. 34. Do you sell Blue Ribbon Playing Cards?

A. Yes.

Q. 35. Did you ever hear of any one who thought that the Blue Ribbon Playing Cards were made by the same people who make the Blue Ribbon Cigars?

Mr. Hinton: This line of examination is objected to as incompetent, irrelevant and immaterial and it is further objected to unless the labels and packages referred to are introduced.

It is stipulated that this objection will be allowed

1210 to apply to this entire line of examination without repetition.

A. No.

Mr. Preston: Samples of all these articles are in the possession of the Lorillard's counsel in New York and will be introduced in evidence in the case at a later date.

Samples of the Blue Ribbon Playing Cards and of the Blue Ribbon Cigars are now produced for purposes of inspection or cross examination by opposing counsel.

1211

Q. 36. Do you sell Chesterfield pipes?

A. Yes.

Q. 37. Do you sell Chesterfield cigarettes?

A. Yes.

Q. 38. Do you sell Uncle Sam Playing Cards?

A. Yes.

Q. 39. Do you sell Uncle Sam Tobacco?

A. Yes.

Q. 40. Did you ever hear of any one who thought that the playing cards were made by the same people who make the tobacco?

1212 A. Not at all.

Q. 41. Do you sell Apple Chewing Gum?

A. Yes.

Q. 42. Do you sell Apple Tobacco?

A. Yes.

Q. 43. What is the nature of the device on the Apple Tobacco, the label?

A. The shape of an apple.

Q. 44. And what is the color?

A. Red in color.

Q. 45. What is the picture on the front of the Apple gum package?

A. An apple, that is also red. 1213

Q. 46. Do you sell Star Tobacco?

A. Yes.

Q. 47. Do you sell Star shaving brushes?

A. Yes.

Q. 48. Do you sell Velvet pencils?

A. Yes.

Q. 49. Do you sell Velvet Tobacco?

A. Yes.

Q. 50. Did you ever hear of any one who thought that the Velvet pencil and the Velvet Tobacco were made by the same firm?

A. No, sir, not at all. 1214

Q. 51. Do you regard them as in the same class of products?

A. Not at all.

Cross Examination.

By Mr. Hinton:

X-Q. 1. This store consists of one room about twelve feet wide?

A. Sixteen by forty-five.

X-Q. 2. And your family runs it?

A. Yes. 1215

X-Q. 3. And you live over the store?

A. Yes.

X-Q. 4. How many members of the family are usually on duty?

A. About three.

X-Q. 5. How many packages of Beech-Nut cigarettes do you suppose you sell in a week?

A. I guess about 350 or 400, or something like that.

X-Q. 6. Do you mean cigarettes or packages?

A. Packages.

1216 X-Q. 7. You sell 300 packages of Beech-Nut cigarettes a week?

A. Something like that, yes.

X-Q. 8. How many packages of Camel cigarettes do you sell a week?

A. About four thousand or five thousand.

X-Q. 9. That many packages a week?

A. Yes, about four cases, a thousand in a case. There are ten packages in a carton and fifty packages in a case. I guess it would be about two thousand a week or more cases.

X-Q. 10. Do you sell as many as 350 packages of the
1217 Beech-Nut a week, are you sure about that?

A. No, it would not be that much. About 3,000 a week would be right.

XQ. 11. It would run about 150, wouldn't it?

A. Yes, I figured double.

X-Q.-12. How much of that Beech-Nut Scrap Tobacco do you sell?

A. About 2½ gross a week.

X-Q. 13. And you wait on 700 customers a day?

A. About seven hundred, sometimes it runs more.

X-Q. 14. How do you know it is seven hundred, do you ever count them?

1218 A. We have our cash register count.

X-Q. 15. The register count would show seven hundred?

X-Q. 16. What did your register count show yesterday?

A. (After examining register slip): 575.

X-Q. 17. Do you do any jobbing business here at all?

A. A little, very little.

X-Q. 18. What do you job, tobacco?

A. Tobacco mostly; mostly cigars.

X-Q. 19. When the Beech-Nut cigarettes were put in here I suppose they were put in by some Lorillard man, were they not, or don't you remember?

A. I guess I ordered them through a jobber first. 1219

X-Q. 20. But you knew in advance, before you saw the goods, that they were a Lorillard product?

A. Yes.

X-Q. 21. And you have been handling the scrap tobacco how long?

A. For the past two years about; since we had the store.

X-Q. 22. How long have you been selling tobacco?

A. Five or six years.

X-Q. 23. Where did you work before you came here?

A. The retail stores.

X-Q. 24. In Philadelphia? 1220

A. Yes.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. Do you do any confectionery jobbing at all?

A. Only chewing gum, that is all; a little bit of candy.

R-D Q. 2. What day of the week was yesterday?

A. Tuesday.

R-D Q. 3. On Saturday do you do a great deal more 1221
business than on Tuesday?

A. Four times as much.

R-D Q. 4. The average number of customers in this store, then, you estimate as seven hundred and fifty?

A. At an average, yes. On Saturday we will run maybe about 1100 or 1200, but during the week we may run 500 or 600.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1222 DAVID ORNSTERN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. What is your name and what is the address of your store.

A. My name is David Ornstern; the address of the store is 2462 Kensington Avenue.

1223 Q. 2. And this store is located in the Kensington business district of Philadelphia, is it not?

A. Yes.

Q. 3. What sorts of articles do you sell in your store?

A. Articles such as tobacco, smoking articles.

Q. 4. Do you sell razor blades?

A. Yes.

Q. 5. Chewing gum?

A. Yes, Chiclets, cough drops and so forth.

Q. 6. Do you know of the Lorillard Company?

A. Yes, I have been dealing with them for some time.

1224 Q. 7. Has the Lorillard Company advertised its products extensively in this neighborhood, do you know?

A. Ever since I remember they have been advertising, yes.

Q. 8. Do you handle Beech-Nut Scrap Tobacco?

A. I do.

Q. 9. How long have you handled that?

A. For about nine years, if I remember right.

Q. 10. What company makes that Beech-Nut Scrap Tobacco?

A. P. Lorillard Company.

Q. 11. Whose name appears on the front of the Beech-Nut Scrap Tobacco at the top?

A. P. Lorillard, Beech-Nut Tobacco. 1225

Q. 12. How much of that Beech-Nut Scrap Tobacco do you sell in a week?

A. I average two gross now, but I used to average much more than that.

Q. 13. How many packages would two gross be?

A. 288 packages.

Q. 14. Do you sell any other scrap tobacco that sells as well as the Beech-Nut scrap tobacco?

A. No, sir, Beech-Nut is my best seller.

Q. 15. Have you another scrap tobacco that sells half as well as the Beech-Nut Scrap Tobacco?

A. No, I can not say that I have. This is my best 1226 seller.

Q. 16. Do you sell Beech-Nut cigarettes such as those in the packages I show you?

A. Yes.

Q. 17. Do you know what company makes those?

A. P. Lorillard.

Q. 18. Whose name is written on the front of that package just beneath the name?

A. Lorillard Company.

Q. 19. And that can be easily read through the glazed paper covering?

A. Yes. 1227

Q. 20. Do you know it to be a common custom to wrap cigarette packages in glazed paper?

A. They are all wrapped that way that I know of.

Q. 21. Do you handle Beech-Nut Chewing Gum?

A. No, sir.

Q. 22. Have you seen Beech-Nut Chewing Gum on the market?

A. I have heard once in a while about it, but I never did handle it.

Q. 23. Have you ever bought any Beech-Nut products in any other stores, such as Beech-Nut mints?

1228 A. No, I have not.

Q. 24. In going about in Philadelphia, have you seen advertisements of any of those articles, Beech-Nut gum or Beech-Nut mints?

A. I have seen Beech-Nut Tobacco and I have often seen that advertised.

Q. 25. But I am speaking of Beech-Nut Food Products, not the tobacco.

A. To tell you the truth I don't go out much and I don't see really much of it, but I have heard of Beech-Nut Chewing Gum, naturally. There was a fellow in one day trying to sell me that gum and I told him I don't get
1229 any calls for it, I only get a call for Spearmint gum, and as I haven't much room I handle only the Spearmint gum.

Q. 26. Were you ever under the impression that the Beech-Nut chewing gum was made by the same company that made the Beech-Nut Tobacco?

A. No, I knew it was not made by the same company.

Q. 27. Do you regard chewing gum and tobacco as the same class of goods?

A. No, I do not; it is an entirely different line. How can you compare tobacco and chewing gum?

1230 Q. 28. What would you think of a man who would allow any one to substitute a gum package for a cigarette package?

A. It would be a mighty poor substitute, that is all I can say.

Q. 29. Do you think that the cigarette package and the gum package look anything alike?

A. No, sir.

Q. 30. Would you prefer to handle a tobacco product put out by a straight tobacco company, or a tobacco product put out by a company that also makes various food articles and also tobacco?

A. Naturally I would rather handle tobacco that is 1231
made by people with experience in tobacco only.

Q. 31. About how many customers do you have in your store here a day?

A. I average about four hundred and fifty daily, four hundred or four hundred and fifty sales.

Cross Examination.

By Mr. Hinton:

X-Q. 1. I suppose you are in business to sell things to the public?

1232

A. Yes.

X-Q. 2. If you could sell an article to the public you would not care who it was made by provided there was a demand for it, is that right?

A. Naturally, yes.

X-Q. 3. Who does make the Beech-Nut gum?

A. I don't know who makes it, to tell you the truth. I have never handled it and I never went into the question of finding out who makes it and I never have had an idea who makes it. I knew it was not made by P. Lorillard.

X-Q. 4. Of course you have dealt with the Lorillard 1233
Company for a great many years?

A. Yes, but I did not go into any details to find out who made the Beech-Nut gum. As you say, that is all I handle, just what is in those three jars there, and what I have in there is just Chiclets and Spearmint, and cough drops and they are all put in recently.

X-Q. 5. How many Beech-Nut cigarette packages do you sell a week?

A. I sell quite a few Beech-Nut cigarettes. I just took a lot out of the window. I judge I go as high as ten thousand a week of Beech-Nut cigarettes.

1234 X-Q. 6. That would be how many packages?

A. That would be fifty cartons or five hundred packages.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 1. You said, I believe, that you regard tobacco and gum as in different classes?

A. Yes, naturally I do.

R-D Q. 2. Will you state whether or not you would

1235 conclude that the Beech-Nut gum was made by a company that you know to be in the Tobacco business?

Mr. Hinton: The question is objected to as calling for an opinion and a conclusion and speculation on the part of the witness.

A. Naturally I would expect it to be made by a company that is in that line of business.

Re-cross Examination.

By Mr. Hinton:

1236 R-X Q. 1. Can you name any other products that are made by the same people that make Beech-Nut Gum?

A. No, sir, I am not familiar with that.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.).

(The taking of testimony was then adjourned until tomorrow morning at 9:30 o'clock.)

1237

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company
vs.
P. Lorillard Company.
} In Equity 3056.

December 14, 1922.

The taking of testimony in the above entitled cause was then adjourned to this 14th day of December, 1922, at 9:30 a. m., at which time I attended, and, in the presence of counsel for the respective parties, proceeded to take the following depositions, that is to say: 1238

EDWARD G. HOCH, a witness called on behalf of the defendant, being by me first duly sworn, deposes and says, as follows:

Direct Examination.

By Mr. Cavanagh: 1239

Q. 1. Please state your name, residence and occupation

A. My name is Edward G. Hoch; I am of lawful age; I reside at 1311 Russell Street, and my occupation is that of manager of the cigar department of the Manufacturers' Club.

Q. 2. How long have you been in the Manufacturers Club cigar department here?

A. About twelve years.

Q. 3. Do you know of the Lorillard Company, the tobacco manufacturers?

A. Yes.

1240 Q. 4. I show you a package of Beech-Nut cigarettes in this case; do you sell these cigarettes?

A. Not any more, we used to sell them..

Q. 5. I also show you a package of scrap tobacco; do you sell any of this?

A. No, no scrap tobacco or plug tobacco at all.

Q. 6. I show you a package of Beech-Nut Chewing Gum; do you sell this?

A. Yes.

Q. 7. How long is it since you sold Beech-Nut cigarettes here?

A. I could not say that. When they first came out
1241 we put them in.

Q. 8. From whom did you purchase those cigarettes, do you know?

A. T. H. Hart & Company.

Q. 9. Those people are jobbers, are they not?

A. Yes.

Q. 10. Do you know who makes the Beech-Nut cigarette?

A. P. Lorillard.

Q. 11. Were you ever under the impression that the Beech-Nut cigarette was made by the same people who make the Beech-Nut gum?

1242 A. No.

Q. 12. Did you ever hear of any comments or inquiries from customers or patrons of yours which would lead you to believe that they thought that the gum and the cigarettes were made by the same people?

A. None whatever.

Q. 13. You never had that in your experience?

A. No, sir.

Q. 14. Would you have any difficulty in distinguishing a package of cigarettes from a package of gum like these Beech-Nut Cigarettes?

A. No, you would not have any difficulty because 1243
they are both different.

Q. 15. The package of cigarettes, from your experience, has a individuality of appearance all its own, has it not?

A. Yes.

Q. 16. Does the same remark apply to the gum?

A. Yes.

Q. 17. Approximately how many people do you serve at your cigar counter here a day?

A. About two hundred and fifty.

Q. 18. This manufacturers Club is one of the largest clubs in Philadelphia, is it not? 1244

A. Yes.

Q. 19. Approximately how many members are there?

A. About 3,800.

Q. 20. And it is located in the heart of the business district?

A. Yes, Broad and Walnut.

Q. 21. At this counter do you sell candy as well as tobacco products?

A. Yes.

Q. 22. Do you sell any other Beech-Nut Packing Company products?

A. Just the Beech-Nut gum and Beech-Nut mints. 1245

Q. 23. Would you have any difficulty in distinguishing in appearance between a package of scrap tobacco and this package of gum?

A. There is the same difference that there is between day and night.

Q. 24. You would not have any difficulty in distinguishing between them?

A. No, sir.

1246 *Cross Examination.*

By Mr. Hinton:

X-Q. 1. You never carried the scrap tobacco?

A. No sir.

X-Q. 2. When did you put in the cigarettes, do you know?

A. When they first came out we put in a few of them.

X-Q. 3. How many do you suppose you sold a week?

A. We did not sell very many of them because the trade for the cheap cigarette is very limited here.

1247 X-Q. 4. Your people did not like that cigarette?

A. I can not say they did or did not; they were not selling very well, however.

X-Q. 5. When you did first put in these cigarettes, do you remember how many packages you sold in a week?

A. No, that I could not say.

X-Q. 6. How many did you buy?

A. We only bought them in small quantities because we get our stock twice a week from the jobber.

X-Q. 7. What do you mean by small quantities?

A. Two or four hundred, one or two cartons at a time.

1248 X-Q. 8. When did you discontinue the Beech-Nut cigarettes?

A. About a couple of months ago.

X-Q. 9. What was the average purchase of those cigarettes during the time that you were handling them?

A. That I could not say. Just as I said before, the sale of that cigarette was very much limited and what it was I could not say.

X-Q. 10. Please try to give me an estimate; did you sell ten packages a week up to the time you quit handling them?

A. No, I did not sell that many.

X-Q. 11. Did you sell five packages a week? 1249

A. I guess about five at that time, yes.

X-Q. 12. And when they first came out, how many were you selling, more than that or less than that?

A. They were going fair when they first came out.

X-Q. 13. But your trade here stopped buying them presumably because they did not like them?

Mr. Cavanagh: That is objected to as calling for a conclusion and as attempting to elicit an answer for which there has been no foundation laid.

A. Yes, they got tired of them, I guess. I could not tell that from the smokers' standpoint. You see here 1250 at this place we do not push any individual brand, we give them just what they ask for. We do not specialize in anything, we sell just what the people demand.

X-Q. 14. Was there a demand for those cigarettes when they first came out?

A. Yes.

X-Q. 15. And the people did buy them for a while?

A. Yes.

X-Q. 16. And then they stopped buying them?

A. Yes, then they stopped buying.

X-Q. 17. And then you discontinued selling them? 1251

A. Yes.

X-Q. 18. You could not tell me how much they bought at the beginning?

A. No, because I did not keep a record of that.

X-Q. 19. You do not remember any customer having made any remarks at all about those cigarettes?

A. None whatever.

X-Q. 20. Do you remember any customer having said anything about the quality of those cigarettes?

A. None whatever.

1252 X-Q. 21. As a matter of fact, the customers in this club do not talk to you about that sort of thing, do they?

A. No, because I don't bother about that.

X-Q. 22. They walk up and put down their money and get what they have purchased and walk away again?

A. Yes.

X-Q. 23. And you do not make any effort to discuss the quality of the goods, or the manufacturer, or anything else with the customer, do you?

A. No.

X-Q. 24. You wait on them and you are busy doing that?

1253 A. Yes.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 1. Most of the cigarettes you sell here are highgrade cigarettes?

A. Yes.

R-D Q. 2. Pallmalls and Egyptian Deities and such cigarettes?

A. Yes, and Murads and Turkish cigarettes.

R-D Q. 3. Do you sell the Pallmall Candy here?

1254 A. No.

R-D Q. 4. But you do sell the Pallmall cigarettes?

A. Yes.

R-D Q. 5. If you had any number of inquiries as to whether the people who made the cigarettes were the same people who manufactured the gum, would you recall such instances?

A. Yes, I would recall it. There were none.

Re-cross Examination. 1255

By Mr. Hinton:

R-X Q. 1. Would you consider Beech-Nut cigarettes quality cigarettes like the Pallmall, or not?

A. I have never smoked a Beech-Nut cigarette, so therefore I do not know.

R-X Q. 2. You do not know anything about their quality?

A. I can tell the quality if I smoke them, but I have never smoked a Beech-Nut cigarette.

R-X Q. 3. You do not know how it compares with a 1256
Pallmall cigarette or Egyptian Deity or any other brand of cigarettes?

A. That is a foolish question to ask because there is as much difference between that tobacco and the Pallmall cigarette as there is between day and night.

R-X Q. 4. What is the difference?

A. One is genuine turkish and the other is domestic.

R-X Q. 5. Which would be the quality goods?

A. The Pallmall.

R-X Q. 6. As compared with the Beech-Nut?

A. Yes, Beech-Nut is cheaper quality.

R-X Q. 7. And you would not consider the Beech-Nut 1257
cigarette a so called quality cigarette, then, would you?

A. I could not say that; it may be in its class.

R-Q. 8. You would not consider the class in which it is to be a quality class, would you?

A. No. It has a quality of its own, that is the way I would figure it.

R-X Q. 9. How does that quality compare with what you know as the quality kind of cigarettes?

A. Like Camel or like Lucky Strikes, that is what I would class the Beech-Nut cigarette with.

R-X Q. 10. How about the Piedmont?

1258 A. The Piedmont is a Virginia cigarette, that is a different class; that is in a class of its own.

R-X Q. 11. You would not class those two together?

A. Not Piedmont and Beech-Nut, no.

R-X Q. 12. If you turned your mind back to the period during which you were handling and selling these Beech-Nut cigarettes to the extent of approximately five packages a week, I want to ask you once again, are you perfectly sure you have never heard any customer make any remark of any kind about the cigarettes?

A. None whatever, no.

R-X Q. 13. And you cannot remember having heard
1259 anything at all?

A. No.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 1. The Pallmall cigarette is an expensive cigarette, is it not?

A. Yes.

R-I Q. 2. It retails for about twenty-five cents?

A. Yes.

1260 R-D Q. 3. And the price of the Beech-Nut is about fifteen cents, isn't it?

A. Yes.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1261

FRED J. HAHN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Cavanagh:

Q. 1. Will you please tell us your name and age and occupation?

A. My name is Fred J. Hahn; I am of lawful age; my occupation is that of manager of the cigar and candy stand in the Land and Title Building, at the corner of 1262
Chestnut and Broad, Philadelphia, Pennsylvania.

Q. 2. How long have you been the manager here?

A. Twelve years.

Q. 3. This stand is in one of the busiest sections of the City of Philadelphia, is it not?

A. Yes.

Q. 4. Do you sell the Beech-Nut cigarettes like the package in this case?

A. I did sell it, yes.

Q. 5. Do you sell the Beech-Nut Scrap tobacco?

A. No.

Q. 6. Do you sell any Beech-Nut chewing gum or oth- 1263
er candy products?

A. Beech-Nut mints, but I will not sell the gum.

Q. 7. Do you know who makes the Beech-Nut cigarette?

A. Yes.

Q. 8. What concern makes it?

A. Lorillard.

Q. 9. Were you ever under the impression that the Beech-Nut cigarette was made by the same people who make the Beech-Nut gum?

A. No.

1264 Q. 10. Did you ever have any of your customers ask you questions or make any comments or inquiries which would lead you to believe that they thought the gum was made by the same people who made the cigarettes?

A. No, nobody ever asked me.

Q. 11. You never knew the question to be raised?

A. No.

Q. 12. Would you have any difficulty in distinguishing a package of cigarettes or a package of scrap tobacco from a package of chewing gum?

A. Do you mean would I have any difficulty in distinguishing the difference between the two? Sure I
1265 would not have any trouble; one is yellow and the other is red and striped.

Q. 13. What would be your opinion of a man who wanted a package of cigarettes or a package of scrap tobacco if he took a package of gum in the place of it?

A. I would think he was crazy to take gum for tobacco.

Q. 14. You think the scrap tobacco and the gum each has an individuality in appearance all its own, then?

A. Yes.

Cross Examination:

1266 By Mr. Hinton:

X-Q. 1. How many of those Beech-Nut cigarettes do you sell in a week?

A. Very few of them.

X-Q. 2. About how many packages a week?

A. The Beech-Nut cigarette does not take; I did sell some of them. They sold for a while.

X-Q. 3. What is the matter?

A. They do not sell, that is all. My trade is mostly Murad and Camels and Piedmonts and Rameses.

X-Q. 4. What do Piedmonts sell for?

A. Fifteen cents, Camels and Lucky Strikes and 1267
Fatimas and Chesterfields, these are the only cigarettes we sell.

X-Q. 5. When the Beech-Nut cigarettes first came out, did you have a demand for them?

A. Yes.

X-Q. 6. What was your average sale approximately in packages per week?

A. About twenty packs a week.

X-Q. 7. And you are not selling as many as five a week now, are you?

A. No.

X-Q. 8. How long did that demand of approximately 1268
twenty packages a week keep up?

A. About four or five weeks, that is all.

X-Q. 9. Then they stopped buying?

A. Yes.

X-Q. 10. Did you ever hear anybody say why he stopped buying the cigarettes?

A. They did not like them, that is all.

X-Q. 11. Did you hear any number of people make that remark, that they did not like the cigarettes?

A. The same remark, that they did not care for them. They would try them, a Camel customer would try them and then he would come back and ask for Camels again. 1269

X-Q. 12. How many times do you suppose you have heard that?

A. Only a few times. The average person will not say anything. They will just say, "Give me so and so."

X-Q. 13. They do not discuss with you what they think?

A. No.

X-Q. 14. There is no reason why they should, is there?

A. No, they just change their brand and that is all.

X-Q. 15. You are alone in looking after this stand, aren't you?

1270 A. Yes.

X-Q. 16. It keeps you pretty busy waiting on the people that come here?

A. Yes.

X-Q. 17. You do not have much time to talk?

A. No, not much. I am here all the time. I never get a dinner hour from morning until night.

X-Q. 18. You are on the job all the time?

A. Yes.

X-Q. 19. You knew, of course, before these cigarettes came in that they were a Lorillard product?

A. Sure, they called on me, the Lorillard man called
1271 on me.

Re-direct Examination:

By Mr. Cavanagh:

R-D Q. 1 You say you do not sell the Beech-Nut gum now?

A. No.

R-D Q. 2. Why not?

A. Because of the conditions, the way they raise their price against other brands, you can not sell them at that price. I stopped selling them when they made them
1272 ninety cents. I would not put it back again. They made the price ninety cents and I threw it out and I would not put it back.

R-D Q. 3. As to cigarettes, different customers have different tastes and different likes and dislikes for different brands?

A. Yes.

R-D. 4. That is all a matter of individual taste, certain brands they like and others they do not like?

A. Yes.

Re-cross Examination: 1273

By Mr. Hinton:

R-X Q. 1. With cigars and cigarettes, will you say it was altogether a matter of individual taste whether a man likes the goods or not, and would you say that there is no such thing as a good cigar and a bad cigar?

A. Certainly there is such a thing as a good cigar and a bad cigar, but it must suit a man's taste.

R-X Q. 2. How about cigarettes?

A. The same way.

(Testimony of witness concluded.) 1274

(Signature of witness waived by consent of counsel.)

FRANKLIN P. STERN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination:

By Mr. Cavanagh: 1275

Q. 1. Will you please state your name, age, residence and occupation.

A. My name is Franklin P. Stern; I am fifty-three years of age; my occupation is that of cigar dealer; my business is located at 20 North Twelfth Street, Philadelphia, Pennsylvania.

Q. 2. How long have you been in business?

A. All my life; I have been here at this store thirty-three years.

Q. 3. What goods do you sell besides tobacco?

1276 A. Chewing gum, candies, razor blades, pipes and smokers' articles.

Q. 4. Do you sell the Beech-Nut Scrap Tobacco and the Beech-Nut cigarettes?

A. Yes.

Q. 5. Do you sell the Beech-Nut Chewing Gum?

A. Yes.

Q. 6. How long have you been selling the scrap tobacco?

A. Ever since it has been on the market.

Q. 7. How does that Beech-Nut Scrap tobacco sell?

A. Very good, indeed.

1277 Q. 8. It is a good seller?

A. Yes, the best scrap seller there is.

Q. 9. Who makes the Beech-Nut scrap, do you know?

A. Lorillard Company.

Q. 10. Who puts out the Beech-Nut Cigarette?

A. Lorillard Company.

Q. 11. Did you ever have any customers make any comments or inquiries, or ask any questions which would lead you to think that they thought the Beech-Nut scrap tobacco and the Beech-Nut cigarettes were made by the same people that made the Beech-Nut chewing gum

A. Positively not.

1278 Q. 12. Were you yourself ever under the impression that the Beech-Nut tobacco or the Beech-Nut cigarettes were made by the same people who made the Beech-Nut gum?

A. No, I knew different.

Q. 13. Would you have any difficulty in distinguishing the appearance of a package of Beech-Nut scrap tobacco and a package of Beech-Nut cigarettes from a package of Beech-Nut chewing gum?

A. Absolutely none.

Q. 14. A scrap tobacco package and a cigarette package have an individuality of their own?

A. Yes, distinctly different from the gum.

Q. 15. Do you sell other articles of different classes and different kinds that have the same name? 1279

A. Yes.

Q. 16. For example, what articles?

A. Apple chewing gum and apple chewing tobacco.

Mr. Hinton: This line of testimony is objected to as immaterial and irrelevant.

Q. 17. I call your attention to a piece of Apple plug tobacco; is that the Apple tobacco to which you have referred?

A. Yes. 1280

Q. 18. And I call your attention to a package of Apple Chewing Gum; is that the Apple gum to which you have referred.

A. Yes.

Q. 19. And you sell both of these articles in your store here, do you not?

A. Yes.

(For convenience in the taking of defendant's depositions it is stipulated that the various exhibits or articles under the same name may be introduced hereafter in evidence and identified, by a separate or general stipulation, subject to any objections which the plaintiff's counsel may wish to make to the introduction or to the materiality or admissibility of the exhibits.) 1281

Q. 20. Do you sell Eveready matches?

A. Yes.

Q. 21. And Eveready razor blades?

A. Yes.

Q. 22. Are those made by different concerns?

A. They are.

1282 Q. 23. What is the reputation of the P. Lorillard Company in the tobacco business?

A. A No. 1.

Q. 24. It is a very large manufacturing concern, isn't it?

A. It is.

Q. 25. As a tobacco man and speaking from your experience, would you prefer to purchase a tobacco product from a tobacco manufacturing company, or from a concern which makes food products?

A. From a tobacco manufacturing company.

Q. 26. Did you ever hear of the Beech-Nut Packing
1283 Company, the chewing gum people, ever putting out any tobacco products?

A. Never.

Q. 27. Did you ever hear of the P. Lorillard Company ever putting out any food products?

A. Never. .

Q. 28. This store is in a busy section of the City, is it not?

A. Yes, centrally located.

Q. 29. And you have about how many customers a day here in your store?

A. Close to a thousand.

1284

Cross Examination.

By Mr. Hinton:

X-Q. 1. How many of those Beech-Nut cigarettes do you sell now, how many packages a week?

A. Just now we have laid them off because we have another brand that we are putting out. When we were selling the Beech-Nut cigarettes we were selling about 10,000 a week, or 500 packages.

X-Q. 2. Up until when?

A. That was up until about six weeks ago. 1285

X-Q. 3. Then, although you were selling five hundred packages a week, you discontinued the sale of them?

A. Yes, because we had them on at a special price; we were selling the 20-cent cigarette at ten cents.

X-Q. 4. Are they a 20 cent cigarette?

A. No, I am mistaken; a 15-cent cigarette; we were selling them at ten cents.

X-Q. 5. How long have you been selling them at ten cents; do you always sell them at ten?

A. No, sir.

X-Q. 6. Before you began to offer them at ten cents, how many packages were you selling a week? 1286

A. About twenty-five.

X-Q. 7. Then you began offering them at ten cents a package and sold about five hundred packages a week?

A. Yes.

X-Q. 8. Until you got rid of your stock?

A. Yes, and then we got another brand to take its place. We could not buy them then to sell at ten cents.

X-Q. 9. When those cigarettes first came out, how many packages did you sell a week, approximately?

A. About twenty-five a week. They started off and held one pace.

X-Q 10. There was no difference; they began at 1287 twenty-five packages a week and sold right straight along about twenty-five a week?

A. Yes.

X-Q. 11. And then for a while you sold five hundred packages a week?

A. At the cut prices, yes.

X-Q.12. And then stopped?

A. Yes.

X-Q. 13. Are you quite sure that when you first put in the cigarettes you did not sell more than twenty-five packages?

1288 A. I would not say: To my estimation it was close to twenty-five a week.

X-Q. 14. No variation?

A. No variation.

X-Q. 15. What is the average purchase of a cigarette smoker?

A. Approximately a package a day, I would say.

X-Q. 16. Then twenty-five pacakges a week would satisfy the demands of three or four or five cigarette smokers?

A. Yes.

X-Q. 17. Or else twenty-five packages a week would
1289 be sold to a great many more people who would buy one package and then never buy another package?

A. Yes, that is the idea.

X-Q. 18. Which of those explanations do you think is the most probable for the fact that you sold twenty-five packages a week only?

A. The explanation would be this, that the blend did not seem to suit the public on cigarettes and they tried them and did not buy any more.

X-Q. 19. I suppose a great many people would buy a package and try them and then not buy another package?

1290 A. Yes.

X-Q. 20. And the reason for that is, as you just said, they did not seem to like it?

A. They did not like the blend.

X-Q. 21. Then you had a good stock of these cigarettes on hand and you cut the price to get rid of them?

A. Yes.

X-Q. 22. And you got rid of 500 packages at ten cents?

A. Yes.

X-Q. 23. You said people did not seem to like the blend of those cigarettes, is that a statement made on

the basis of anything that your customers said to you about those cigarettes? 1291

A. No, they simply tried them and did not buy again.

X-Q. 24. They did not tell you whether they liked them or not?

A. No, they just went back to their old blends.

X-Q. 25. You did not hear any customers say anything about the cigarettes?

A. No, sir, they did not.

X-Q. 26. They never said anything of any kind except to ask for the cigarettes and then not buy them any more? 1292

A. That is right.

X-Q. 27. How long have you been selling that Apple chewing gum and the Apple chewing tobacco?

A. The Apple chewing gum has been on the market about four months and the chewing tobacco has been on the market about ten or twelve years.

X-Q. 28. Is the Apple chewing tobacco a good seller?

A. Very.

X-Q. 29. How many clerks do you employ here?

A. Three besides myself.

X-Q. 30. I do not suppose you can tell exactly, but how many packages of those Beech-Nut cigarettes would the average purchaser buy before he quit using them? 1293

A. I couldn't give you an idea of that, That would be very hard to tell. The average smoker usually tells on one package of cigarettes whether it suits his taste or not. That is the average man.

X-Q. 31. Then in so far as the purchasers who would buy those Beech-Nut cigarettes and then fail to repeat, your twenty-five sales a week would represent about twenty-five people a week who bought a package a week?

A. Experimenting on the cigarettes.

1294 X-Q. 32. And they quit because they did not like it?
A. Yes.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 1. At the time you reduced the price of the Beech-Nut Cigarettes there was a price cut war on in Philadelphia, was there not?

A. Yes.

R-D Q. 2. And the prices were being cut on all domestic cigarettes, practically?

1295 A. Yes.

R-D Q. 3. And throughout the whole city of Philadelphia it was well known that there was a price-cut war on?

A. Yes.

R-D Q. 3. And a tobacco store had to cut the prices to sell any goods?

A. To sell any goods, otherwise they were not salable.

R-D Q. 4. And the price was cut on the various standard brands?

A. Yes, nothing sold at normal prices.

1296 R-D Q. 5. Everything was cut?

A. Everything was cut. There is a little thing that I would like to explain in addition to that that may bear on this question. In our stock of cigarettes, if w do not turn it over once a week, we consider it a dead brand and our main object, then is to sell them quickly. Having fresh cigarettes is what makes them salable.

R-D Q. 6 You mean by that that cigarettes must not be dried out?

A. Yes, they must not be dried out, the goods must be fresh to be sold. . This is especially true of cigarettes. Cigarettes must turn over once a week with us.

R-D Q. 7. Different customers have different tastes in that regard? 1297

A. Absolutely.

R-D Q. 8. You find that in the scrap tobacco the same rule applies?

A. Yes.

R-D Q. 9. The Beech-Nut Scrap tobacco is a great seller with you, is it not?

A. The best we have.

R-D Q. 10. Lots of your customers like that scrap tobacco?

A. Yes.

R-D Q. 11. And they might not take the same liking to other brands of scrap? 1298

A. That is correct.

Re-cross Examination.

By Mr. Hinton:

R-X Q. 1. As a matter of fact, in order to put an end to the discussion, you did cut the price more on your Beech-Nut cigarettes than you did on the other cigarettes?

A. Yes, because we consider that a dead brand.

R-X Q. 2. You wanted to get rid of it? 1299

A. We wanted to clean it up.

R-Q Q. 3. And you did not want to deal in it any more?

A. Not unless they came back.

R-X Q. 4. Because your customers, having tried them, did not like them?

A. They did not like the cigarettes.

1300 *Re-direct Examination.*

By Mr. Cavanagh:

R-D Q. 1. And it may have been a question of their own taste?

A. Certainly. The blend did not seem to suit.

R-D Q. 2. One may like one blend and another man may like another blend?

A. Yes.

(Testimony of witness concluded.)

1301 (Signature of witness waived by consent of counsel.)

LOUIS GRAY, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and
1302 occupation.

A. My name is Louis Gray; my store here is No. 52 North 13th Street; the store is located in the business section of the City of Philadelphia.

Q. 2. What sort of goods do you handle?

A. Just what you see here, all kinds, tobacco, razor blades, toilet articles, gum, and a little candy.

Q. 3. Do you sell playing cards and perfumery?

A. Yes.

Q. 4. How many customers a day do you have approximately?

A. About four hundred and fifty.

Q. 5. Do you know of the P. Lorillard Company? 1303

A. Yes.

Q. 6. Do you handle Beech-Nut Scrap Tobacco like this package I now show you?

A. Yes.

Q. 7. Do you know what company makes that?

A. Yes.

Q. 8. What company makes it?

A. Lorillard Company.

Q. 9. Do you sell the Beech-Nut cigarette?

A. Yes.

Q. 10. Do you know what company makes the Beech-Nut cigarette? 1304

A. Yes.

Q. 11. What company is it?

A. Lorillard.

Q. 12. Do you sell Beech-Nut chewing gum here?

A. No sir.

Q. 13. Did you ever handle the Beech-Nut gum?

A. I did, but not here, not in this store. I had another store where I used to handle it.

Q. 14. How long ago was it that you used to handle it?

A. About a year ago.

Q. 15. Do you know what company makes the Beech-Nut chewing gum? 1305

A. The Beech-Nut Company, Beech-Nut Mint Company that makes the Beech-Nut mints.

Q. 16. Were you ever under the impression that the same company made the tobacco that made the mints and the gum?

A. No.

Q. 17. Either in this store or in the store where you worked before, did you ever hear any customers make any remarks which indicated that they were under the impression that the same company that made the gum also made the cigarettes?

1310

1306 A. No, not in the stores where I was.

Q. 18. A cigarette package has an individuality of its own as far as its appearance goes, has it not?

A. Yes.

Q. 19. And does the same thing apply to the Beech-Nut Scrap tobacco?

A. Yes.

Q. 20. And the appearance of the cigarette package is entirely different from the appearance of the gum package, is it not?

A. Yes.

Q. 21. What would you think of any one who would
1307 mistake a package of Beech-Nut chewing gum for a package of Beech-Nut cigarettes?

A. In what way? I don't understand you.

Q. 22. What would you think of a man who would accept Beech-Nut gum under the impression that he was getting a package of Beech-Nut cigarettes, would that be possible?

A. If he would come in and ask for Beech-Nut, do you mean?

Q. 23. Would it be possible for any one to take Beech-Nut gum in place of Beech-Nut cigarettes, if he wanted the cigarettes?

1308 A. No.

Q. 24. Is the Beech-Nut Scrap tobacco a good seller?

A. Yes.

Q. 25. Have you any scrap tobacco that is as good seller as the Beech-Nut scrap?

A. Not here I have not.

Q. 26. How much of the Beech-Nut scrap tobacco do you sell in a week?

A. About eight dozen.

Q. 27. Did you ever hear of a tobacco company making food products?

A. No, I never did.

Q. 28. Did you ever hear of a food products company making tobacco? 1309

A. No.

Q. 29. Would you prefer to handle a tobacco which was put out by a straight tobacco company, or a tobacco which was put out by a food products company that also made tobacco?

A. I think I would prefer to buy from a straight tobacco company.

Q. 30. Is your sale for Beech-Nut gum as good as it was before the Beech-Nut cigarette made its appearance on the market?

A. I do not have a call for Beech-Nut gum once in 1310 six months, and the price is so high that there is no profit in it.

Cross Examination.

By Mr. Hinton:

X-Q. 1. How many packages of Beech-Nut cigarettes do you sell a week, approximately?

A. About a thousand Beech-Nut cigarettes a week.

X-Q. 2. That would be fifty packages?

A. Yes.

X-Q. 3. Are they selling as well now as they did in 1311 the beginning, or not so well?

A. They are not selling so well on account of the other cigarettes coming down so low in price.

X-Q. 4. How many packages did you sell when they first came out, how many packages a week?

A. We sold more at that time, before the other cigarettes came out.

X-Q. 5. About how many?

A. About 3,000.

1312 X-Q. 6. In other words, you sold at least three times as much in the beginning as you do now?

A. Yes.

X-Q. 7. Wouldn't it be closer to five times?

A. Maybe a little more; I can not give you exactly the figures.

X-Q. 8. How long did you say you had been in this store?

A. Over a year.

X-Q. 9. Before that you were in another tobacco store?

A. Yes.

1313 X-Q. 10. How many years were you there?

A. About two years.

X-Q. 11. What were you doing before that?

A. In the tobacco game, but not in the retail game.

X-Q. 12. In the wholesale line?

A. Manufacturer of cigars.

X-Q. 13. Were you a manufacturer of cigars before?

A. Yes.

X-Q. 14. When you were a cigar manufacturer, did you make any private brands of cigars?

A. Yes.

X-Q. 15. Did you make cigars which were branded
1314 with some brand that bore the name of some particular retailer?

A. No, I could not do that.

X-Q. 16. I mean did you furnish him with his brand?

A. Oh, yes.

X-Q. 17. The retailers would order their brands from you?

A. Yes.

X-Q. 18. Their own private brands?

A. Yes.

X-Q. 19. You did not make any effort to make a note or to remember any remarks or comments or inquiries

that customers may have made about the Beech-Nut cigarettes, did you? 1315

A. No, I did not.

X-Q. 20. Did anybody ever say anything to you about the Beech-Nut cigarettes, except to buy them?

A. No.

X-Q. 21. From the time you first put them in until the present time there have been no remarks of any kind made to you by anybody over the counter about those cigarettes?

A. Do you mean as far as the quality is concerned?

X-Q. 22. Or about anything?

A. No. 1316

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. How long ago was it that you sold 3,000 Beech-Nut cigarettes a week?

A. Just before the price of the other cigarettes came down.

R-D. Q 2. In your opinion, was the decrease in the sale of Beech-Nut cigarettes due to the cut in the price of the other brands?

A. Yes. 1317

Mr. Hinton: I object to the question as calling for the opinion and conclusion of the witness.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1318

HARRY A. LINN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says:

Direct Examination.

By Mr. Preston:

Q. 1. What is your name, residence and occupation?

A. My name is Harry A. Linn; the address of this store is 2557 Kensington Avenue, Philadelphia, Pennsylvania.

1319

Q. 2. What sorts of stuff do you sell in your store in addition to tobacco?

A. Everything, toys, novelties, magazines, clocks.

Q. 3. Do you sell playing cards?

A. Yes, playing cards, perfumery, soda and everything.

Q. 4. Do you know of the Lorillard Company?

A. Yes.

Q. 5. Do you handle the Beech-Nut Scrap Tobacco like the package I now show you?

A. Yes.

Q. 6. How long have you handled it?

1320

A. For the last ten years anyway.

Q. 7. Is that a good seller with you?

A. It is.

Q. 8. Do you know what company makes this?

A. Sure.

Q. 9. What company?

A. Lorillard.

Q. 10. Do you sell Beech-Nut cigarettes?

A. Yes.

Q. 11. Do you know what company makes them?

A. The same company.

Q. 12. How do those sell? 1321

A. Not so extra with me.

Q. 13. Is it a fair seller?

A. A fair seller.

Q. 14. Do you sell Beech-Nut chewing gum like this package I now show you?

A. Yes.

Q. 15. Were you ever under the impression that the same company that made the Beech-Nut Chewing Gum also makes the Beech-Nut tobacco and the Beech-Nut cigarette?

A. No, it never entered my mind.

Q. 16. Do you know what company makes the Beech- 1322
Nut chewing gum?

A. I did not take interest enough in it to find out.

Q. 17. Did you ever hear any remarks or comments among your customers which indicated that they were under the impression that the chewing gum was made by the same company that made the tobacco?

A. No.

Q. 18. How many customers do you have in your store in a day, on an average?

A. I never took a figure on that.

Q. 19. Can you approximate how many?

A. About three or four hundred, I guess. 1323

Q. 20. How much of this scrap tobacco do you sell in a week?

A. About ten dozen or twelve dozen a week.

Q. 21. Have you any other scrap tobacco which is as good a seller as that Beech-Nut Scrap?

A. That is about my best seller, the Beech-Nut Scrap. The Omega comes next.

Q. 22. Whose name appears on the front of the cigarette package?

A. Lorillard.

1324 Q. 23. Can you read that readily from where you stand?

A. Certainly.

Q. 24. And you are about four feet from that package?

A. Yes.

Q. 25. You know it is a common custom to wrap cigarette packages in glazed paper, do you not?

A. Yes.

Q. 26. The cigarette package has an individuality of its own as far as its appearance is concerned, isn't that true?

1325 A. Yes.

Q. 27. And the same thing is also true of a chewing gum package?

A. Yes.

Q. 28. What would you think of any one who would mistake the gum package for the cigarette package?

A. I would say that he was crazy altogether. If anybody wants gum he doesn't want tobacco and if anybody wants tobacco he doesn't want gum.

Q. 29. Do you regard gum and tobacco in the same or in different classes?

A. Different classes entirely.

1326 Q. 30. Did you ever hear of a tobacco company putting out any food products?

A. Not that I know of.

Q. 31. Did you ever hear of a food products company making any tobacco?

A. Not to my knowledge. Maybe they did.

Q. 32. Would you prefer to handle tobacco made by a straight tobacco company, or tobacco made by a company that also makes various food products?

A. If they handle tobacco only they generally know their business better. I would rather buy from a tobacco company.

Q. 33. Is your sale of Beech-Nut gum as good as it 1327
was before the cigarette appeared?

A. Beech-Nut gum is a slow seller with me.

Q. 34. About how many packages a week of the gum do you sell?

A. Very little.

Q. 35. Do you sell twenty packages of the gum a week?

A. About that, I would say.

Q. 36. How many packages of Beech-Nut Scrap tobacco do you sell in a week?

A. About twelve dozen.

Q. 37. What is the reputation of the Lorillard Com- 1328
pany in this community?

A. Good, to my knowledge.

Q. 38. Can you say whether the Lorillard Company advertises their wares and products extensively in this district?

A. Sure they do.

Q. 39. Do you sell the Gem razor blades?

A. Yes.

Q. 40. Do you sell Gem matches?

A. No, I have none on hand today. Sometimes I do sell them.

Q. 41. You have handled the Gem match? 1329

A. Yes.

Q. 42. They are not made by the same company, are they?

A. Not to my knowledge.

Mr. Hinton: This line of testimony is objected to as incompetent, irrelevant and immaterial to any issue in this case.

1330 *Cross Examination*

By Mr. Hinton:

X-Q. 1. Do you have a record of the number of purchases made, a record from your cash register?

A. Do you mean of the sales?

X-Q. 2. Yes.

A. I never take a note of how many people come in here in a day. It is all foolishness because some kid can come in three times a day for some little thing. It does not mean the number of customers coming in.

1331 X-Q. 3. Would that show how many sales you made a day?

A. Yes.

X-Q. 4. Would you mind telling me how many you made yesterday?

A. I don't mark down the sales, I just mark down the receipts, not the sales, because while you are sitting there I can ring up three times for you. You will order one thing and pay for it and I will ring it up and pretty soon you will order something else.

X-Q. 5. I would like to know how many times you did operate it, if you will tell me.

1332 A. I don't keep track of that.

X-Q. 6. Are you here by yourself most of the time?

A. I am always here, but I have help.

X-Q. 7. How much help?

A. One, sometimes two.

X-Q. 8. How many packages of Beech-Nut cigarettes do you sell a week?

A. About two or three cartons.

X-Q. 9. Did you ever hear any customers say anything to you about those cigarettes, any remark of any kind except to say, "Beech-Nut cigarettes" when they bought them?

A. That is about all, Beech-Nut cigarettes.

X-Q. 10. You never heard anybody express any opin- 1333
ion of any kind about them?

A. No, sir.

X-Q. 11. As to whether they liked them or not, or anything about them?

A. When they come in for Beech-Nut cigarettes they make up their mind before they come in that they want Beech-Nut cigarettes. It is not like a man purchasing a cigar. They ask my opinion sometimes as to whether it is a good one or a bad one, in the case of cigars; but with the cigarettes they make up their minds whether they want them before they come in.

X-Q. 12. How long have you been selling tobacco? 1334

A. For the last fifteen years.

Re-direct Examination

By Mr. Preston:

R-D Q. 1. If you had heard a considerable number of remarks which indicated confusion in the minds of the customers, or which indicated that they thought that the same company which made the gum also makes the tobacco, would you have remembered it or wouldn't you?

A. Nobody ever asked, it never came into my mind.

R-D Q. 2. If there had been a considerable number of 1335
those inquiries, you are sure you would now remember it?

A. Surely.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1336

DANIEL M. HARBOT, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says, as follows:

Direct Examination

By Mr. Preston:

Q. 1. Please state your name, residence and occupation.

A. My name is Daniel M. Harbot; the address of this store is 6802 Tacony Street, Philadelphia.

1337 Q. 2. How far are we from the center of Philadelphia?

A. By rail thirteen miles and by road about nine miles.

Q. 3. How many people do you have in and out of your place a day?

A. My register goes anywhere from 200 to 325 customers, that is sales.

Q. 4. You are near the Diston Saw Works, are you not?

A. A half a square down the street are the Diston Saw Works.

1338 Q. 5. Do you serve lunches here?

A. Yes.

Q. 6. You have a great many of those workers in here to lunch?

A. Quite a few.

Q. 7. What sort of stuff do you sell here in addition to tobacco?

A. Pies, light lunches, soft drinks, ice cream, groceries of a small description.

Q. 8. Do you sell razor blades here?

A. Yes, razors and razor blades, hair-pins, shoe strings, collar buttons, gloves, candy, hosiery, suspend-

ers, false faces and other things too numerous to mention. 1339

Q. 9. Do you sell Beech-Nut Scrap Tobacco like the package I now show you?

A. Yes.

Q. 10. How long have you sold it?

A. Ever since it has been on the market.

Q. 11. How much of that do you sell a week?

A. From twelve to fifteen dozen.

Q. 12. Have you any scrap tobacco that sells as well as that Beech-Nut Scrap?

A. No.

Q. 13. Do you sell Beech-Nut cigarettes? 1340

A. I have them for sale, but I don't sell them.

Q. 14. Do you know what company makes these Beech-Nut tobacco products?

A. Lorillard makes the tobacco, but I don't know who makes the cigarettes.

Q. 15. Who would you think makes the cigarettes?

A. I don't know, I never bothered to find out.

Q. 16. Will you look at that package of cigarettes; whose name is on the front of it?

A. Lorillard. I never tried to look at it before.

Q. 17. Do you handle Beech-Nut chewing gum?

A. Yes. 1341

Q. 18. Did you ever think that the same people who made the Beech-Nut chewing gum also made the Beech-Nut cigarettes?

A. I never thought anything about it.

Q. 19. Do you know what company makes the Beech-Nut gum?

A. No, I never looked.

Q. 20. Do you think that the cigarette package looks like the gum package?

A. No.

Q. 21. Did you ever hear any remarks among your

1342 customers that indicated that they thought the same company made the gum that made the tobacco?

A. No, I never did.

Q. 22. And you yourself were never under the impression that the two things were made by the same company?

A. I never considered it, to my knowledge.

Q. 23. Can you read that name Lorillard Company on the front of that package easily through the glazed paper?

A. Yes.

Q. 24. You know that it is a common custom to wrap
1343 cigarette packages in glazed paper, do you not?

A. It is lately, yes.

Q. 25. How much Beech-Nut Chewing Gum do you sell here a week?

A. About three packages.

Q. 26. How much Beech-Nut Scrap Tobacco do you sell?

A. Twelve or fifteen dozen.

Q. 27. Did you ever hear of a Tobacco company putting out food products?

A. Not to my knowledge.

Q. 28. Did you ever hear of a food products company
1344 making tobacco?

A. I never heard of it.

Q. 29. Would you rather have a tobacco product made by a straight tobacco company, or one made by a food products company that made tobacco as well?

A. Candidly I guess if I chewed it I would not care where it was made as long as it was good.

Q. 30. Will you state whether or not you handle the following products: Do you sell Apple Tobacco?

A. Yes.

Q. 31. Do you sell Apple Chewing Gum?

A. Yes. That is another one like Beech-Nut cigarettes, we have it to sell, but we sell very little of it.

Q. 32. I show you a piece of the Apple Plug Tobacco and a package of the Apple gum; what is the device on the Apple Tobacco? 1345

Mr. Hinton: That speaks for itself. We object to it.

A. It is a tin tag, that is about all.
Q. 33. What does it represent?
A. It represents an apple.
Q. 34. What is the picture on the front of the gum?
A. An apple.
Q. 35. Are they both red?
A. They are. 1346
Q. 36. Do you sell Comet Playing Cards?
A. Yes.
Q. 37. And Comet Tobacco?
A. Yes.
Q. 38. Do you sell Velvet pencils?
A. I do sell them, or I did.
Q. 39. Do you sell Velvet Tobacco?
A. Yes.
Q. 40. Do you sell Chesterfield pipes?
A. No.

Mr. Hinton: This line of testimony is objected to as irrelevant. 1347

Cross Examination.

By Mr. Hinton:

X-Q 1. You cater to the laborers in the Diston Saw Works and their families, I suppose?

A. There are very few families in this neighborhood. The majority of them in this neighborhood are coons, as far as families are concerned.

1348 X-Q 2. You will put in stock anything that you can sell and that you have a demand for?

A. Yes.

X-Q. 3. It does not make any difference to you who makes it, does it?

A. No, sir, not so long as it sells.

X-Q. 4. How many packages of Beech-Nut cigarettes did you sell a week when they first came out; did they go pretty well for a while?

A. For the first couple of weeks they did, yes.

X-Q. 5. Then they fell off?

A. Yes.

1349 X-Q. 6. How many are you selling now?

A. We sell a pack a week; if we sell a pack a week now we are lucky.

X-Q. 7. What made the demand for them fall off?

A. The other cigarettes dropped in price, the Camels and the Piedmonts dropped down in price. When the Beech-Nut cigarettes first came out they were twenty for fifteen cents and we were getting twenty cents for Camels and Piedmonts, and then they dropped and that knocked the sale out on Beech-Nut cigarettes.

X-Q. 8. What was your maximum sale of Beech-Nut Cigarettes in packages per week, would you say?

1350 A. When they first came out?

X-Q. 9. Yes.

A. I would say from twenty to twenty-five packs.

X-Q. 10. Never anything to amount to anything?

A. No.

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. A cigarette package has an individuality of its own, as far as its appearance is concerned, is that true?

A. Yes. 1351

R-D Q. 2. And the gum package also has an individual appearance of its own?

A. Yes.

R-D Q. 3. Is there any similarity in the appearance of a cigarette package and a gum package?

A. There is a lot of difference between a pack of cigarettes and a pack of chewing gum, as far as the looks is concerned.

R-D Q. 4. Do you think any one could confuse the two?

A. Only if he was blind.

R-D Q. 5. And you say you sell now about a package 1352
a week of Beech-Nut cigarettes?

A. Some weeks, and some weeks I don't sell a package.

R-D Q. 6. How many packages of Beech-Nut Chewing Gum do you sell a week?

A. One or two.

R-D Q. 7. How many packages of Beech-Nut Scrap Tobacco do you sell in a week?

A. From twelve to fifteen dozen.

(Testimony of witness concluded.)

(Signature of witness waived by consent of 1353
counsel.)

JOSEPH COHEN, a witness produced on behalf of the defendant, being by me first duly sworn, deposes and says, as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Please state your name, age, residence and occupation.

1354 A. My name is Joseph Cohen; my place of business is 934 North Second Street, Philadelphia, Pennsylvania; I am in the tobacco business.

Q. 2. Retail business here, are you not?

A. Yes.

Q. 3. What sorts of articles do you sell here?

A. Cigars and cigarettes.

Q. 4. Do you sell candy?

A. Not retail.

Q. 5. You sell gum, I believe?

A. Not retail.

Q. 6. You do not sell any Beech-Nut gum at retail
1355 at all?

A. No.

Q. 7. Do you job tobacco and confections?

A. Yes.

Q. 8. Do you job Beech-Nut gum?

A. Yes.

Q. 9. How long have you been handling Beech-Nut Scrap tobacco like this package I now show you?

A. As long as I have been in business, seven years.

Q. 10. Is that scrap tobacco a good seller on this market?

A. Very good..

1356 Q. 11. Is there any other scrap tobacco that is as good a seller as that?

A. Not with us there is not.

Q. 12. Do you handle the Beech-Nut cigarette?

A. We do.

Q. 13. How many people come in and out of your store here a day, about?

A. Closer to a hundred than it would be to a thousand.

Q. 14. Did you ever hear any discussion or any remarks among your customers which indicated to you that they thought that the Beech-Nut Chewing Gum was

made by the same people that made the Beech-Nut Tobacco? 1357

A. No.

Q. 15. You know what people make the Beech-Nut Tobacco and the Beech-Nut Cigarettes, do you not?

A. Yes.

Q. 16. Which company is it?

A. The P. Lorillard Company.

Q. 17. You never thought yourself, that the same company made the Beech-Nut Chewing Gum and the Beech-Nut Tobacco?

A. No.

Q. 18. Do you regard the Tobacco and the gum as in the same class? 1358

A. As far as selling them is concerned I imagine they work together because it would be natural for a tobacco man to handle chewing gum. They have done it as long as I remember.

Q. 19. Do you regard tobacco and gum as in the same class of goods?

A. No.

Q. 20. Did you ever hear of a tobacco manufacturing concern that made gum and also made food products?

A. No sir.

Q. 21. Did you ever hear of a food manufacturing concern that made tobacco products? 1359

A. No sir.

Q. 22. Do you think that a cigarette package and a gum package look at all alike?

A. They have the oval there.. I never paid much attention to either one. That has the oval and the words "Beech-Nut" written in it in the same way and that may have something to do with it.

Q. 23. Is it true that a cigarette package has an individuality of its own? You know a cigarette package when you see it?

1360 A. Of course.

Q. 24. You think that no one could confuse a cigarette package with a gum package?

A. No sir.

Q. 25. Do you know the oval to be a common device upon various articles on the market?

Mr. Hinton: The question is objected to as leading.

Q. 26. Will you state whether or not you know the oval to be a common device?

1361

Mr. Hinton: I make the same objection.

A. I do not know. I really could not answer that. I would not think that because it had an oval that it would necessarily have to be a cigarette package.

Q. 27. Whose name is written on the front of that cigarette package underneath the label?

A. P. Lorillard Company.

Q. 28. You can read that through the glazed cover, can you not?

A. Yes.

1362 Q. 29. Would seeing that name on there indicate to you that Lorillard Company was the maker?

A. Naturally, yes.

Q. 30. You never saw a package of those cigarettes without Lorillard's name on it, did you?

A. No, I don't think I did. I have never paid much attention to that.

Q. 31. And you never heard of any one who thought that the people who make the Beech-Nut tobacco and the Beech-Nut cigarette also made the Beech-Nut gum?

Mr. Hinton: The question is objected to as calling for hearsay testimony and for the conclusion of the witness. 1363

A. No, sir.

Cross Examination.

By Mr. Hinton:

X-Q. 1. When did you first notice the name P. Lorillard on these Beech-Nut cigarettes?

A. I never noticed the name other than the fact that I know when the Beech-Nut cigarettes first came out that they were introduced by Lorillard's man. 1364

X-Q. 2. But you never noticed that they had that P. Lorillard on there before this moment, did you?

A. I could not say. I would not know now unless you gentlemen asked me about it and I looked at it, because I didn't pay that much attention to an individual package.

X-Q. 3. Your business is mainly jobbing?

A. Yes.

X-Q. 4. Very small retail trade?

A. Very little. 1365

X-Q. 5. Who do you job to, what kind of people? Any particular kind of trade?

A. Yes, the average small store.

X-Q. 6. Small tobacco stand?

A. Yes, or small store, a few drug stores.

X-Q. 7. Do you go out and sell goods yourself personally?

A. I do, yes.

X-Q. 8. How much of a sale have you got on these Beech-Nut Cigarettes now?

A. Very little.

X-Q. 9. What is the matter with them, do you know?

1366 Mr. Preston: The question is objected to as calling for a conclusion of the witness.

A. Maybe it is because of the price, I don't know.

X-Q. 10. Did you have a good sale for them at the beginning?

A. Yes, for the reason that at the time they first came out the other cigarettes were much higher, that is the leading brands like Camels and Piedmonts were retailing at twenty cents and Beech-Nut came out at a cheaper price.

X-Q. 11. They will not hold their own against other
1367 cigarettes of the same price?

A. I can not say. The cigarette may be just as good but maybe there are too many other leading brands selling for fifteen cents today so that there is not room for a cigarette of that sort.

X-Q. 12. Have you ever heard any remarks from your customers about these Beech-Nut cigarettes at all?

A. In reference to what?

X-Q. 13. About anything?

A. No, with the exception that at one time there were a few sold in town below the regular price, that is the retail price was cut, but that was mainly due, I suppose,
1368 to the distribution.

X-Q. 14. I am talking about remarks from the customers, did you ever hear anybody say anything about the Beech-Nut cigarettes?

A. No.

X-Q. 15. Or the Beech-Nut Scrap Tobacco?

A. No.

X-Q. 16. You cannot remember any remark of any kind at the moment?

A. No.

Re-direct Examination. 1369

By Mr. Preston:

R-D Q. 1. Will you state whether your experience leads you to believe that the Beech-Nut Scrap Tobacco is the best tobacco seller on this market?

A. We sell more Beech-Nut Scrap Tobacco than we do any other scrap.

R-D Q. 2. Do you sell much more?

A. Yes, pretty nearly twice as much of the Beech-Nut Scrap as we do of the next best.

R-D Q. 3. Did you ever look carefully at a package of Beech-Nut cigarettes before? 1370

A. No. This has really been the first time I ever looked at it as close as I am looking at it now.

R-D Q. 4. If you had looked at it, without paying any attention to what is on there, could you fail to see that name Lorillard?

A. No, that is perfectly plain.

R-D Q. 5. And if you saw that it would seem to you that Lorillard was the maker, would it not?

A. Exactly.

R-D Q. 6. You knew before that Lorillard did make the Beech-Nut Cigarette?

A. Yes. 1371

R-D Q. 7. Will you state whether or not you assumed that Lorillard made the Beech-Nut Cigarette from the fact that you handled the Lorillard Beech-Nut Scrap and knew that they made the Scrap?

A. Yes.

(Testimony of witness concluded.)

(Signature of witness waived by consent of counsel.)

1372

It is hereby stipulated by and between counsel for the respective parties that if

M. PODOLNIC of Philadelphia, Pennsylvania, were called as a witness on behalf of the defendant, that he would testify as follows:

Direct Examination.

My name is M. Podolnic; I am fifty-two years of age; my address is 320 South Street, Philadelphia. I keep a cigar and novelty store and have been in business about
1373 thirty years. I handle from five hundred to a thousand customers a day. In my novelty shop I sell suit cases, pipes, watches, clocks, canes, gum, fountain pens, cameras, razors, playing cards and other novelties, but I must say that I do not sell any of the Beech-Nut Packing Company's products, although I do sell chewing gum of other companies. Since 1915 I have been selling Lorillard's scrap tobacco and it is the best seller that I have in scrap tobacco. I have also been selling the Beech-Nut Cigarettes and I know that the Scrap Tobacco and the Cigarette are Lorillard products. I
1374 never supposed that the scrap tobacco or the cigarettes were made by the same people who put out the Beech-Nut gum. The Beech-Nut scrap is my best selling scrap tobacco. The Beech-Nut cigarettes do not sell as well with me. I do not remember having heard any of my customers make comments or remarks or inquiries of any kind about the Beech-Nut scrap, or make any remarks that would lead me to believe that they thought these products were made by the same people who made the gum.

1375

STIPULATION.

It is hereby stipuated by and between counsel for the respective parties that if the witness

WILLIAM SOBEL were called as a witness to testify for the defendant, the Lorillard Company, that he would testify as follows:

Direct Examination.

My name is William Sobel; I live at 518 South 56th Street, Philadelphia, with a place of business at 1317 Filbert Street, Philadelphia, Pennsylvania. I run a cigar and lunch room and have been in business about eight years and serve about three hundred customers a day. I have been selling Beech-Nut Scrap Tobacco since about 1915 and have also sold the Beech-Nut cigarettes. I also sell the Beech-Nut gum and mints. The Beech-Nut Scrap Tobacco is the best selling Scrap Tobacco I have, but the Beech-Nut cigarettes do not sell so well with me. It never occurred to me that the Beech-Nut Tobacco and the Beech-Nut Cigarettes were manufactured by the same people that made the Beech-Nut gum, nor did I ever hear any comments or inquiries or remarks from my customers which would lead me to believe that they thought that the tobacco and cigarettes were made by the same people that made the gum. I would think a man was crazy who would take cigarettes for gum.

1376

1377

Cross Examination.

I do not remember any customers making any remarks at all about Beech-Nut Scrap or Beech-Nut Cigarettes. I know that the Cigarettes are a Lorillard product and knew that before I saw them, as they were put in by a

1378 Lorillard agent. I have been handling the scrap tobacco for some years and I knew that that was a Lorillard product.

STIPULATION.

It is stipulated by and between counsel for the respective parties that the witness WALTER I. DAVIDSON, if called to testify for the defendant Lorillard Company, would testify as follows:

1379 *Direct Examination.*

My name is Walter I. Davidson; I am twenty-seven years of age; I have a store at 712 Spring Garden Street in the business district of Philadelphia, and serve about six hundred customers a day. I sell pipes, candies, gum, razors, toilet articles and magazines. I have been selling Beech-Nut Scrap Tobacco since 1915 and the Beech-Nut cigarettes since about 1921, and I know that these are products of the P. Lorillard Company. I sell Spearmint chewing gum and also sell Beech-Nut gum. I am selling Beech-Nut gum now and have sold the Beech-Nut mints.
1380 I was never under the impression myself that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were made by the same people that make the Beech-Nut Chewing Gum, or the Beech-Nut mints and candies, and I never heard of any comments or inquiries or remarks from my customers which would lead me to believe that they thought that the tobaccos and cigarettes were made by the same people who make the gum I might also say that I sell Chesterfield pipes and Chesterfield cigarettes, Apple tobacco and Apple gum, Eveready matches and Eveready safety razors, and I have also handled

Sweet Caporal cigarettes and Sweet Caporal candy cigarettes. These articles, although going by the same name, are made by different concerns. 1381

Mr. Hinton: This testimony with respect to the other articles being sold under the same name is objected to as irrelevant and immaterial, and it is stipulated that this objection may apply to this line of testimony without repetition.

Cross Examination.

I don't remember having heard my customers make any remarks of any kind about Beech-Nut cigarettes or scrap tobacco. The Beech-Nut cigarettes were put in by a Lorillard agent and I knew who made them before I saw the goods. I have been handling the scrap tobacco for several years and it is my best seller. 1382

1383

1384 IN THE UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*,
vs.
P. Lorillard Company, *Defendant*.
No. 3056.
In Equity

County of Philadelphia, }
State of Pennsylvania, } ss.:

1385 I, Edward N. Legg, a Notary Public, in and for the County of Philadelphia, State of Pennsylvania, acting as Special Examiner by consent of Counsel, do hereby certify that the foregoing depositions of William Waschler, Samuel B. Welsh, Benjamin Newman, Harry S. Sylk, Davis Ornstern, Edward G. Hoch, Fred. J. Hahn, Franklin P. Stern, Louis Gray, Harry A. Linn, Daniel M. Harbot and Joseph Cohen, were taken on behalf of P. Lorillard Company, defendant, pursuant to agreement and notice, before me, in the City and County of Philadelphia, State of Pennsylvania, beginning on the 13th day of December, 1922, and ending on the 14th day of December, 1922; that each of the above named witness
1386 was by me duly sworn; that the testimony of said witnesses was taken in shorthand, under my supervision, by Lafayette P. Temple, a Court Reporter, and thereafter reduced to typewriting; that the opposing party was represented by Sebastian Hinton, Esq., of Counsel, during the taking of said testimony; that by agreement of counsel the signature of each of the witnesses was waived, as indicated on the depositions.

I am not connected by blood or marriage with either of the parties hereto, nor interested directly or indirectly in the matter in controversy.

EDWARD N. LEGG,
Notary Public.
My Commission expires Jan. 20, 1927.

(SEAL)

1387

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Beech-Nut Packing Co.,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

Depositions taken in behalf of P. Lorillard Company, defendant, before Henry F. Weller, a Notary Public and Court Reporter, acting as Special Master, by consent of counsel, pursuant to notice and by agreement of counsel, 1388
at the office of Francis X. Boden, Majestic Building, Milwaukee, Wisconsin, beginning Monday, January 29, 1923, at 2:30 o'clock P. M.

Present: H. McClure Johnson of Offield, Poole, Hinton & Scott, for Beech-Nut Packing Company; Richard B. Cavanagh of Meyers, Cavanagh & Whitehead and Thomas L. Preston for P. Lorillard Company.

WILLIAM GOLDSTEIN, a witness produced in behalf of defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Cavanagh, 1389
deposes and says, as follows:

Q. 1. Please state your name, age, residence and occupation.

A. William Goldstein, age 32, residence 4839 Hutchison Street, Chicago, Illinois. I am head salesman for P. Lorillard Company in the Cigarette Department, which is called the S. Anargyros cigarette department.

Q. 2. How long have you been connected with P. Lorillard Co.?

A. I have been with P. Lorillard Company since the

1390 dissolution of the American Tobacco Company in 1911. It has been eleven years, I should judge ten or eleven years, I started sometime during the summer months, I don't remember exactly which date it was.

Q. 3. What territory do you cover at the present time and what are your duties?

A. At the present time I am the assistant of Mr. C. W. Burkley who is the head salesman in charge of the cigarette department in Cook County, Illinois, Lake County, Indiana, and Lake County, Illinois. I look after the cigarette department, the S. Anargyros cigarette business in the city of Chicago and the adjoining terri-

1391 tory mentioned, calling on jobbers, calling on retailers, work with our retail salesmen, in other words, generally looking after the interest of the products listed under the S. Anargyros name, Murad, Egyptian Deities, Helmar, Mogul, London Life and Turkish Trophies cigarettes.

Q. 4. How long have you been engaged on these duties in this Chicago territory?

A. Since January 5, 1922.

Q. 5. Where were you before that? What did you do?

A. I had charge of the state of Wisconsin from

1392 January 3rd, 1921, up to December 16th, 1921, that is for about a year as head salesman in charge of the S. Anargyros cigarette department of the Lorillard Tobacco Company. I was given charge of the marketing of Beech-Nut cigarettes which was introduced in the Milwaukee territory on September 26th, 1921.

Q. 6. Then, as I understand it, you were located here in the territory of Wisconsin for about one year, from January, 1921, until December, 1921, is that correct?

A. Yes, sir.

Q. 7. And where were your headquarters?

A. Milwaukee, Wisconsin.

Q. 8. What address? 1393

A. 84 Detroit Street.

Q. 9. And what duties did you perform during that year's period when you were in the Milwaukee territory?

A. I called on jobbers, called on retail dealers, interviewed consumers in the interest of the sale of the S. Anargyros brand of cigarettes, worked with my retail salesmen and generally looked after the promotion end of the brands of cigarettes known as Egyptian Deities, Murads, Mogul, Luxury, Helmar, London Life and Turkish Trophies.

Q. 10. What was your position or what was your title? 1394

A. Head salesman.

Q. 11. Did you have salesmen under you?

A. Yes, sir, from January, 1921, until the early part of September I had two men. From September until the end of the year I had three in my department and during the Beech-Nut campaign I was given the assistance of another man who worked in the tobacco department, which gave me a total of four at the end of the year.

Q. 12. What do you mean by the "Beech-Nut campaign"?

A. The marketing of Beech-Nut cigarettes. 1395

Q. 13. When was that cigarette introduced into this Wisconsin territory under your charge?

A. September 26th, 1921.

Q. 14. How long did you continue to have charge of this introductory campaign?

A. Until our vacation period, which commenced on December 16th, 1921.

Q. 15. Now will you just tell us in your own words precisely what system or procedure you followed in introducing the Beech-Nut cigarettes into the Wisconsin

1396 territory, beginning, as you have stated, September 26th, 1921?

A. The most essential thing in marketing a new product of that kind is to get the distribution, when you are selling the retail dealers, and while we are selling the retail dealers we had the general duties which consists of different advertising which is furnished by the company, indoor advertising and exterior advertising. Along with that we sample customers who we find are smoking competitive brands of cigarettes. About the first effort was to place the cigarettes with the retail dealer in getting our distribution. Then second was the getting the
1397 general distribution of our advertising matter, third was the sampling and building consumption for the brand we were placing on the market.

Q. 16. How many men did you have under you as a crew in introducing this brand during this campaign?

A. Five including myself.

Q. 17. Now, I want you to tell me just exactly how a man would proceed to introduce the brand to the retailer or to the trade.

A. Well, first he is given territory in the morning which he is expected to cover that day. Then he is given the allotment of cigarettes which he carries along to sell
1398 for cash in order to get immediate distribution and get them on sale right there before the consumer. When you call on the retailer you introduce yourself as a salesman of the P. Lorillard Company, advise the dealer, "We are making Beech-Nut cigarettes, the latest addition to the numerous brands made by the P. Lorillard Company", and we would go on and tell that we were the manufacturers of Beech-Nut scrap tobacco and the tremendous popularity of the brand, then we would go on and tell him we were also manufacturers of such well-known brands of cigarettes as Egyptian Deities, Helmar and Murad cigarettes and tell him the brands put on had

to sell for fifteen, twenty and twenty-five cents and due 1399
to the fact all other brands of this character and class are selling for twenty and eighteen cents, there is no doubt in the world, due to the high qualities of Beech-Nut cigarettes you will have some ready sales in this brand. Some salesmen would call attention to the fact they had been marketed in other territories and met with great success. And he would open up his carton, his carton would have been open at all times while talking to the retailer, and he would say, "I want very much to leave this little package of Beech-Nut cigarettes, it will cost you $1.14", and take out his order book and commence to write up the order, and the dealer would say, 1400
"All right, I will take it", and the salesman would write up an original and duplicate and make a tissue copy also, handing the white copy to the dealer, and bring the other copy back to me to show where he placed the cigarettes. That is the way the average salesman would talk to the retailer or jobber.

Q. 18. How do you know he would proceed that way?

A. Because he was taught along those lines by myself in charge of the territory. When we opened up the campaign we had a little school. We went a day or two before the campaign and were told these things.

Q. 19. Now, when a salesman would go into a store 1401
what would he have with him, if anything?

A. When he would go in a store, his earlier calls he would make in the morning, he would have two thousand Beech-Nut cigarettes consisting of ten cartons of this size (witness shows carton of Beech-Nut cigarettes containing ten packages) which contain two hundred cigarettes. Then he would carry along the various advertising material, which, at the opening of the campaign consisted of window posters, interior card tackers and exterior tackers used on the outside of the dealer's store front and in all cases he was instructed when he called

1402 on a dealer, after he had sold them, to tear off these edges (indicating edges of carton), tear off the end flap on the carton and place the carton card inside and ask the dealer if he would not allow him to place this on the cigar counter so it would be readily seen by the consumer. Then his instructions were to get the window poster on a dealer's store that he sold cigarettes to, and if possible to get some of the other advertising material displayed which he carried along with him. At all times salesmen were sufficiently supplied with advertising material which was the most essential thing in the promoton of the brand, creating business on the brand.

1403

Mr. Johnson: Objection to all that part of this witness' testimony in which he tells what the agents would do.

Q. 20. (Mr. Cavanagh.) Upon what do you base your statement that the agents would do this?

A. Well, because as I told you, in the early part here it has been customary at all times in marketing a new brand or when we had new work to perform, the head salesmen were requested to school their retail men on the proper line of work expected of them, and naturally

1404 I would take it for granted the men instructed would follow out my instructions, and if they did not follow out along those lines and after I had checked up their territory and found out from the retail dealers they didn't do that, I immediately dispensed with their services.

Q. 21. Did you personally take part in the introduction and sale of this Beech-Nut brand of cigarettes beginning September 26th, 1922? That is, did you visit the trade and introduce it?

A. Yes, sir.

Q. 22. Where?

A. I worked what I call in Milwaukee the Loop or downtown district. I worked the sections bounded by the river or Sycamore Street up to Wells Street and possibly four or five blocks the other side of East Water Street going east, up as far as Byram's Store on Grand Avenue, which took in the immediate downtown, all of the important dealers in the town. 1405

Q. 23. That is, sir, it included the business section of Milwaukee?

A. Yes, sir, and then I incidently worked with my retail salesmen from day to day, calling on retail dealers and placing advertising matter and sampling consumers, everything to promote the creation of the demand, which naturally a man would do. 1406

Q. 24. So as to avoid a long repetition, did you or did you not follow out the procedure or system in introducing the brand that you have described as the instructions to your salesmen?

A. Absolutely, in every detail.

Q. 25. You followed that out?

A. Absolutely.

Q. 26. That card to which you refer as having asked the retailer to permit you to stick into the carton of Beech-Nut cigarettes and put on the counter, will you read what it says on that card, so we will have it on the record? 1407

A. "Lorillard's Beech-Nut Perfect Cigarettes, 20 for 15 Cents, Mildest of Them All."

Q. 27. That is a small yellow card about three inches by five or six?

A. Five or six inches.

Q. 28. And that comes in each carton of cigarettes?

A. Yes, sir.

Q. 29. For how long a period were you engaged in this work of introducing the Beech-Nut cigarettes in Milwaukee?

1408 A. From September 26th, 1921, up until vacation period started, December 16th, 1921.

Q. 30. Now, where else outside of Milwaukee in the state of Wisconsin did you personally have charge of a crew introducing this cigarette?

A. Nowhere else.

Q. 31. Just the city of Milwaukee?

A. Just the city of Milwaukee, yes, this territory included Waukesha County, Racine County and Kenosha County.

Q. 32. Then you did go outside the city of Milwaukee?

1409 A. Yes, sir.

Q. 33. Into neighboring cities or towns?

A. Yes, sir.

Q. 34. Are you acquainted with the Lorillard Beech-Nut scrap tobacco?

A. Yes, sir.

Q. 35. How long, to your knowledge, has that scrap tobacco been on sale in Milwaukee and vicinity?

A. Well, I have understood it was placed in this market sometime during the year 1919, the latter part.

By Mr. Johnson: Objection, as hearsay.

1410

By Mr. Cavanagh:

Q. 36. Mr. Goldstein, are you acquainted with Mr. E. R. Lewis, who, I understand, is or was division representative of the Beech-Nut Packing Company in Milwaukee?

A. Yes, sir, I was introduced to him by a retail dealer in the city here.

Q. 37. Mr. Lewis has testified on behalf of the Beech-Nut Packing Company in this case and has stated he was acquainted with you and that he met you about the time

you first came here, that is around the first of the year 1921. What have you to say as to that? 1411

A. To my knowledge the first time I met Mr. Lewis was in the cigar store known as the "Loop Cigar Store" located on East Water near Wisconsin, and was introduced to the gentleman by a clerk in this store known as Charlie Tuckwell. I came in there about nine o'clock one morning and Mr. Lewis and another gentleman was in the store, I didn't learn the other gentleman's name, and as I walked in Mr. Tuckwell called me over and said—I am known as "Bill" to Tuckwell, never known as Goldstein, we are very good friends, he said, "Bill, this is Mr. Lewis, representative of the Beech-Nut Packing Company." 1412

Q. 38. And about when was that?

A. Sometime between September 26th, 1921, and October 5, 1921.

Q. 39. And that was the first time you ever met Mr. Lewis?

A. Yes, sir.

Q. 40. And you were introduced to him by Mr. Tuckwell?

A. By Mr. Tuckwell as the P. Lorillard Company representative in charge of Beech-Nut cigarettes.

Q. 41. So, as far as your knowledge goes, you did not meet Mr. Lewis around there the first of the year 1921 when you first came here? 1413

A. Absolutely not.

Q. 42. Mr. Lewis has testified for the Beech-Nut Packing Company that he first met you about the first of this year (meaning 1921) at the store of A. S. Goodrich. Do you agree with that?

A. No, sir, I do not recall meeting him in A. S. Goodrich's store at any time.

Q. 43. Now, Mr. Goldstein, as I understand it, you say you were introduced to a Mr. Lewis, the Beech-Nut

1414 Packing Company representative, by Mr. Tuckwell at the store where the latter was employed, sometime around or shortly after September 26th, 1921. Is that correct?

A. Yes, sir.

Q. 44. And I understand you to say there was another man with Mr. Lewis at the time?

A. Yes, sir.

Q. 45. Did you know that gentleman's name?

A. No, sir, I was never introduced to that gentleman. I know he was in the company of Mr. Lewis because he talked to Mr. Lewis, but I was never introduced to him.

1415 Q. 46. Was anyone else present when you met Mr. Lewis?

A. Well, there were several people in the store which is quite a hang-out, you know, for different people in there, but nobody paid any particular attention outside of Mr. Tuckwell, who introduced us, and he was present during the entire time I was in this particular store in the company of Mr. Lewis.

Q. 47. The Beech-Nut cigarette was not on sale in this territory the first of the year, in January, 1921, was it?

By Mr. Johnson: Object to that as a leading question.

1416

A. No, sir.

By Mr Cavanagh:

Q. 48. Mr. Lewis in his deposition for the plaintiff has testified that when he first met you in the fore part of the year (1921) you told him about the sale of Beech-Nut cigarettes in the east, what have you to say as to that?

A. No, sir, I have never had any conversation with Mr. Lewis or never had any acquaintance with Mr.

Lewis prior to the time we marketed the Beech-Nut cigarettes in September, 1921. 1417

By Mr. Johnson: Objection to the manner in which these questions are being asked. If Mr. Cavanagh wants to get this information he can get the witness's story without reading from the record.

Mr. Cavanagh: Without entering into any argument with counsel it is obvious that following the usual practice in taking of depositions going to the presentation of evidence it is necessary not only to present the evidence on behalf of the defendant, but to distinguish and if not a fact to re-but the evidence given on behalf of the plaintiff, and Mr. Cavanagh is referring to the record solely and for the purpose alone of making sure that he does no injustice to this plaintiff by inadvertently misquoting or misinterpreting any statements of plaintiff's witnesses. 1418

By Mr. Johnson: Objection to all questions put in this manner.

By Mr. Cavanagh:

Q. 49. Now, Mr. Goldstein, I want you to tell us in your own words just exactly what took place and what conversation you had with Mr. Lewis of the Beech-Nut Packing Company when or after you were introduced to him by Mr. Tuckwell, which you say was the first time you met him. 1419

A. Well, after I was introduced to Mr. Lewis—I was introduced to him as a Lorillard representative in charge of Beech-Nut cigarettes and he was introduced to me as a Beech-Nut Packing Company representative in charge of Beech-Nut gum and Mr. Lewis asked me whether we were putting on a very big campaign on Beech-Nut cigarettes and I said, "Yes." He said, "What success are you meeting with?" I said, "As well as we had hoped

1420 for the brand is doing very nicely." And he asked me if we made any other Beech-Nut brand and I said, "Yes, sir, we manufacture Beech-Nut scrap and Beech-Nut plug", and I asked him if he had ever heard of Beech-Nut scrap and called his attention to the fact Beech-Nut scrap was a tremendous big seller in the city of Milwaukee, and he said, "Yes, I have heard of it in Pennsylvania some years ago, it was a very big brand over there." We talked about general things and I just don't remember the exact words that transpired. We talked about the marketing of Beech-Nut cigarettes and I told him it was a very good quality of cigarette and we hoped
1421 to make a big seller out of it. But I had an appointment at nine-thirty with one of my jobbers and I told him I would have to run along, I had an appointment to keep, and I opened up a carton of cigarettes, which I carried at all times to use as samples in sampling consumers and I asked Mr. Lewis if he smoked and he said yes, and I presented both Mr. Lewis and his friend with packages of Beech-Nut cigarettes and I told him I thought he would find Beech-Nut cigarettes as high a quality as the rest of the Beech-Nut line, particularly Beech-Nut scrap tobacco. Then Mr. Tuckwell, who was back of the counter, and present at the coversation, due to the fact he was
1422 not a smoker of domestic, but smoked Turkish cigarettes, I presented him with a couple of packages of Murad cigarettes, and he invited us across the street to have a soft drink, and we went across the street into an ice cream parlor and the three of us had a Coca Cola and we stood around there and talked about different things that possibly any salesman would talk about, you know, but in parting I said to Mr. Lewis, "If you can do anything to help further the sale of Beech-Nut cigarettes I will appreciate it, and in turn if I can do anything for Beech-Nut gum I will reciprocate" and with that we parted.

Q. 50. How many times after that do you recollect 1423
meeting Mr. Lewis, if you did?

A. To my knowledge the second time I met Mr. Lewis was in a cigar store known as Kerns & Son, which was across the street from the Loop Cigar Store. I don't just recall whether Mr. Lewis was in there with a friend of his or whether I was in this store first, and he came in, and at this meeting I was introduced to another gentleman, I don't just recall his name, and we chatted a little bit and during this conversation nothing was said about tobacco, cigarettes or gum or anything else, and on leaving I had some business to transact with Milton Kerns, who was manager of this store and on leaving I 1424
noticed his friend was smoking a cigar and I presented Mr. Lewis with a package of cigarettes, knowing he was a cigarette smoker and I asked his friend if he indulged in cigarettes and he told me he did not, so I didn't give him any, and with that I left.

Q. 51. Please state whether or not on that occasion you had any coversation about the Beech-Nut cigarettes or Beech-Nut gum, further than offering him the cigarettes?

A. Absolutely not.

Q. 52. Did you meet him on any other occasion, to your knowledge? 1425

A. Yes, the next time after that I met him in Kenosha, Wisconsin. He was in a jobber's known as Beck & Mahlsted, I came into this jobbing house and Mr. Lewis was there and I believe that at this meeting Mr. Dick Mahlsted, who is part owner in this business, was there, and the only thing was mentioned about cigarettes or gum was, he said, "Well, it is a funny thing, here is a Beech-Nut cigarette man and a Beech-Nut gum man, you fellows ought to get along pretty well."

Q. 53. Who said that?

1426 A. Mr. Mahlsted. And I said, "Yes, I know Mr. Lewis and we get along very nicely together."

Q. 54. Is that all that happened on that day?

A. That is all happened in that place.

Q. 55. And do you recollect ever meeting Mr. Lewis at any other place at any other time?

A. No, sir, not to my knowledge. Absolutely never had any other meetings with him.

Q. 56. When you were first introduced to Mr. Lewis it was made known to you that he was a Beech-Nut Packing Company salesman?

A. Absolutely, I know that clearly.

1427 Q. 57. And it was made known to him that you were a P. Lorillard Company representative?

A. I was introduced to him as the P. Lorillard representative of Beech-Nut cigarettes. If his hearing was good he surely knew I was.

Q. 58. Now, as I understand your testimony, you had charge of the introductory or missionary crew in Milwaukee or territory on this Beech-Nut cigarette, starting about September, 1921. Will you please state whether or not you gave the members of this crew any instructions in connection with the introduction of Beech-Nut cigarettes, and in connection with the products of the

1428 Beech-Nut Packing Company?

A. Yes, sir, I did.

Q. 59. Tell us in your own words what you did.

A. At one of the meetings that we had, and many times after that I called their particular attention to the fact that Beech-Nut cigarettes was the product of Lorillard Tobacco Company, as they knew, and in calling on retail dealers to make it very clear to them that the Beech-Nut cigarettes were manufactured by P. Lorillard Company so there would be no confusion. The reason I did that, I had read in a tobacco journal and possibly some other papers that there was some sort of

suit going on at the time about the label or trade mark, and I didn't want my salesmen to be the cause of any confusion to the retail dealers or consumers they may have sampled in the course of a day's work, which I knew was the wish of the company at the time, and every man was instructed to make it very clear to the retail dealer, before he even showed him the Beech-Nut cigarettes, during his introduction to them to say, "I represent the Lorillard Tobacco Company, we are now putting on Beech-Nut cigarettes," and in mentioning Beech-Nut cigarettes to also mention, "We are also the manufacturers of Beech-Nut scrap tobacco and such other famous brands of cigarettes as Murads, Egyptian Dieties and Helmar cigarettes." They were also told in sampling consumers, when they made their approach to the prospective consumer and sampled them on Beech-Nut cigarettes to call attention to the fact Beech-Nut was manufactured by the P. Lorillard Company, manufacturers of Murads, Egyptian Dieties and Helmar cigarettes, which were the largest selling high-grade cigarettes in the United States. And I made sure this instruction was followed out, and I also called on retail dealers with my salesmen and every time I was with them they used just such instructions as I gave them. 1429 1430

Q. 60. When you made a sale of Beech-Nut cigarettes in this introductory campaign in this territory, that is, to the retailer, just exactly what took place? Did you take cash and give them the receipt or what did you do? 1431

A. The dealer was sold a carton of cigarettes in all cases where he wished to buy it direct from our salesman, and in such cases he was given a carton or two, whichever quantity he bought, and he was given a receipt for it, which we call a retail order blank. I believe there is one of the blanks there now (indicating).

1432 Mr. Johnson: I want an objection to this testimony in which the witness tells what his salesmen did, as being hearsay only, and secondary evidence.

It is stipulated that this objection shall apply to all testimony of this character without repetition.

By Mr. Cavanagh:

Q. 61. I understood you to testify that you have personally solicited retailers and dealers on this Beech-Nut cigarette during the introductory campaign and have personally sold the cigarettes. Will you tell me just
1433 exactly what you did when you sold the cigarettes to the dealers?

A. Well, whenever I sold the dealers a carton or whichever quantity of cigarettes he might have wanted, if I could interest him to buy them for cash I gave him his wished quota, giving him a receipt in what we call a retail order blank made out in original, duplicate and tissue paper copy, marked on there his name, put on there "Cash Sale," his address, the quantity of cigarettes purchased, and the selling price, marked on there "Paid," and then signed my name to it.

1434 (The three sheets referred to are marked defendant's Exhibit 10 A, 10 B, and 10 C, respectively for identification.)

The Witness: (Continuing) Of the three sheets, the white one marked "A" I gave to the customer, the one marked "B" was attached to the duplicate daily report as a record in our office as to who the cigarettes were sold to, and the thin tissue paper sheet marked "C" was kept in our order book for a record for the particular salesman who sold the goods.

Q. 63. What appears printed at the top of that white slip "A" and the yellow slip "B"?

A. "P. Lorillard Co., Inc. 119 West 40th Street, New York, N. Y." 1435

By Mr. Cavanagh: The triplicate sheets produced and referred to by the witness are fastened together to form one exhibit and are now offered in evidence and the Notary is requested to mark the same Defendant's Exhibit 10 A, 10 B, 10 C, retail order blanks.

Q. 64. So far as your knowledge extends, from whom would the retailer subsequently obtain the repeat orders of the cigarettes, if he wanted it? 1436

A. Well, most generally he would get it from the jobber, but in some cases he purchased them from our retail salesmen on our re-canvassing of the trade after the first introductory visits were made. In such orders we call them reorders.

Q. 65. Will you please state from your own knowledge whether or not you ever knew one of your salesmen on this campaign to go into a store without advertising matter?

A. Absolutely not.

Q. 66. Likewise will you please state whether or not a salesman to your knowledge would go to a store or did go into a store with only one package of cigarettes? 1437

A. No, sir.

Q. 67. What did he usually take in there, so far as you know?

A. He usually carried in the cigarettes he had to sell for cash. He was thoroughly instructed if it was any time before five o'clock, which was usually the hour for him to quit work, between five and five-thirty, if he ran out of selling stock to come back to the warehouse or go to the nearst jobber to his territory and re-

1438 purchase the amount of cigarettes he had sold during that day's work. Therefore at all times when he called on retail dealers he had sufficient cigarettes to sell for cash to the retailer.

Q. 68. In addition to introducing and selling the cigarettes yourself, personally, to the retail trade around Milwaukee, will you please state whether or not you ever accompanied any of your salesmen into a store?

A. Yes, I have at different times, when I check up on our territory and meet them on our territory I usually spend an hour or two with them, call on retail dealers and show them the proper way to approach a dealer and
1439 the proper way to sell him, particularly the sampling of consumers.

Q. 69. Do you know a party here in Milwaukee by the name of J. Brimakow?

A. Yes, sir, he was a retail clerk in a drug store that I did business with, he was known as the manager of the cigar department of Kiefer Drug Company.

Q. 70. Where was that concern located?

A. West Water Street.

Q. 71. Do you know of your own knowledge whether Mr. Brimakow purchased for his concern any Beech-Nut cigarettes, and if so will you state the circumstances as
1440 you know them?

A. Well, it was about a month prior to the time we had marketed the brand, I made one of my usual visits to his store and had sold him some Murad and Helmar cigarettes, and he said he had had a call for Beech-Nut cigarettes, and I said, "Yes, that is one of our products, you know that, don't you, Joe?" and he said, "Yes, I know Lorillard Company makes them, can't you get some of them?", I said, "No, I am sorry, I don't know when my company will get ready to market the brand here, but they have been placed on the eastern market and, as I understand, they are moving along very well, and no

doubt those consumers who have been calling for them 1441
have just come from the east, and then he said, "Yes, they did." Sometime after that I called on Brimakow, about two weeks later, and he had Beech-Nut cigarettes in stock and I inquired as to the sale of them and he said they were moving along very well, he had a brand on sale for fifteen cents, which was the regular price and due to the fact I had received some correspondence from the company requesting me to make positive that Beech-Nut cigarettes were not placed on sale in any part of my territory until September 26th, which was set as the opening day of the campaign, I asked Mr. Brimakow if he would not refrain from selling the Beech-Nut cigar- 1442
ettes until such time as we got ready to market the brand, as other dealers had called for them, due to the fact he was selling them, and I was unable to supply them an it was causing hard feelings among some of my good friends among the trade. And I had this conversation, I asked him where he had obtained his Beech-Nut cigarettes and he told me from the National Cigar Company at Chicago, Illinois, which is one of the direct buyers of the Lorillard Tobacco Company. At this interview I had with him he promised me he would stop selling the brand. Two or three days later I received some information he had still some Beech-Nut cigarettes on sale. 1443
I had written my Company to tell them the circumstances, that Beech-Nut cigarettes were on sale in Milwaukee, Wisconsin, and being supplied by the National Cigar Company, and I requested them to ship Beech-Nut cigarettes into Milwaukee, which they did. And while all this correspondence was going on this market was opened up on Beech-Nut cigarettes and I believe up until that time Mr. Brimakow had sold approximately forty thousand Beech-Nut cigarettes.

1444 Mr. Johnson: Objection to that part of this answer which is hearsay only and not good evidence from this witness.

By Mr. Cavanagh:

Q. 72. So Mr. Brimakow had the cigarettes on sale before you started the campaign here on September 26th, 1921?

A. Yes,sir.

Q. 73. Did you ever tell Mr. Brimakow that he would be discontinued handling it if he did not uphold the price on the Beech-Nut cigarettes?

1445 A. No, sir. The day prior to the marketing of this brand, September 26th, I called on all large cut-rate dealers in the city of Milwaukee and told them that due to the fact Beech-Nut cigarettes was a high quality cigarette, we were going to try to market Beech-Nut cigarettes as a fifteen cent cigarette, and I would personally appreciate it if these cut-rate dealers who had built their business on cut-rate business would refrain from cutting the price on Beech-Nut cigarettes as I did not think it necessary to sell Beech-Nut cigarettes cheaper than fifteen cents.

1446 Mr. Johnson: Objection to this answer as not responsive.

By Mr. Cavanagh:

Q. 74. Is that all the conversations you had about that?

A. Yes, sir.

Q. 75. Did you know Mr. Brimakow before he went to work for the Kiefer Drug Company?

A. Yes, sir.

Q. 76. Where was he working?

A. I first met Mr. Brimakow after I came into the territory, January, 1921, at the Central Drug Company. At that time he was manager of the cigar department. 1447

Q. 77. Where is the Central Drug Company located?

A. On Third Street.

Q. 78. Who runs it?

A. At that time it was run by a gentleman named Reinhardt; since then it has been run by Mr. Reinhardt and Mr. Kemp, who, I believe, were joint partners in this business.

Q. 79. To your own personal knowledge is Mr. Brimakow with the Kiefer Drug Company?

A. I am almost positive he is not. 1448

Q. 80. But you don't know yourself?

A. I am positive he is not.

Q. 81. Will you please state whether or not you, at any time, or upon any occasion represented, stated or intimated to any person or dealer that the Beech-Nut cigarettes or Beech-Nut scrap tobacco were made by the same concern that makes the Beech-Nut food products, chewing gum and other like products, that is, the Beech-Nut Packing Company?

A. Absolutely not, never.

Q. 82. Would you state whether or not you ever knew any of your agents to make such representation? 1449

A. Never.

Mr. Johnson: Objection to that last question and answer as an opinion of the witness, unfounded on anything that has preceded.

Q. 83. (Mr. Cavanagh.) It has been testified to on behalf of plaintiff in this case by one Clarence W. Smith that he met you in Kerns & Son Cigar Store on East Water Street in Milwaukee the latter part of 1921, while he was in company with Mr. Lewis of the Beech-Nut

1450 Packing Company and that you exhibited a package of cigarettes and said, "These cigarettes are quality goods like the rest of the Beech-Nut line." Did you ever make any such statement in Kerns & Sons Cigar Store?

Mr. Johnson: Objection to the manner in which this and all similar questions are put to the witness.

A. No, sir, there was no remark made in regard to the quality of the brand or the character of the cigarette. The only thing I said at that meeting, at which Mr. Smith was present in company with Mr. Lewis, I pre-
1451 sented Mr. Lewis with a cigarette, due to the fact I knew he was a cigarette smoker, and I asked Mr. Smith, who was the gentleman with Mr. Lewis at the time, whether he indulged in cigarettes and he promptly told me he did not indulge in cigarettes and possibly the exhibit he referred to is the package I offered him when I asked him if he was a cigarette smoker.

Q. 84. Is that all that occured?

A. Yes, sir.

Q. 85. Did you know whether his name was Smith or not?

A. I couldn't say. As I mentioned in the early part
1452 of my testimony I did not remember the gentleman's name in the company of Mr. Lewis, but I remembered that Mr. Lewis had a party with him and I was introduced to him. This was the second meeting in Henry Kerns & Sons Cigar Store.

(Direct Examination Closed.)

Adjourned to January 30th, at 10:00 A. M.

Jan. 30th, at 10:00 A. M. 1453

Met pursuant to adjournment, parties appearing as before.

Cross Examination.

By Mr. Johnson:

X-Q. 86. Mr. Goldstein, are you employed by P. Lorillard Company?

A. Yes, sir.

X-Q. 87. How long were you working in Milwaukee for them? 1454

A. Just one year.

X-Q. 88. What were the dates when you came to Milwaukee for the P. Lorillard Company, and the date you left Milwaukee

A. I took charge of the Wisconsin territory on January 5th, 1921, and left here at the commencement of winter vacation on December 16th, 1921, and I was transferred to Chicago territory, which took effect January 3rd, 1922.

X-Q. 89. Was your vacation time in between December 16th and January 5th?

A. That was vacation period, a little over two weeks, 1455 I think about fifteen days.

X-Q. 90. How long have you been with the P. Lorillard Company all together?

A. Since 1911, about eleven years excluding the time I put in the service, in the United States Army.

X-Q. 91. What have you been doing for them during the rest of the time?

A. I was employed in Chicago—do you wish me to give you an idea of just what I have done for them?

X-Q. 92. Yes, just briefly.

A. I commenced as retail salesman and for four or five years I travelled—

1456 X-Q. 93. When was that?

A. From 1911 until about 1916, I believe. I covered practically all states east of Illinois on different campaigns, introductory and advertising campaigns and sampling campaigns and then I believe it was the latter part of 1916 or early part of 1917 I was promoted to head salesman.

X-Q. 94. Were you working out of Chicago during that time?

A. No, I worked at various headquarters, different headquarters, Detroit and Cleveland and sometimes it was Boston, and that is about all. Cleveland, Detroit and
1457 Boston were the different headquarters I worked in during the time I was a retail salesman for them.

X-Q. 95. Did you take part in a number of introductory campaigns in new brands during that time?

A. Yes, sir.

X-Q. 96. What did you do for them after 1916?

A. I believe it was the latter part of 1916 or early part of 1917 I was promoted to the head salesmanship, still working under the supervision of a head salesman named H. A. Asby. I met Mr. Asby in Akron, Ohio, and I was advised I was promoted to head salesman to take charge of the Colorado territory, which embraced Colo-
1458 rado and part of Wyoming. I stayed in that territory until I was called to service in the United States Army.

X-Q. 97. When was that?

A. That was the latter part of—about the middle of 1918, I believe. I just don't know the exact date.

X-Q. 98. When did you get out of military service?

A. In January, 1919.

X-Q. 99. What did you do then?

A. Then I went to Utah and took charge of Utah as head salesman, which embraced the territories of Idaho—

X-Q. 100. For whom?

A. Lorillard Tobacco Company—which embraced the territories of Utah, Idaho, part of Nevada and a part of Wyoming. 1459

X-Q. 101. How long were you there?

A. I was there until I was transferred to Milwaukee in January, 1921.

X-Q. 102. Did you take part in any introductory campaigns of new brands while you were there in that Utah-Idaho-Wyoming district?

A. Why, yes, I introduced Windsor Castle Fags cigarettes.

X-Q. 103. Will you name some of the brands that you introduced during the time you have been with the P. Lorillard Company? 1460

A. Well, the campaigns I personally conducted were on Windsor Castle Fags while I was out in Utah, and Beech-Nut cigarette campaign from September 26th, 1921, up until the time I left Milwaukee territory, those were the only two campaigns I personally conducted, but I assisted in different works which consisted in marketing such new brands as London Life, Nebos, Zira, Zubelda's and Tiger cigarettes.

X-Q. 104. Any others?

A. That is all of the new brands.

X-Q. 105. Can you name any of those brands which you have just mentioned that the Lorillard Company had taken over from other companies? 1461

A. No, all these brands I have mentioned are brands represented by trade marks that Lorillard Company had personally controlled. I never worked on another brand that the company had taken over from other manufacturers. London Life was an origination of the company, likewise with Tigers, likewise with Nebos, likewise with Zira and Zubelda. And the last brand I worked on was Beech-Nut which the company had scrap tobacco on the market by the same name for several years, and Beech-Nut plug.

1462 X-Q. 106. Do you know whether any of these brands you have mentioned were made by subsidiary companies?

A. No sir, these brands were all manufactured by the Lorillard Company.

X-Q. 107. Were any of these Anargyros brands?

A. London Life was an Anargyros brand, but it is not a subsidiary of P. Lorillard Company, it is just a trade name the P. Lorillard Company had acquired during the dissolution of the American Tobacco Company.

X-Q. 108. What name appeared on London Life as to makers?

A. "S. Anargyros".

1463 X-Q. 109. What is your present position?

A. I am head salesman.

X-Q. 110. What does your work consist of?

A. My work consists of assisting Mr. C. W. Burkley, who is also head salesman in charge of S. Anargyros cigarettes in Chicago territory, which takes in Cook County, Illinois, Lake County, Indiana and Lake County, Illinois.

X-Q. 111. What position did you hold here in Milwaukee?

A. Head salesman in charge of the brands manufactured by the P. Lorillard Company which are under the

1464 supervision of what we call the S. Anargyros department.

X-Q. 112. What brands are those?

A. Murad, Egyptian Deities, Helmar, Mogul, Luxury, London Life and Turkish Trophies.

X-Q. 113. Whose name is on the packages of those cigarettes as to maker?

A. Well, it reads "S. Anargyros, capital stock owned by P. Lorillard Co."

X-Q. 114. Which of those names, S. Anargyros or P. Lorillard, appears more prominent on the package?

A. Well, the "S. Anargyros" on these particular brands appear in larger type.

X-Q. 115. Very much larger? 1465

A. Well, possibly twice the size, maybe two and a half times the size of "P. Lorillard Company".

X-Q. 116. When you glance at a package of these Murads, what name do you see as you glance casually at the package?

A. "S. Anargyros."

X-Q. 117. It is considerably larger than the name "P. Lorillard Co."?

A. Yes, possibly two or two and a half times the size of P. Lorillard Company.

X-Q. 118. When you look at it from five feet away you don't see the name "P. Lorillard Co." at all, do 1466 you?

A. I see it, because I know just where it is.

X-Q. 119. But if you didn't know it was there, there wouldn't be much chance of your seeing it, would there?

A. That is a question, it all depends on how closely I would look.

X-Q. 120. In your sales effort do you offer these cigarettes as a S. Anargyros product?

A. Well, we offer them as a Lorillard product to the trade, but these brands, I believe, have been identified by the consumers of high-grade cigarettes as those formerly manufactured by the S. Anargyros brands which 1467 I understand, and have always heard from consumers, predominates in high class cigarettes about in the same category as Tiffany in New York in diamonds. In fact, I have been in stores in territories strange to me, and I walked in and said, "I want a high-grade Turkish cigarette—

By Mr. Johnson: I object to the latter part of this answer as entirely unresponsive to the question.

The Witness: (Continuing)—they invariably hand you a brand of those manufactured by Loril-

1468 lard Company and say, "Here is a Murad" or a Diety or Mogul, "which is one of the S. Anargyros products manufactured by the P. Lorillard Company."

X-Q. 121. Are you quoting the dealers when you say that?

A. Absolutely.

X-Q. 122. Did you ever hear a dealer say, "This is a package of Murad cigarettes made by the S. Anargyros Company which is owned by the P. Lorillard Company"?

1469 A. Absolutely.

X-Q. 123. Did you ever hear a customer ask for a Lorillard Murad?

A. Well, as a rule, let us assume he goes into a store, the ordinary consumer won't go in and say, "Give me Lorillard's Murads," he will say, "Give me a package of Murad cigarettes."

X-Q. 124. Is the name "Lorillard" featured at all on the package of cigarettes you mentioned?

A. Yes, it is on there and we feature it in our sales talk.

X-Q. 125. Is the name "Lorillard" featured on any
1470 of those packages of cigarettes?

A. Yes, I would say it is, it is on there.

X-Q. 126. When you can't see it when you are five feet away from it, would you say the name "Lorillard" was featured on that package of Murads or on the package of any of those other brands when it is not on there big enough so you can see it when within five feet of it?

A. I would say it is featured on there, because the Lorillard name is on every package of these so-called S. Anargyros brand of cigarettes.

X-Q. 127. As a matter of fact, Mr. Goldstein, isn't

it the brand of the cigarette, Murad or Moguls or London Lifes, the people ask for? 1471

A. As a rule the ordinary consumer does, yes.

X-Q. 128. Isn't it the brand that sells the particular cigarette?

A. Sure, it is the trade name that sells it, but the average consumer that calls for that trade name knows it is a product of the Lorillard Tobacco Company.

X-Q. 129. How did the sales of the new product, Beech-Nut cigarettes, when they were first put on, compare with the volume of sales of the other brands you mentioned as having taken part in introducing?

A. Well, do you refer to the sales of Beech-Nut 1472 cigarettes in the territory I work?

X-Q. 130. Yes, only in the territory you observed.

A. During the time I was here in charge of the campaign on Beech-Nut cigarettes I always classed them as fourth sellers.

X-Q 131. What do you mean by that?

A. I mean by that the leading seller, first seller, was Camels, the second seller was Lucky Strike, the third seller was Chesterfields and the fourth seller was Beech-Nut cigarettes.

X-Q. 132. But, as compared with the other new brands of cigarettes put out by the Lorillard Company, 1473 did you find that the Beech-Nut cigarette sold more easily at the start than other brands you had put on first?

A. No, I can't say that it did. I worked on a brand, Nebo cigarettes, the first brand Lorillard manufactured after the dissolution, and Nebos in six weeks from the time we put them on the Chicago market were the largest selling brand on the market at that time. So I cannot say Beech-Nut cigarettes outsold any of the other new brands.

X-Q. 133. Did any of these new brands that you took part in introducing, fail as a commercial brand?

1474 A. Well, I could not exactly say whether they failed. Most of these brands are still being manufactured and are scattered throughout the United States. In some places the sales are a little larger in volume than other places, but to my knowledge all of the so-called brands I have mentioned are still being manufactured by P. Lorillard Company.

X-Q. 134. None of them have been discontinued?

A. Not to my knowledge, no sir.

X-Q. 135. What was your district while you were stationed here at Milwaukee?

A. Well, when I came to Milwaukee I took charge
1475 of the entire state of Wisconsin excluding the points around the extreme northern end, which was under the supervision of Minneapolis, Minnesota. During the Beech-Nut campaign my territory was confined to Milwaukee county, Waukesha County, Racine County and Kenosha County.

X-Q. 136. And was the rest of the state taken out from under your charge during the Beech-Nut campaign?

A. As far as Beech-Nut cigarettes were concerned, yes, sir, but I still had maintained my regular territory on the Turkish brands we manufactured.

1476 X-Q. 137. On all of the brands except Beech-Nut?

A. On all of the brands except Beech-Nut.

X-Q. 138. Then am I correct in understanding that for general purposes the whole state of Wisconsin is one district except the northern part which goes into the Minneapolis district?

A. Yes, sir, it did at that time, during 1921. Of course, I am unable to say whether it is managed that way now.

X-Q. 139. Was the state of Wisconsin sub-divided into smaller districts during the Beech-Nut cigarette campaign?

A. Well, you see there were during 1921 three head 1477
salesmen in the territory and that consisted of the tobacco department head salesman, the scrap department head salesman and the Turkish brand head salesman, and in order to get an immediate distribution the entire state was divided among us three.

X-Q. 140. That is the usual state of Wisconsin district was divided into three parts?

A. Three territories.

X-Q. 141. For the purpose of the Beech-Nut campaign?

A. For the purpose of getting a thorough distribution as quick as possible.

X-Q. 142. Was the Beech-Nut cigarette campaign 1478
started and continued during the same period of time in all three of the Wisconsin districts?

A. Yes, sir.

X-Q. 143. What, just in general, were the other two districts? That is, what parts of the state?

A. Well, I really couldn't tell you just exactly what counties they took in.

X-Q. 144. I didn't mean by counties, but as for instance the eastern part or western part, north of your district—

A. Well, I believe that the part north of Racine and 1479
Kenosha county was handled by Mr. Marks, who was a scrap man.

X-Q. 145. Is that the district immediately north of Milwaukee, you mean?

A. I believe so, and his pivot point I think was Green Bay.

XQ. 146. Green Bay then was in Mr. Marks' district?

A. I believe it was.

X-Q. 147. And Appleton?

A. No, I am not positive whether Appleton was in

1480 Mr. Marks' district, but I imagine it would have been, because when I was given my territory I was given my four counties and really paid no attention as to what the other men drew, as far as territories were concerned.

X-Q. 148. And Manitowoc?

A. Manitowoc, I think, was in Mr. Marks' territory.

X-Q. 149. And Sheboygan?

A. I believe that would go in his territory.

X-Q. 150. What else, in outline, was the other district?

A. The other district, I believe, is what was called the western side of the state and that was held by Mr. Frank Hopewell. His pivot point, I believe, was Madison
1481 Wisconsin. That was the largest point in this territory.

X-Q. 151. What crews did you have in your district for this special Beech-Nut campaign—cigarette campaign?

A. You mean the amount of salesmen I had?

X-Q. 152. Yes.

A. There were five, including myself.

X-Q. 153. Was that all one crew?

A. Yes, sir. I had three retail salesmen and one was working for Mr. Frank Hopewell, formerly in the Milwaukee territory, was put under my supervision at the
1482 time.

X-Q. 154. Did you have any other crews beside these four men and yourself, working under you?

A. During the Beech-Nut campaign?

X-Q. 155. During the special introductory campaign of the Beech-Nut cigarettes.

A. No, sir.

X-Q. 156. Did you have the same four men right through the campaign?

A. Well, there was one man resigned, prior to the termination of the campaign, and I continued with three retail salesmen.

X-Q. 157. Will you give me the names of these four men, please? 1483

A. They were a Mr. Gimbel—

X-Q. 158. Do you know his initials?

A. E. A. Gimbel, and W. C. Jackson and a Mr. William New—he was with me a short time, and a Mr. M. J. Schimmel.

X-Q. 159. Taking Mr. Gimbel, of these four men you have just named, do you know how long he had been with the Lorillard Company before that?

A. Well, when I acquired the Milwaukee territory I had no memorandums turned over to me as to the exact date of his employment, but I understand he was with 1484 our company about four or five years.

X-Q. 160. He was an experienced man then in your company's employ?

A. Yes, sir.

X-Q. 161. Do you know where he is now?

A. I couldn't say. I haven't been in touch with him since I have left this territory.

X-Q. 162. Is he still in the employ of the P. Lorillard Company?

A. No, sir, he left our employ since, and I couldn't tell you where he is located.

X-Q. 163. W. C. Jackson, was he with the Lorillard 1485 Company before that?

A. I understand about a year and a half.

X-Q. 164. In what territory immediately before that, do you know?

A. I believe he had been, ever since his employment with the company in the Wisconsin territory.

X-Q. 165. Do you know what territory Mr. Gimbel had been in immediately before that campaign?

A. In the Wisconsin territory also.

X-Q. 166. Is Mr. Jackson still in the employ of the P. Lorillard Company?

1486 A. No, sir.

X-Q. 167. Do you know where he is now?

A. I couldn't say.

X-Q. 168. Mr. New, do you know whether he was with the P. Lorillard Company before that campaign?

A. No, sir, I employed Mr. New about two weeks prior to the introductory campaign on Beech-Nut cigarettes.

X-Q. 169. About two weeks before?

A. About two weeks prior to that.

X-Q. 170. Was he a tobacco man?

A. No, he was hired to work Helmar cigarettes.

1487 X-Q. 171. I mean, had he had previous experience in the tobacco trade?

A. From the information I was able to get from him and some of the references he had gotten for me prior to his employment, he had selling experience, but no tobacco experience.

X-Q. 172. Is he still with the P. Lorillard Company?

A. No, sir, he resigned about seven weeks, I believe, after the date he was employed.

X-Q. 173. Why did he resign?

A. He went into the railroad game. He formerly was selling and soliciting freight business for some

1488 railroad and I understood he was going back into that business.

X-Q. 174. Did you have the hiring and firing of these men, this crew?

A. Why, yes. We pick our prospects, line up their references, send in what we call their employment papers regular form to fill out, and request our New York office to grant us permission to employ whatever particular prospect it may be, and if their references we have mailed in meet with the approval of our superiors they usually wire or write us, "It is O. K. to employ Mr. So-and-so."

X-Q. 175. Did you request Mr. New to resign? 1489

A. No, sir, he resigned of his own accord.

X-Q. 176. Had there been any complaint or dissatisfaction with his work while he was with you?

A. Absolutely none.

X-Q. 177. Had Mr. Schimmel previously been with the P. Lorillard Company before this campaign?

A. Yes, I believe he was with them about nine months.

X-Q. 178. In what territory?

A. In the Milwaukee territory.

X-Q. 179. Was he an experienced man in the tobacco trade?

A. Yes, sir. 1490

X-Q. 180. Is he still with the P. Lorillard Company?

A. Yes, he is working under the supervision of Mr. Frank Hopewell.

X-Q. 181. Which one of these four is the one that you say you took over from Mr. Hopewell's previous district?

A. Mr. Schimmel.

X-Q. 182. During the course of your campaign did you have any other men under you for the Lorillard Company at all?

A. No, sir.

X-Q. 183. Not even temporarily? 1491

A. No, sir. There was a window man here who worked under the supervision of Mr. Frank Hopewell in the window trimming department, Mr. Smith, but he was not working under my supervision, but h had assisted me in putting in our regular window trims.

X-Q. 184. What were Mr. Smith's initials?

A. I can't say just exactly what his initials were because he never worked under my supervision, but I always addressed him as "Mr. Smith" and he addressed me as "Mr. Goldstein".

X-Q. 185. In working your district, Mr. Goldstein,

1492 how did you assign these four men that you have just named?

A. There was not any particular territory assigned to any of the men, due to the fact we wanted to get our distribution as quickly as possible I thought it was essential to cover the main thoroughfares of the city first and I worked car-line streets only and routed the men daily. I started them from the central part of the city, commenced on a car-line and worked out to the end.

X-Q. 186. The same man go pretty much all the way out on one car-line?

A. Yes, if it happened to be Fond du Lac Avenue
1493 the same man would work Fond du Lac Avenue, but possibly the next day he would be working another end of the city.

X-Q. 187. Could you tell me just in outline just what principal car-lines Mr. Gimbel worked?

A. Well, he had worked Third Street, he had worked Center, he worked Grand, he worked Wisconsin, and such other small branch lines as lead off of these streets.

X-Q. 188. Can you name, just in outline, what car-lines Mr. Jackson worked?

A. Well, he had worked Center.

X-Q. 189. That is a different Center from the one Mr.
1494 Gimbel worked?

A. There is one west and one east.

X-Q. 190. Well, which, do you remember?

A. Mr. Jackson worked west. He had worked Oakland, East Water, West Water and also worked Third Street.

X-Q. 191. Is that the same Third that Mr. Gimbel worked?

A. Yes, sir. He also had worked Fond du Lac Avenue.

X-Q. 192. Which end of the Third Street car route was Mr. Jackson on?

A. He commenced on Grand Avenue and worked north. 1495

X-Q. 193. And was Mr. Gimbel on Third Street south?

A. Well, he had worked Third Street south, but the streets over there are very much cut up. He started at Grand Avenue and worked south and then he would cut off into possibly Mitchell and Eighth. I have been away from here now a year, but in my work on Anargyros cigarettes I personally covered very little of the outlying sections.

X-Q. 194. You didn't go out very much into the outlying sections?

A. Very, very seldom. 1496

X-Q. 195. About what percentage of your trade was in the outlying sections, roughly?

A. You mean, cigarette dealers?

X-Q. 196. Yes.

A. Well, on Beech-Nut cigarettes I would judge possibly—on domestic cigarettes of the character of Beech-Nuts I would judge possibly sixty-five per cent.

X-Q. 197. About sixty-five per cent. of the dealers were in the outlying districts?

A. On the Anargyros brands possibly about from twenty-five to thirty per cent.

X-Q. 198. Just quickly in outline can you give the car routes Mr. New worked? 1497

A. He had worked all car-lines practically on the south side of the city. I could not just name them. I know one of the principal ones was Mitchell Street.

X-Q. 199. He worked on routes these other men worked on also, did he?

A. He had also re-worked Third Street and had re-worked Walnut Street and Fond du Lac. They were pretty much scattered around, you know, changed around.

X-Q. 200. Walnut, did you say?

1498 A. Yes, sir.

X-Q. 201. And Mr. Schimmel, just briefly?

A. Mr. Schimmel had a Ford car and due to that fact I assigned him to working all of the outlying sections off of Street cars commencing on the northwest side and his time was taken up considerably in helping me transfer around cigarettes to jobbers and placing up outdoor advertising in the immediate loop.

X-Q. 202. He had the outlying districts beyond the car-lines, you say, in general?

A. Yes, that is when he was not working with me.

X-Q. 203. Did you ever have any complaints in re-
1499 spect to any of these four men in your crew, as to the way they were presenting Beech-Nut cigarettes to the dealers?

A. How do you mean? From retail dealers or jobbers?

X-Q. 204. From anybody.

A. Never.

X-Q. 205. Did you ever have to caution them as to their methods?

A. Well, no, I never had to caution them because I had at different times during the campaign joint dealings with them which we call schooling meetings, and
1500 brought out just how I wanted them to approach the retail dealers and how I wished them to approach the consumer, and by checking up their work I found my instructions were followed out very closely.

X-Q. 206. Did you ever have any complaints as to the work of Mr. Gimbel?

A. Never.

X-Q. 207. As to the way he was offering these Beech-Nut cigarettes to the dealer?

A. Never.

X-Q. 208. Found no fault at all?

A. No, sir, he was a very thorough man.

X-Q. 209. Did you have any complaints in regard to 1501
Mr. Jackson?

A. None, whatsoever.

X-Q. 210. Did you ever have to warn Mr. Jackson?

A. No, sir.

X-Q. 211. In regard to his methods of selling Beech-Nut cigarettes?

A No, sir.

X-Q. 212. Did you ever have any complaints in regard to Mr. New?

A. No, sir.

X-Q. 213. Did you ever have to warn Mr. New?

A. No, sir. 1502

X-Q. 214. Did you ever have any complaints in regard to Mr. Schimmel?

A. No, sir.

X-Q. 215. Did you ever have to warn Mr. Schimmel?

A. No, sir.

X-Q. 216. Did the P. Lorillard Company ever send you any instructions to instruct the salesmen not to put forward these Beech-Nut cigarettes as a product of the gum people?

A. Well, I had received a letter—the only instructions, what I might call instructions were prior to the opening of this campaign, I was called to Chicago, my 1503
letter was signed by my general sales manager in charge of the Turkish cigarette department, Mr. C. C. Auld to meet a Mr. E. J. Bush in Chicago.

X-Q 217. When was this?

A. This was prior to September 26th, 1921.

X-Q. 218. What was Mr. Auld's position?

A. At that time general sales manager of the Turkish department.

X-Q. 219. Was he manager of the Turkish sales in Chicago?

1504 A. No, throughout the United State, from what I understand.

X-Q. 220. Will you please tell what took place at that meeting, in regard to instructions?

A. I went over there and met Mr. E. J. Bush and a Mr. Fitzsimmons who had charge of the Beech-Nut scrap business and a Mr. Everett Meyer who had charge of the tobacco department for the central western states and at this meeting we were allotted our respective territories we were to cover on Beech-Nut cigarettes and all of the head salesmen present at this meeting were given a sales talk, and our attention was particularly
1505 called to the fact that in marketing Beech-Nut cigarettes we should not meet with any trouble because we had such wonderful brands as Beech-Nut scrap to call to the retailer's attention that we were the manufacturers of, that had made such tremendous success and we had such brands as Murad, Egyptian Dieties, Helmars and Moguls, they were the leaders in their respective class, and in mentioning these brands to the retail dealers, we would no doubt get a quicker co-operation from them. The entire talk was along those lines, explaining how they wanted us to sample, how they wanted the advertising to be placed, and that just about terminated our
1506 campaign. Of course, the meeting lasted practically all morning, but the entire meeting was based on those lines.

X-Q. 221. Do you remember the date of that meeting?

A. I believe it was about three days prior to the time we had opened up our campaign in Wisconsin.

X-Q. 222. Did you receive a letter from P. Lorillard Company calling that meeting?

A. Just as I have mentioned, I received a letter from our general sales manager advising me to meet Mr. E. A. Bush in Chicago, and mentioning a certain date, and to be guided by any instructions he might give me, which was the customary way of the company doing business.

X-Q. 223. Did you ever receive from the P. Lorillard Company written instructions for yourself or to be relayed to your salesmen as to the way you should present these cigarettes to the market and to refrain from letting the idea be given that they were put out by the gum people? 1307

A. I never received any written instructions, because I imagine the company didn't think it necessary.

X-Q. 224. Did you at any time receive a written or printed letter or circular giving you such instructions or warning to be careful in that regard?

A. No, sir.

X-Q. 225. You have never at any time received such a letter or circular? 1308

A. No, sir.

X-Q. 226. Did you ever write or issue a circular letter warning your salesmen?

A. No, sir. At these meetings that I had with my salesmen everything was done in person, because I was right here with them all of the time and I called their attention to the way I wanted them to present Beech-Nut cigarettes in the trade. I instructed them that in introducing themselves to the trade I wanted them to make it clearly understood to the retailer that they were representatives of P. Lorillard Company who manufactured Beech-Nut scrap tobacco and such other brands as Murads, Egyptian Deities, and Helmar and also Mogul and then tell them, "We are now putting on a new brand of cigarettes called Beech-Nut cigarettes, which is the latest addition to the numerous trade marks we already have on the market." 1309

X-Q. 227. Do you ever receive circular letters from the P. Lorillard Company?

A. Yes, I received circular letters in regards to different methods of sampling, or maybe received a circular from the general sales manager telling us what he had

1510 seen in other territories that would be beneficial in promoting larger sales on our products.

X-Q. 228. You have been, you say, ten or eleven years with the P. Lorillard Company. From your experience with that company, isn't it usual for them to send such a circular or letter in regard to anything which they want to impress upon their salesmen?

A. As I say, if they had something they wanted to impress upon us in regard to new methods of working or new methods of sampling or advertising they would write us about it and send us out a regular circular letter, or possibly a circular letter from the sales
1511 manager requesting us to read such letter to our retail salesman.

X-Q. 229. If the general sales manager of the P. Lorillard Company or any branch of the Home Office had wished to impress these instructions upon you, wouldn't you have expected some letter or circular on it?

By Mr. Cavanagh: That question is objected to, as the witness is not competent to answer this. He is not supposed to know what is in the minds of the officials of the Lorillard Company as to what
1512 they regard as important.

(Last question read to the witness).

A. Well, in this particular case I would not because the company—

By Mr. Johnson:

X-Q. 230. Just in general.

A. As I say, in general I would not expect instructions of this kind because the company knows that the men in their employment in charge of territories are

well acquainted with the products of the Lorillard Company, and we all know that Beech-Nut scrap is one of our famous trade mark brands and that naturally they would not be sending us instructions telling us we should not mention anybody else's product with them. I imagine if the company had to send me instructions of that kind they would immediately dispense with my services. 1513

X-Q. 231. About how often, Mr. Goldstein, did you hold these meetings of your salesmen in your district?

A. Well, incidentally these instructions were given to them practically from day to day or every other day. These instructions were given to them practically continuously. 1514

X-Q. 232. You spoke of having meetings at which you gave instructions.

A. The instruction meetings I referred to are little meetings held prior to the time the men started out to work in the morning.

X-Q. 233. Then these meetings you speak of for the purpose of giving instructions were informal times when you came together in the morning before beginning your day's work?

A. Yes, sir.

X-Q. 234. You said on direct examination, I believe, that at these meetings you specially told the salesmen that the Beech-Nut cigarettes were a Lorillard product, is that right? 1515

A. Yes, sir.

X-Q. 235. Now, why was that necessary to tell four Lorillard salesmen that one of the products which your company was putting out was their own product?

A. Well, we not only do that with Beech-Nuts, we do it with all brands. We go to a retail dealer we naturally call attention to the fact it is a Lorillard

1516 product to bring attention to which manufacturer is producing the cigarettes.

X-Q. 236. This is the salesmen you said you were talking to?

A. These instructions were relayed to them so they in turn could relay the information to the retail dealers. As I said in that direct examination, I had read in the newspapers and also in the tobacco journal there was some sort of case going on on the question of trade marks, and I didn't want any possibility of confusion in my territory, and I took it upon myself to enlighten the men, figuring possibly they might run across some
1517 dealer who, when they first mentioned Beech-Nut to him might say, "Who made this, the Beech-Nut Packing Company?" I wanted to avoid all of that and therefore gave them their instructions.

X-Q. 237. As I understood you to say, you specially told your salesmen that the Beech-Nut cigarettes were a Lorillard product. Did you think that even your own salesmen were in uncertainty as to the origin of these cigarettes?

A. Absolutely not, because my salesmen that worked for me prior to this campaign had heard of Beech-Nut cigarettes and the success they were meeting with in the
1518 east and the numerous requests they had had from retail dealers as to when they would be able to get them. They knew it was a product of the Lorillard Company, and the reason I had given these instructions was to avoid any possibility of confusion.

X-Q. 238. Had you found some confusion?

A. Absolutely none.

X-Q. 239. Then isn't it peculiar you should have thought it necessary every day to repeat these instructions, when you found no confusion at all out in the trade?

A. These instructions were only given to them as

to Beech-Nuts, but instructions were given to them it 1519
was a product of the Lorillard Company, that was done in order to impress on the retail dealer that we were the manufacturers of successful brands and therefore wanted to bring out the fact we were again making a new brand of cigarette and to impress on the retail dealer it was a Lorillard brand.

X-Q. 240. As you have gone about in your day's work during the weeks of this Beech-Nut cigarette campaign did you have any questions asked you as to who made the Beech-Nut cigarettes?

A. Well, I never had a consumer or retailer ask me that question because when I personally approached a 1520
retailer or wholesaler I made it understood at the start that I was representing Lorillard Company, manufacturers of Beech-Nut tobacco and cigarettes. Only in one case I stopped a consumer who I had seen smoking a cigarette and as usual I would walk up to any man, possibly yourself if I saw you on the street smoking a cigarette, I would say, "Pardon me, I notice you indulge in cigarettes and I would like very much to present you with a package of cigarettes manufactured by the P. Lorillard Company", and this man stopped and he said, "I wouldn't smoke that cigarette manufactured by people who have to resort to burglary." And I said, 1521
"You are all wrong on that, where did you get that information?" He said, "I have a friend of mine who sells Beech-Nut gum and he told me that." I said, "I am telling you he is all wrong, I would like to get his name and I would like to have a meeting with him and possibly yourself." I said, "We have manufactured Beech-Nut scrap for a great number of years, to my knowledge, and the gentleman that told you that has absolutely told you something false that would hurt the prospect of the promotion of this brand." "Nevertheless", I said, "I wouldn't like to have you feel that way about it, I would

1522 like to have you accept this package of cigarettes and give them a good trial, you will find them a very fine quality of cigarette." That was the only case I had ever had where a man mentioned Beech-Nut gum or Beech-Nut products to me.

X-Q. 241. Is that the way you approached Mr. E. R. Lewis and his friend who was with him the day you have told about in your direct examination in the Loop Cigar Store?

A. I did not approach Mr. Lewis—I was introduced to Mr. Lewis.

X-Q. 242. Well, did you open up with similar remarks
1523 that you say you used to every one that you met, "I am a Lorillard man"—

A. No, I didn't say I was a Lorillard man, I said I represent the Lorillard Company, manufacturers of these cigarettes. When I met Mr. Lewis I was introduced to him by Mr. Tuckwell as a Lorillard representative and there was not any necessity of my telling him that, he knew that, and I was told he was the Beech-Nut Packing Company man.

X-Q. 243. To go back to these instructions, I understood you to say on your direct examination that you told your salesmen that these Beech-Nut cigarettes were
1524 of a high quality and emphasized to them the quality of the cigarette, is that correct?

A. You mean, our salesmen?

X-Q. 244. Yes, in your meetings that you have described.

A. Well, I told them the Beech-Nut cigarettes were a very high quality domestic cigarette.

X-Q. 245. Now, are you familiar in general with the Beech-Nut Packing Company products?

A. None other than the fact I know they manufacture Beech-Nut bacon and Beech-Nut gum.

X-Q. 246. Have you seen their products in stores at different places?

A. Well, in the character of stores I call on I don't 1525
see any Beech-Nut bacon, but I do see Beech-Nut gum.

X-Q. 247. Have you seen their advertising in magazines and posters and bill boards and such?

A. I read very little magazines, therefore have never noticed any advertising. As far as bill boards, I have never seen a Beech-Nut bill board. I have seen little ads, and window displays which I would call window screens, set up by the salesman who worked the territory.

X-Q. 248. You have seen considerable Beech-Nut Packing Company advertising, haven't you?

A. These screens I mention, which I believe carried a picture of their factory or their different machineries 1526
they manufacture with. I have never taken pains enough to see what the ad represented, but I knew it was a Beech-Nut ad.

X-Q. 249. You get about a great deal, don't you, Mr. Goldstein?

A. In cigar stores only.

X-Q. 250. But you have to get about from store to store, don't you?

A. Absolutely.

X-Q. 251. You must pass a great many sign boards?

A. I do.

X-Q. 252. A great many windows? 1527

A. I do.

X-Q. 253. And is it possible for you to say you haven't seen any great amount of Beech-Nut Packing Company's advertising?

A. I say I have seen Beech-Nut screens, but I don't ever recollect seeing a Beech-Nut bill board.

X-Q. 254. You know that the key word of all Beech-Nut Company's advertising is quality of the goods?

By Mr. Cavanagh: That question is objected to as being improper cross-examination, as nothing was

1528 said about the quality of Beech-Nut goods or their standing, on direct examination, and furthermore this witness is absolutely not competent to answer any such questions.

The Witness: No, sir, I can't say that I do. I have never had any occasion to hear that and I never met any Beech-Nut representative outside of the fact I met Mr. Lewis and during that conversation he never mentioned to me their trade name or mark was "quality".

X-Q. 255. Didn't you know when you emphasized to
1529 your salesmen the word "quality" in connection with these Beech-Nut cigarettes, you were putting in their hands the very material for connecting this product up with the Beech-Nut Packing Company?

By Mr. Cavanagh: That question is objected to as absolutely improper. There is nothing in the record to show that this Beech-Nut Packing Company is the possessor and sole owner of the common, every day, wholesome English word "quality" for food products, chewing gum or what not, let alone tobacco.

1530 Mr. Johnson: Answer the question, please.

A. No, sir, I didn't know that I was using any of their words that they may control or phrases they may control, as I had used the word "quality" in practically every brand I sample. When I sample Murads I bring out the point very clear, "Murad cigarettes contain the highest quality of Turkish tobacco on the market", and I have used that word ever since I have been in the cigarette business.

Adjournment Taken to 2:00 o'clock p. m. this day.

1531

January 30th, 1923, 2:00 p. m.

Met pursuant to adjournment, parties appearing as before.

WILLIAM GOLDSTEIN resumes the stand for further cross-examination.

By Mr. Johnson:

X-Q. 256. I understood, Mr. Goldstein, on your direct examination, that you told your salesman from time to 1532
time to put these cartons of Beech-Nut cigarettes on the shelves in stores. Did you caution them at that time to avoid having them put right alongside the Beech-Nut Packing Company's product in the same store?

A. They were not told to put them on a shelf. My instructions to them were to get the dealer, after he succeeded in selling a carton or two for cash,—if possible to get the retail dealer to put them on the cigar case, which is the first place the consumer coming in the store would be likely to see the brand.

X-Q. 257. Don't your salesmen place these things in stores that keep general lines of goods as well as cigar 1533
stores only?

A. Oh, yes, if they just happen to run across possibly a stationery store or grocery store that may happen to handle cigarettes, but as a rule a cigarette salesman is not going around calling on grocery stores or other lines of merchants that carry cigarettes outside of drug stores or cigar stores or confectionery shops or soft drink parlors, just look for cigarette dealers in places that do business of that kind.

X-Q. 258. Haven't you found dealers of cigarettes in the small towns or the general stores?

1534 A. Yes, in the smaller towns, but I personally have had little dealings in the smaller towns for the reason I have always worked the Anargyros brand of cigarettes, with the exception of the special campaign.

X-Q. 259. The Beech-Nut cigarette being a cheaper cigarette, did you not expect they would be carried by a greater variety of stores?

A. Absolutely.

X1Q. 260. Did you ever caution your salesmen about that, having them placed alongside of the Beech-Nut Packing Company products?

A. I don't recall ever mentioning in my conversation
1535 to any salesman the Beech-Nut products, outside of the fact when I talked to them I said, "The reason I want you folks to mention particularly Lorillard Company and Beech-Nut scrap and other brands, I do not want any confusion about the Beech-Nut name or some other article made under the Beech-Nut label."

X-Q. 261. Were you able to go with your salesmen in very many cases to see how they carried out your instructions?

A. At times when I got a little time away from calling on my jobbers and downtown dealers I spent a little time with them but mostly I went around and checked over
1536 their work from their daily reports.

X-Q. 262. Could you say about what percentage of cases you were able to watch what your salesmen were actually doing?

A. Well, possibly in twenty per cent of the sales they made.

X-Q. 263. Do you mean that you went with them in about twenty per cent of the visits?

A. No, not with them, but about twenty per cent of the merchants they had sold cigarettes to, twenty per cent of the most important merchants I had gone around later on and inquired as to the success of the brand, and

to look around to see how they had placed the adver- 1537
tising material.

X-Q. 264. But in what portion of the cases were you able to go in with the salesmen?

A. Oh, very small, about possibly five per cent of the dealers they called on.

X-Q. 265. Then have you any means of knowing what your salesman said or did when he went into these stores to place Beech-Nut cigarettes?

A. Only in the places where I personally was in the store when they called on the retail dealer.

X-Q. 266. You had very little means of knowing then what the salesman had actually said or done at those 1538
times?

A. Yes, I had means of knowing. When I called on the retail dealer my remarks were as a rule along this line. I would go in there and introduce myself as Mr. Goldstein, the representative of the Lorillard Company, and, "I am interested in the marketing of this brand and looking after the interests of the Beech-Nut cigarettes and I came in to find out whether you carried this brand on hand." And he said, "Yes", and I said, "Did my salesman place advertising material here?" or "I don't see any around." The chances are in placing up material the retail dealer will jerk down the advertising 1539
matter after the retail saelsman leaves, so to make sure whether he has any on his report I would inquire to that effect, but as a rule if a salesman did anything out of the ordinary, that the retail dealer would not expect a salesman to do, he would naturally tell me about it.

X-Q. 267. Didn't you hear any inquiries from any of these dealers of any kind, on their part, as to whether the Beech-Nut Gum people were putting out these cigarettes?

A. Never.

X-Q. 268. But is it not true that you had very little opportunity yourself to observe what your salesmen said

1540 and did when they went in to make sales of the Beech-Nut cigarettes?

A. Only in the places I was with them.

X-Q. 269. Is that not true, you had very little opportunity yourself to observe what your salesman said or did?

A. I have considerable opportunity in the places I was with them and where I had inquired in regard to their work and how they had conducted their work.

X-Q. 270. But when you only went with them in perhaps five per cent as you have said, of their visits, you yourself had very little opportunity, did you not, for ob-

1541 serving what they said and did at those times?

A. Yes, but I could judge from that five per cent when I worked with my salesmen in the most important sales of my territory, and when I judged that five per cent I could almost figure out exactly how they had conducted their work and duties in the remaining ninety-five per cent.

X-Q. 271. But how can you know what the salesman said or did at that time if you were not there?

A. Well, it has always been the policy with our company to train our salesmen to do their work and conduct the business along the lines laid out by the company and

1542 their head salesman. We have always felt if the salesman is properly trained by the head salesman, in ninety-nine per cent of the cases he conducts his work along that line.

X-Q. 272. Did you ever accompany this salesman, W. C. Jackson, you have mentioned, on any of his visits?

A. Did I ever accompany Mr. Jackson?

X-Q. 273. Yes.

A. Yes, I have.

X-Q. 274. Do you know the C. H. Beese grocery store at 701 Murray Avenue?

A. Just know of them, only within the last week or

ten days. I went out to see what character of store it was, but Mr. Beese is not in there any more. 1543

X-Q. 275. What was the reason for your going out there?

A. Well, I just went out to see whether that particular dealer was located on any of the routes I had worked my salesmen on.

X-Q. 276. What did you find in that respect?

A. I found I never routed a salesman to work that part of Murray Avenue. The store does not directly face a car-line, and a salesman who works that territory was not to work that particular store.

X-Q. 277. What car-line is that on? 1544

A. The side of the building facing on Folsom, if I am not mistaken, and the front of the building facing directly on Murray Avenue which hasn't a car-line and if the salesman was over there he was off his route.

X-Q. 278. What car-line route in general, as you have outlined them, is that on?

A. The closest to that particular store?

X-Q. 279. Yes.

A. Oakland Avenue.

X-Q. 280. Did your man, Mr. Jackson, ever visit that store?

A. Not to my knowledge, he has not. 1545

X-Q. 281. Have you looked into that on your records?

A. On my records? Well, I wouldn't have any means of knowing on my records, the only way I would know is from the routes I had given him, unless he had gotten off his territory. Possibly he had, but if he stuck to his territory and was not loafing on the job, he was not there. I know we had never sold that gentleman any cigarettes and it is most likely he was not in there, because the dealer from the information I got from the dealer out there, Mr. Beese did not carry any cigarettes or tobacco products.

1546 X-Q. 282. But that is on the Oakland Avenue car-line, didn't you say?

A. No, it is not on the Oakland Avenue car-line. It is a block from the car-line street, Oakland Avenue, or whatever street it is, is a block west of there—or north of there.

X-Q. 283. It is in the territory of the Oakland Avenue car-line?

A. It is in the vicinity, but a salesman may be routed to work East Water Street and cross East Water, say from Sycamore to Grand and not touch any of the corner stores on Grand Avenue, but adhere strictly to Third
1547 Street or East Water Street.

X-Q. 284. When you say, Mr. Goldstein, on your direct examination, that your salesman would do this and would do that, how could you possibly know that your salesman certainly did such things as you said?

A. The reason I take it for granted they did, is because of the continuous checking I did, which was one of the most important duties in my work, checking my salesmen up to see if they are following out my instructions. If they were not, I would have dispensed with their services.

X-Q. 285. You did take it for granted?

1548 A. Absolutely, because I never found any of my salesmen doing otherwise.

X-Q. 286. It was a mere guess on your part?

A. No, it was no guess at all, absolute positive checking from records of what they do, and inquiring from different people they come in contact with.

By Mr. Johnson: This last answer is objected to, except the first sentence, as not responsive.

X-Q. 287. You introduced some order slips, Mr. Goldstein. Were these always issued when your salesman made a sale of Beech-Nut cigarettes?

A. When they made a cash sale they left the retail dealer what is known as the white slip, which I consider the original, and he brought the duplicate attached to his duplicate daily report for my records and kept a tissue paper copy for his records. And when he sold through a jobber he brought me back the original to turn in to the jobber for delivery and left the retailer the duplicate yellow slip to show that the retail dealer had purchased the goods and signed for them, and the white slip he brought back attached to his daily report for my records. 2342

X-Q. 288. Did your salesmen always issue these order slips?

A. Absolutely. 2343

X-Q. 289. Did you ever have any trouble with them about their failing to do that?

A. Not to my recollection.

X-Q. 290. Do tobacco jobbers have order slips of a similar character to that, with their own name at the top?

A. You mean similar to?

X-Q. 291. Yes.

A. No, I don't recollect any jobber having forms of this kind. They usually have a large bill head.

X-Q. 292. But of the same character? 2344

A. No, I don't think so. In fact, I have never seen one.

X-Q. 293. Did the Lorillard Company or your department organize any daily or weekly or monthly competitions among your salesmen to induce increased sales or make an offer to the man who would make the most sales in a given period?

A. Not in my territory, no, sir.

X-Q. 294. Have you heard of that being done in connection with these Brook-Nat cigarettes?

1552 A. I heard indirectly, with other salesmen, there were other salesmen that worked competitive districts like that.

X-Q. 295. Was there any of that in the state of Wisconsin?

A. I couldn't say.

X-Q. 296. Were any other kinds of inducements or bonuses offered to your salesmen or to your jobbers' salesmen?

A. Yes, the jobbers' salesmen and the jobber received a circular letter telling that from September the 26th up until some time in November he would receive
1553 twenty-five cents a thousand on each thousand Beech-Nut cigarettes sold to the retail dealer, and my salesmen and myself were offered a bonus on all of the introductory business we had obtained on Beech-Nut cigarttes.

X-Q. 297. Have you a copy of that circular you speak of?

A. No, I have not. All my correspondence that transpired between the company and myself was destroyed when I left Milwaukee, Wisconsin, as I didn't want to carry all of this stuff along. It was really unimportant and I destroyed it upon leaving Milwaukee
1554 for Chicago.

X-Q. 298. Can you tell me if it was similar to some circulars that are now on exhibit in this case?

Mr. Cavanagh: That question is objected to as improper cross-examination, as this witness did not testify on direct as to anything in connection with these circulars. Counsel for Lorillard Company is willing to allow all latitude of cross examination, but sees no sense in going so far afield.

By Mr. Johnson: This witness was avowedly put on to explain the methods of distribution of the Lorillard products.

By Mr. Cavanagh: Witness was put on to explain the method of introducing the matter to the trade, not any question between the Lorillard Company and salesmen on any bonus proposition, if that is what Mr. Johnson is after. 1555

By Mr. Johnson:

X-Q. 299. I show you three circular letters marked Plaintiff's Exhibit #12-A, # 12-B and #12-C. Will you tell me whether the circular which was sent to jobber salesmen in this district were similar to this, just in general. 1556

A. (Witness looking at same) I don't recollect this circular (referring to Exhibit 12-C) ever being mailed to any particular jobbers in this state. This (referring to Exhibit 12-A) is a similar circular; was mailed advising the jobbers in the state of Wisconsin Beech-Nut cigarettes were being introduced and making a blanket offer. This is the exhibit here (indicating).

X-Q. 300. Plaintiff's Exhibit 12-A?

A. Yes, but the dates were different on that.

X-Q. 301. Did the circulars that came into this district of this character, offering this additional compensation to the salesmen for selling Beech-Nut cigarettes, contain any warning to the salesmen not to take any chances in having the Beech-Nut cigarettes put forward as a product of the Beech-Nut Packing Company? 1557

A. Well, the circular, to my recollection, spoke of nothing else but Lorilard's Beech-Nut cigarettes and what they requested of the jobbers or wished jobbers to do for them in helping market Beech-Nut cigarettes, the only instruction I recollect put on there was not to sell any one dealer any big quantity, I would suggest not over five thousand, which was in order to keep the merchandise fresh in the dealer's stock.

1558 X-Q. 302. Then, do I understand you that this special inducement to increase sales was made without any warning being issued at the same time of the danger of confusion among the consuming public?

A. Well, this circular did not go to the jobber salesmen, it just went to the jobber and the jobber in turn—Lorillard has no connection in the course of their business with the jobber salesmen—

By Mr. Johnson: Objection to this as not responsive.

(Last question read).

1559

A. There was not any warning of confusion or anything given in the circular.

X-Q. 303. In your direct examination, Mr. Goldstein, you told about meeting Mr. E. R. Lewis of the Beech-Nut Packing Company. Will you please state again the first time you ever met him?

A. The first time I met him, Mr. Lewis, was some time after September 26th, shortly after we opened up the campaign, in a store known as the Loop Smoke Shop, which is on East Water Street, near Wisconsin, and to my knowledge Mr. Lewis and another gentle-

1560 man, that I was not interested in until later on, were in this store when I came in, I should judge about nine o'clock in the morning.

X-Q. 304. Were you introduced to the other gentleman?

A. No, sir.

X-Q. 305. Not at all?

A. Not at all.

X-Q. 306. Did you talk to the other gentleman?

A. No, sir, our conversation was purely and only with Mr. Lewis.

X-Q. 307. Do you remember what the other gentleman looked like?

A. Well, I didn't take any particular pains to find out. I was more or less in a hurry and had an appointment with jobbers and had a very brief conversation with Mr. Lewis, and the fact Mr. Lewis didn't make any attempt or Mr. Tuckwell did not make any attempt to introduce me to him, I didn't pay any particular attention to him. 1561

X-Q. 308. Do you remember seeing Mr. Lewis before at any time?

A. Not to my knowledge, I don't. I possibly saw him, but didn't know the gentleman.

X-Q. 309. Didn't you and he visit the same trade, to a great extent? 1562

A. Well, yes, I imagine we do, because practically every cigar store carries the candy and the gum that he sells, but I don't ever recollect running across him in any of the stores until this particular time I was introduced to him.

X-Q. 310. But you and he were practically running in and out of the same offices a great deal?

A. The same dealers?

X-Q. 311. Yes.

A. That may have been, I couldn't say, but I don't ever recollect noticing him.

X-Q. 312. It is quite possible he may have noticed you even if you didn't notice him? 1563

A. That may be. Lots of people may have noticed me that I don't know. I couldn't account for the things he sees.

X-Q. 313. He might even have said, "Hello," to you a great many of times without you remembering it?

A. I don't recall it, because any man saying "Hello" to me, I would try to find out who he was or at least I would make some remark to him, such as, "You look familiar to me, but I can't just place you," or something like that, to find out whether he recognizes me.

1561 X-Q. 314. What was the next meeting that you remember between yourself and Mr. Lewis?

A. The next meeting was in the store known as Kerns & Sons cigar store, directly across from the Loop Smoke Shop.

X-Q. 315. When was that?

A. Oh, I should judge possibly sometime during the month or the early part of October. I can't just say the exact date, because I had no object at that time to remember the dates of meeting him. Just a casual meeting in the store.

X-Q. 316. Do you remember definitely which of those
1565 meetings came first?

A. The meeting where I was first introduced to him in the Loop Cigar Store, by Charles Tuckwell.

X-Q. 317. Are you sure of that?

A. Absolutely.

X-Q. 318. When was the other meeting you mentioned at Beck & Mahlsted's?

A. That was sometime, I should judge, the latter part of October in a city known as Kenosha, Wisconsin.

X-Q. 319. Can you think of any other circumstance that enables you to fix the date?

A. No, I could not. I was running in and out of Ken-
1570 osha practically three or four times a week, in between Milwaukee, Kenosha and Racine. Those were the three largest points I had to work and I was running in and out of there right along.

X-Q. 320. That time you went to Chicago to the meeting called by Mr. Bush, was it?

A. The first meeting prior to the marketing of the Beech-Nut cigarette?

X-Q. 321. Yes, at the time of that meeting did you stop at Kenosha on your way back to Milwaukee?

A. No, I went directly to Chicago to meet Mr. Bush, because—

X-Q. 322. (Interrupting.) I mean from Chicago, coming back to Milwaukee, did you stop at Beck & Mahlsted at that time? 1567

A. Well, I don't recall whether or not I did, I don't just recall that.

X-Q. 323. How long before the start of the campaign was that, did you say?

A. I should judge about three days prior to September 26th.

X-Q. 324. You don't remember stopping there and telling a group of men in that office of the coming campaign?

A. I don't recall that. 1568

X-Q. 325. You don't recall seeing Mr. Lewis there at that time?

A. No, sir, I didn't know Mr. Lewis at that time.

X-Q. 326. When you came to Milwaukee to take this P. Lorillard position in January, 1921, you became rather a marked figure, didn't you, as holding a position of that kind with such a well known company?

A. Well, I wouldn't say a marked figure. I made it my business to become permanently acquainted with the people in position to do me some good in the furtherance of the sale of the brands I represented, yes.

X-Q. 327. That was one of your objects, to become well known? 1569

A. Among retail dealers and better class of consumers, yes.

X-Q. 328. It is quite possible, isn't it, that Mr. Lewis knew who you were very soon after you arrived?

A. He possibly knew who I was, but as I didn't know him I couldn't say. He may have known a lot of things I didn't know anything about.

X-Q. 329. Was I correct in understanding you to say

1570 that even after this time you met Mr. Lewis in the Loop Smoke Shop that you never saw him any other times except the three times you have mentioned?

A. Not to my recollection, no, sir.

X-Q. 330. You don't remember seeing him, even though you were in and out of the same dealers' offices frequently?

A. No, I don't recall ever seeing him or having any conversation other than the three times I have mentioned.

X-Q. 331. Did I understand you to say, Mr. Goldstein, in your direct examination, that you referred to
1571 Beech-Nut cigarettes in your conversation with Mr. Lewis, as one of the Beech-Nut lines?

A. Well, it came about in this way. Do you wish me to tell you just exactly how it was said and brought about?

X-Q. 332. Just answer the question, yes or no.

A. I was in this particular store, the first meeting when I presented Mr. Lewis with a package of Beech-Nut cigarettes. He was smoking a cigarette at that time and I said, "I notice you are a cigarette smoker, I would like to present you with a package of our Beech-Nut cigarettes and you will find the Beech-Nut cigarettes as
1572 high a quality of cigarette as the rest of the Beech-Nut line, particularly Beech-Nut scrap." That was the exact conversation regarding Beech-Nut line.

X-Q. 333. Did you make a practice of referring to the Beech-Nut line and meaning those Beech-Nut tobaccos and cigarettes put out by the Lorillard Company?

A. Absolutely not. The reason this line was mentioned was because Mr. Lewis had put a direct question to me prior to that as to whether or not we manufactured any other Beech-Nut goods and I had told him, "Yes, we manufacture a Beech-Nut scrap and Beech-Nut

plug, you have no doubt heard of them as the largest 1573
scrap tobacco dealers in the world." And he said, "Yes, I heard of Beech-Nut scrap in Pennsylvania several years ago." Then I made the remark, "You will find Beech-Nuts as high quality cigarettes as the rest of the Beech-Nut line, particularly Beech-Nut scrap."

X-Q. 334. Do you know Mr. Charles Tuckwell?

A. Yes, sir.

X-Q. 335. Was he in the Lorillard Company while you were there?

A. Just what do you mean by that?

X-Q. 336. While you were in the Lorillard Company.

A. Was he employed by them? 1574

X-Q. 337. Yes.

A. Yes, he was employed by the Lorillard Company while I was in their employ, yes, but not since I have been in the Wisconsin territory.

X-Q. 338. Do you know why he left the Lorillard Company?

A. I couldn't say, I haven't any means of knowing that.

X-Q. 339. Did you see him often during the campaign on Beech-Nut cigarettes?

A. Oh, yes, practically when I was in town every day and sometimes two or three times a day. 1575

X-Q. 340. Was he a friend of yours?

A. Well, he is so far that he did everything he possibly could to help me increase my business here. I would consider that a friend, I would consider him a a very dear friend.

X-Q. 341. Was he friendly then to the Lorillard Company at the time you were introducing the these Beech-Nut cigarettes.

X-Q. 342. Well, I couldn't say whether he was a friend of Lorillard Company, but I know he was friendly

1576 to their representatives and naturally he must have been friendly to the company.

X-Q. 343. Have people ever asked you if the Beech-Nut tobacco and cigarettes were made by the Beech-Nut Packing Company?

A. Never.

X-Q. 344. You have never heard any comments or curiosity in regard to that question?

A. That was only once, and that was when I mentioned to you as the experience I had when I was sampling the comsumer. That is the only direct connection the consumer or anybody had brought out to me, mentioning

1577 the Beech-Nut Packing Co.

X-Q. 345. Did you ever make the statement that most people took Beech-Nut cigarettes to be a product of the gum people?

A. Absolutely not.

X-Q. 346. Did you ever make the statement that the Lorillard salesman could offer cigarettes as the product of the Beech-Nut gum people, that there were no instructions against it?

A. Absolutely not.

X-Q. 347. Why were you transferred to Chicago, Mr. Goldstein?

1578 A. Well, I will tell you just exactly why, the way it was explained to me. The early part of last year the Vice-president of our company, Mr. B. L. Belt, was there in Chicago and I had asked him what their motive was in coupling me up with another head salesman to assist him, and he says, "Why, because we feel you are the proper man for this territory, we are promoting you by putting you here." That is the information I received from one of the officials of the company, due to the fact Chicago is one of the largest, in fact the second largest, Turkish market we have, and I had a wider experience and was put in that territory.

X-Q. 348. Did the campaign on Beech-Nut cigarettes 1579
continue after December 16th, 1921, when you left here?

A. Do you mean in Milwaukee?

X-Q. 349. In Wisconsin.

A. I couldn't say. I don't have any idea as to what line of work they did in this territory after I left here.

X-Q. 350. How long was the special introductory campaign announced for when you entered into it?

A. Well, it was not set for any definite date, but I was to work Beech-Nut cigarettes as my first leader until I was further advised.

X-Q. 351. Had the campaign been withdrawn at the time you left Milwaukee? 1580

A. No, sir.

Cross Examination Closed.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 352. In your cross-examination a few moments ago you refered to sampling the consumer. Will you just explain what you mean by that, how you proceeded to "sample the consumer" with Beech-Nut cigarettes?

1581

A. Well, what I mean by sampling the consumer, it has always been the policy of the Lorillard Tobacco Company to do as much work directly with the consumer as possible and in interviewing a consumer we come in personal contact with the consumer and in this way we are able to tell him of the quality of our brand and try to make a prospective consumer out of our competitive smokers. As a rule when a man is—when for instance I am out for business during the course of my day's work I carry along several packages of cigarettes, particularly during the Beech-Nut campaign I sampled between I

1582 should judge ten and fifteen packages a day and every time I saw a competitive consumer smoking such brands as Camels, Lucky Strikes, Chesterfields, Fatimas and Omars, I make it my business to stop this individual and try to interest him to try a package of our Beech-Nut cigarettes and see if I cannot convert him over to smoke our brand, and usually when a stranger was approached we would walk up in this manner, "Pardon me, sir, I notice you are indulging in cigarettes. Do you smoke domestic cigarettes all of the time" "Well", he would say, "yes" or, "no." If he would say yes I would say, "I am interested in the marketing of Beech-
1583 Nut cigarettes, which is the latest brand marketed by the Lorillard Tobacco Company. This brand is guaranteed to retail at fifteen cents. You will find Beech-Nut cigarettes guarantee the highest grade Virginia and Burleigh tobacco obtainable and including we put in the finest quality Turkish leaf money can possibly buy, and there is no doubt in my mind if you will accept a package of these Beech-Nut cigarettes and will give them a good fair trial you will like them in preference to the brand you are smoking." Then he perchance may ask a question or two about the process of manufacture or the difference between the brand he is smoking and this
1584 brand, and naturally the answers pertain to what questions he would put to us, which we are prepared to answer. A man would happen to say, "Well, I just smoke domestic cigarettes, occasionally I like Turkish", then I would call attention to the fact we are also the manufacturers of such brands as Murads, Helmar and Dieties under the brand of S. Anargyros Company and "you have surely heard of those brands." "Oh, yes." "If you don't like Beech-Nuts I would appreciate your business on one of the Anargyros brands", re-mentioning the names of our most important brands. Of course, this sampling, you know, is a thing some men give you a

lot of time to talk to and others wouldn't. You run 1585
across a business man, he hasn't much time, you have to make it brief as posible and others are willing to listen and really want information about the different methods of manufacture of the different grades of tobacco put in the cigarettes and will ask questions. We call that advertising to the consumer.

R-D Q. 353. In sampling the consumer will you state whether or not you ever had any of them ask, "Was that cigarette made by the Beech-Nut Packing Company, the Beech-Nut gum people "

A. I have always eliminated the possibility of any confusion by mentioning, "This is the latest addition to 1586
the Lorillard brands, the latest brand manufactured by the Lorillard Tobacco Company." That eliminates any possibility of the consumer even asking if we manufacture gum or candy or any such products made by the Beech-Nut Packing Company because he is told right then and there it is a product of the Lorillard Tobacco Company.

R-D. Q. 354. Now, when you were instructing or schooling your crew as to approaching the trade and consumers, what instruction did you give them? The same as this or different?

A. I gave them exactly the same instructions I have 1587
told you I used in sampling the consumer, asked them to follow that out in every case.

R-D Q. 355. You have spoken of these four men you have had in your missionary or campaign crew at that time. Were all of these four men so instructed?

A. Absolutely.

R-D Q. 356. How many times?

A. Well—

R-D Q. 357. Approximately, daily or weekly?

A. Possibly two or three times a week.

1588 R-D. Q. 358. You had charge of these men, did you not?

A. Yes, sir.

R-D Q. 359. What would happen to them if they disobeyed these instructions?

A. If I found they did, I dispensed with their services.

R-D Q. 360. What did you say the names of those men on the crew were?

A. E. A. Gimbel, W. C. Jackson and there was a Mr. New,—I can't remember his initials. He worked for me a short time, and M. J. Schimmel.

1589 R-D Q. 361. Can you give me an idea where each of these men are now?

A. Mr. New was a resident of Milwaukee, he lived on the south side. I had his record at the time, where he was, where he lived, and his record when I lived here. These records were all left in Milwaukee with Mr. Hopewell, and Mr. Gimbel also was a native of Milwaukee and I guess he is living here. Mr. Jackson is, I presume, around Milwaukee here somewhereon. He is a single man, but I don't know just exactly where he could be located, but he is around Milwaukee. I have heard from folks that he has been seen.

1590 R-D Q. 362. And where is this other man?

A. Mr. Schimmel? He is still employed by the Lorillard Tobacco Company.

R-D. Q. 363. So, as far as you know, all of those men are in and around Milwaukee, are they not?

A. I imagine so, yes, sir.

R-D Q. 364. Do you know the house address of any of them?

A. Not at this time, I don't so, sir.

R-D Q. 365. Do you know Mr. Schimmel's address?

A. Mr. Schimmel?

R-D Q. 366. Yes.

A. I believe he lives at 1322 Fond du Lac Avenue. 3349

R.D.Q. 367. He is a man that is still with you?

A. He is still with the company, that is the reason I know that.

R.D.Q. 368. Will you please state whether or not you ever instructed or permitted any of your crew to take orders for Hoods Nat final products?

A. That is ridiculous. Absolutely not. We are not allowed to take orders, even for competitive brands of cigarettes and tobacco. If you got an order from the dealer and the dealer says, "I would like to have some Chesterfields," or any other competitive brand, he was told he couldn't do that—"I am sorry, but I cannot put 3389 that down in my order book, as that goes in as a report and you would have to phone your order to the jobber." Our salesmen are not allowed to sell other merchandise than our own.

R.D.Q. 369. Will you please state whether or not you ever know any of your crew to take any order for final products or to ask for any order of final products?

A. Never, absolutely not.

R.D.370 When one of your crew went into a store to sell a cigarette or introduce the tobacco, who was he supposed to see in there? 3389

A. Well, naturally he was supposed to see the buyer, the man who manages the store or has authority to do the buying, if he is going to to sell merchandise.

R.D.371. What was he supposed to have with him, under your instructions?

A. During the Hoods Nat campaign?

R.D.Q. 372. Yes.

A. He at all times had a sufficient amount of cigarettes with him to sell to retail dealers for cash and along with that he carried sufficient advertising. I should judge when he would leave in the morning he

1406

1594 would carry possibly from fifty to seventy-five different pieces of advertising and from ten to fifteen cartons of cigarettes. When he got rid of this he reported up there to 84 Detroit Street, which was our warehouse at that time, and he would pay us for the cigarettes sold for cash and I would give him an equal amount in return for that money to replenish his stock, and then he would fill his supply of advertising matter again and would not report back again until the following morning.

R-D Q. 373. Would he go into a store with a single package of cigarettes?

1595 A. Absolutely not.

R-D. Q. 374. Without any advertising matter or cards?

A. Absolutely not. A man was instructed when he called on a retail dealer he was at all times to have at least two or three cartons of cigarettes, so if the dealer wished to buy them for cash he would deliver them right then and there, and if he ran out of cigarettes to sell for cash he was to come back to the wareroom or nearest jobber and replenish his stock.

R-D. Q. 375. You say you were out near this Beese store a few days ago. What kind of store is that?

1596 A. I should judge from the looks of the place it is a first class grocery store.

R-D Q. 376. Is it out in the suburbs or in the city?

A. Well, it is in the city, it is right directly in the city of Milwaukee.

R-D Q. 377. If one of your men of your crew went into that store and the buyer wasn't there or he didn't sell cigarettes, was he supposed to be half an hour or an hour in that store?

A. Absolutely not, if he wasn't living there. He

wouldn't have any objective in staying there half an hour or even five minutes. 1597

R-D Q. 378. Have you ever been in Mr. Beese's store?

A. Well, just recently. I walked in there to get an idea of what character of store it was and who it was owned by, and whether they had ever had Beech-Nut cigarettes or sold cigarettes, and I found Mr. Beese had sold out, and I can't just repeat the gentleman's name who owns it now. I found that Mr. Beese never carried cigarettes or tobacco products of any kind.

R D Q. 379. Could you find out if a Miss Heller was working there yet? 1598

A. Working there now?

R-D Q. 380. Yes.

A. No, she is not working there any more.

R-D. Q. 381. How do you know?

A. Because I have inquired from this dealer and he told me she resigned when he had taken over the store.

R-D Q. 382. Did he tell you about anything she said to him before she left?

A. Well, I inquired as to—

By Mr. Johnson: Objection to that as hearsay.

The Witness (Continuing): I inquired from this merchant and asked him who owned this store and he told me he did, and I asked him if Mr. Beese ever owned this store and he said, "Yes, I purchased the store some time in the middle of 1922." I asked him if he has an employe there by the name of Miss Heller and he said, "No, she left here when I purchased the store, I asked him how long she had worked there, and he said, "Approximately two years." I asked him whether he has any means of knowing whether she was ever acquainted with any Beech-Nut man and he said "Why 1599

1600 yes." "How do you know?" He said, "Well when I purchased the store she left here, she told me she knew the Beech-Nut man." And he further said that when she left she had recommended the purchase of Beech-Nut Packing Company's goods.

Mr. Johnson: Objection to this question and answer as incompetent, irrelevant, as hearsay, as secondary evidence.

By Mr. Cavanagh:

1601 R-D Q. 383. I understood you to testify on cross examination that you did not know whether or not a Lorillard man was in that store or not, one of your crew.

A. Well, I doubt very much whether there was a Beech-Nut cigarette man in there.

R-D Q. 384. Of your own personal knowledge you don't know whether he was in there or not?

A. Absolutely not.

R-D Q. 385. I understood that Mr. Schimmel had no particular route, but worked in general around Milwaukee, is that right?

1602 A. Well, his instructions were, due to the fact he had a car and could readily get around in the scattered sections, to work all of the scattered sections first, and I started him off on the northwest side, working all systematically but the car-line streets, and considerable of his time was spent driving me around to the jobbers and helping me place interior and exterior advertising.

R-D. Q. 386. Now, as to these jobbers, on cross-examination you were referred to certain exhibits, circulars, purported to be sent out by the P. Lorillard Company and marked Plaintiff's Exhibit 12-A, B and C. Do you personally know what jobbers received these, or if any jobbers received them?

A. Well, I wouldn't call them circulars. When we 1603
marketed a brand over here I was not requested to solicit orders for Beech-Nut and the company sent each jobber in the territory a blank order on it, which has been the customary thing in marketing new brands of cigarettes and in so doing they sent the jobber this particular letter which Mr. Johnson called a circular, notifying him of the shipments made to him and the quantity of cigarettes and also mentioning the offer they make indirectly to the jobber for the jobber salesmen.

R-D Q. 387. But you don't know whether the jobbers received those letters or not, of your own knowledge personally? 1604

A. No, I have no means of knowing what correspondence the jobbers received from the New York office because I received no copies of them.

R-D. Q. 388. Do you know who owns or runs the Loop Cigar Store?

A. Yes, sir, it is owned by the Cavala Tobacco Company. The owners of that firm are Mr. George Panagis and Peter Panagis.

R-D. Q. 389. Now, when you had this conversation with Mr. Lewis in this cigar store at the time you say you were introduced by Mr. Tuckwell, what impression did you get from his questions that you say he asked 1605
you?

A. The questions of Mr. Lewis?

R-D. Q. 390. Yes.

A. Well, from the little notices I have been reading in the paper about the litigation going on between the Beech-Nut Packing Company and the P. Lorillard Company I sort of felt he was trying, by the question he put to me, "Do you manufacture any other Beech-Nut line?" it looked to me as if he was trying to get me to commit myself to say yes, we manufacture other lines, but when I said yes, we made other Beech-Nut lines and I men-

1606 tioned to him we manufactured Beech-Nut scrap and Beech-Nut plug, it seemed to me he was trying to make me commit myself in some way.

R-D. Q. 391. That is, you mentioned to him tobacco lines?

A. Absolutely, Beech-Nut scrap and Beech-Nut plug.

R-D. Q. 392. And those are tobaccos?

A. Yes, sir.

R-D. Q. 393. I understand you are now in the Chicago territory for the Lorillard Company?

A. Yes, sir.

R-D. Q. 394. Is that a larger territory than the Mil-

1607 waukee district?

A. Yes, sir.

R-D. Q. 395. Much greater population, I presume?

A. Oh, certainly.

R-D. Q. 396. Now, about this S. Anargyros concern, who controls that, if you know?

A. Lorillard Tobacco Company. All of the S. Anargyros brands are brands owned and controlled by the P. Lorillard Company.

R-D. Q. 397. What kind of cigarettes do they manufacture?

A. The brands they manufacture?

1608 R-D. Q. 398. Yes.

A. Are known as Turkish cigarettes, which are all Turkish brands manufactured by the P. Lorillard Company put under the name of "S. Anargyros."

R-D. Q. 399. Will you please state whether or not in the marketing of your Beech-Nut cigarettes or any other Lorillard tobacco product you would think it either necessary or advisable to trade on the reputation or name of any other concern?

A. You mean in the Lorillard tobacco, marketing a new product? Asbolutely not.

R-D. Q. 400. Why not?

A. Because we are known as the manufacturers of 1609
the greatest percentage of volume of Turkish cigarettes marketed in the United States, and then again we are known as the manufacturer of the famous Beech-Nut scrap, which I believe consists of about seventy-five or eighty per cent. of all of the scrap manufactured in the United States, and it would be ridiculous of any salesman who has had any experience at all to come out and mention the reputation of the other manufacturers when he has such famous brands as the Moguls, Egyptian Dieties, Murads and Climax plug to talk about, which are very famous in that particular line in tobacco commodities.

1610

By Mr. Johnson: Objection to that part of his answer which gives statistics as to the distribution and sales of Beech-Nut scrap tobacco, as hearsay.

By Mr. Cavanagh:

R-D. Q. 401. How long were you in the army?

A. I should judge all told about eleven months.

R-D. Q. 402. And that was the only period for eleven years that you were not with the P. Lorillard Company, is that correct?

A. Yes, sir, absolutely. 1611

R-D. Q. 403. Did you go over seas?

A. Yes, sir.

R-D. Q. 404 Did you see any active service?

A. Absolutely.

R-D. Q. 405. Were you wounded?

A. Yes, sir.

R-D. Q. 406. In what battle?

A. In the St. Mihiel sector.

Re-direct Examination Closed.

1612 *Re-cross Examination.*

By Mr. Johnson:

R-D. Q. 407. Were you disappointed in the quality of the Beech-Nut cigarettes?

A. Well, I was not exactly disappointed in the quality of the Beech-Nut cigarette. The brand was manufactured on a similar test that helped make Beech-Nut scrap a great seller. It is inclined to be a little sweet, which did not meet with the approval of the average smoker that liked a little more kick to it. The quality
1613 was all right, but the kick was not there, and that is the only complaint we ever heard on that brand.

R-D. Q. 408. Are you handling the distribution of them now in Chicago?

A. No, sir, the only brands I handle now are the Turkish brands of cigarettes in Chicago. The Beech-Nuts are under the supervision of the tobacco department which worked all of the Lorillard products.

R-D. Q. 409. Did you get any letter or circular at all from the P. Lorillard Company instructing you and your salesmen not to offer these Beech-Nut cigarettes as the product of the Beech-Nut Packing Company?

1614 A. No, sir, I didn't receive that, because I imagine the company felt it was unnecessary to call their head salesmens' attention to that fact, as they sort of felt it wouldn't be done.

R-D. Q. 410. You are sure you never got any such letter or circular from the P. Lorillard Company?

A. I am sure I did not.

Re-cross Examination Closed.
Deposition closed.
Signature waived.

1615

CHARLES TUCKWELL, a witness called on behalf of the defendant, P. Lorillard Company, being first duly sworn, deposes and says in response to interrogatories propounded to him by Mr. Cavanagh, as follows:

Direct Examination.

Q. 1. Please state your name, age, residence and occupation?

A. Charles Tuckwell, age 32, residence 1237-25th Street, Milwaukee, Wisconsin, cigar clerk.

Q. 2. Where are you employed, Mr. Tuckwell? 1616

A. 409 East Water Street, Cavala Tobacco Company.

Q. 3. How long have you been employed at that place?

A. Since September 8th, 1921.

Q. 4. Do you know from whom that store is leased?

A. Piggly Wiggly Company.

Q. 5. What is the address of it?

A. 409 East Water.

Q. 6. Where were you employed before that?

A. M. L. Annenberg.

Q. 7 In the same business?

A. Cigar and newspaper business, not as a clerk. 1617

Q. 8. What were your duties around there?

A. Salesman, and collect for the Sunday papers, Chicago papers.

Q. 9. At your store, at your present place of employment you sell the Beech-Nut cigarette and Beech-Nut scrap tobaco?

A. Both.

Q. 10. Do you sell any products of the Beech-Nut Packing Company?

A. Beech-Nut gum.

Q. 11. Do you sell any candies of that company?

A. Just the gum.

1618 Q. 12. How long have you been selling the Beech-Nut cigarette, to your knowledge?

A. Oh, it has been over a year now, I think it was a year last October or thereabout.

Q. 13. Are you acquainted with Mr. Goldstein?

A. Yes.

Q. 14. How long have you known Mr. Goldstein?

A. About January, 1920.

Q. 15. Do you know what concern he represents?

A. P. Lorillard Company.

Q. 16. What line of business are they in, do you know?

1619 A. Manufacturers of cigars, cigarettes and tobacco.

Q. 17. Do you know Mr. Lewis of the Beech-Nut Packing Company?

A. Yes, sir.

Q. 18. What does he do with that company, as far as you know?

A. He sells Beech-Nut products, as far as I know.

Q. 19. How long have you known Mr. Lewis?

A. About two years.

Q. 20. Now, Mr. Tuckwell, do you know personally if Mr. Lewis knows Mr. Goldstein?

A. Yes, sir.

1620 Q. 21. How do you know that?

A. I introduced him to Mr. Goldstein.

Q. 22. Will you please state the circumstances and when and where you introduced Mr. Lewis and Mr. Goldstein?

A. I don't know about what date it was, it was about the time Mr. Goldstein was putting on Beech-Nut cigarettes for the Lorillard Tobacco Company, and Mr. Lewis happened in the store one day, one morning, and when Mr. Goldstein came in a few minutes after he did and I said, 'Mr. Lewis, I want you to meet Mr. Goldstein, the P. Lorillard Company is putting on Beech-Nut ciga-

rettes", and then I says, "Mr. Goldstein, meet Mr. Lewis 1621
of the Beech-Nut Packing Company."

Q. 23. Did you hear or were you present at any conversation then between Mr. Lewis and Mr. Goldstein?

A. They did talk about their products between themselves, but waiting on trade I didn't get much of it.

Q. 24. Was anybody else in that store with Mr. Lewis at the time?

A. There was one man there he introduced me to as sort of an investigator of some kind for the Beech-Nut Packing Company.

Q. 25. Do you recall what his name was?

A. I don't know what his name was. 1622

Q. 26. Then when you introduced Mr. Lewis to Mr. Goldstein you mentioned the concern that each worked for to the other?

A. Absolutely.

Q. 27. Did you hear any part of the conversation at all between Mr. Lewis and Mr. Goldstein?

A. Well, I just got straggles of the conversation, it was both their products, same as any salesmen meeting one another would carry on.

Q. 28. Can you remember any of that conversation, state any of it?

A. Mr. Lewis asked Mr. Goldstein if they made any 1623
other Beech-Nut products and Mr. Goldstein said they made Beech-Nut scrap and Beech-Nut plug.

Q. 29. Will you please state whether or not you heard Mr. Goldstein say anything to Mr. Lewis which would lead you to believe that Mr. Goldstein was trying to leave the impression or statement that the Beech-Nut cigarettes were made by the Beech-Nut Packing Company?

A. No, Mr. Goldstein didn't say anything to that effect. It seems to me like Mr. Lewis and Mr. Goldstein both being in the employ of their respective companies

1624 would know that one did not make cigarettes and the other did not make gum.

Q. 30. So you didn't hear any such conversation?

A. No, absolutely not.

Q. 31. Have you ever heard any comments or inquiries or remarks from any of your customers which would lead you to believe they thought the cigarettes or scrap tobacco were made by the same people that made the gum?

A. Very seldom, if ever.

Q. 32. You don't recall any such?

A. No, it has been four or five years.

1625 Q. 33. Before the cigarettes were on the market?

A. Before the cigarettes were on the market.

Q. 34. Would you yourself ever confuse such products as cigarettes or scrap tobacco with gum or candies or food products?

A. You mean, the Beech-Nut? No.

Q. 35. Why not?

A. I was employed by Lorillard's for about seven years and I knew positively they did not make any ham, bacon, candies or gum.

Q. 36. Never heard of them making such products?

A. Never.

1626 Q. 37. What has their line been directed to entirely?

A. Lorillards?

Q. 38. Yes.

A. Tobacco and cigarettes and little cigars.

Q. 39. Did you know of the P. Lorillard Company making any packing products at all?

A. No, sir.

Q. 40. Have you ever sold any tobacco products as those of the Beech-Nut Packing Company?

A. Never.

Q. 41. About when was it you say you introduced Mr. Goldstein to Mr. Lewis?

A. I think about October. I don't know, it was when 1627
Mr. Goldstein was putting on Beech-Nut cigarettes for Lorillard.

Q. 42. What year?

A. 1921, that was the only year Mr. Goldstein was in this territory.

Q. 43. And was it in this cigar store which is leased from the Piggly Wiggly on East Water Street where you are at present that you introduced them?

A. Yes, sir.

Q. 44. Are you still buying goods from Mr. Lewis of the Beech-Nut Packing Company?

A. I never bought goods from Mr. Lewis, my firm 1628
buys goods from them. At that time I don't believe they did buy direct.

Q. 45. But you knew Mr. Lewis?

A. I knew Mr. Lewis and knew what he did.

(Direct Examination closed.)

Cross Examination.

By Mr. Johnson:

X-Q. 46. Where is this store, Mr. Tuckwell, in which 1629
you say this incident happened?

A. 409 East Water Street.

X-Q. 47. What sort of tobacco store is that?

A. Retail cigars and tobacco.

X-Q. 48. Any wholesale?

A. No wholesale.

X-Q. 49. About what size store room is it, just roughly?

A. It is ten by about sixty feet.

X-Q. 50. How many clerks have you?

A. Just one.

1630 X-Q. 51. Just yourself?

A. Just myself, and I have one of the boys from the wholesale department relieve me at noon and at night.

X-Q. 52. And have you yourself anything to do with the wholesale department?

A. Nothing.

X-Q. 53. About how many customers come into your store in a day, approximately?

A. Four hundred and fifty to five hundred.

X-Q. 54. You are kept pretty busy then waiting on those people, aren't you?

A. Quite busy.

1631 X-Q. 55. As a rule have you much time to talk to individuals?

A. At certain times, before the banks open up and right after lunch, about two or two thirty.

X-Q. 56. When did this meeting of Mr. Goldstein and Mr. Lewis take place in your store?

A. I don't know exactly what date it was, I think it was in October some time, about 9:30 in the morning.

X-Q. 57. How do you remember that date?

A. I don't remember the date, but I kind of remember the month because they just put on Beech-Nut cigarettes in that month.

1632 X-Q. 58. Had they already put them on?

A. Just started to put them on.

X-Q. 59. Had you known Mr. Lewis for long?

A. I had known Mr. Lewis for about two years.

X-Q. 60. Had you known Mr. Goldstein for long?

A. He succeeded me, I think, in January, 1921.

X-Q. 61. Succeeded you in what?

A. As head salesman for the state of Wisconsin for the Lorillard Tobacco Company.

X-Q. 62. And you were with the Lorillard Tobacco Company yourself for how long?

A. Seven years.

X-Q. 63. What makes you think that Mr. Lewis and Mr. Goldstein had never met before? 1633

A. Because I had introduced them.

X-Q. 64. Did you have any way of knowing that they had not been introduced before?

A. No, sir, only by the way they acted. If they had met before one of them would have said he had the pleasure of meeting Mr. So-and-so previously.

X-Q. 65. Do you remember their ever being together in your store before?

A. Not before. If they had I would have introduced them, I believe.

X-Q. 66. You never saw them together before? 1634

A. No, sir.

X-Q. 67. About what time of day was that?

A. About 9:30, I should judge.

X-Q. 68. You say there were a good many people in the store?

A. I didn't say there was a great many before the banks opened up, the banks open up at ten o-clock.

X-Q. 69. You say you didn't hear much of their conversation?

A. No, sir.

X-Q. 70. You said that, didn't you?

A. Yes, sir. 1635

X-Q. 71. And you have also said you only heard straggles of the conversation?

A. Yes, sir.

X-Q. 72. So you really wouldn't have an opportunity really to say what they did say or didn't say to each other at that time, if you only heard snatches of it?

A. Only what I told Mr. Cavanagh.

X-Q. 73. You heard the part that you told Mr. Cavanagh, but as to the rest you wouldn't be able to say what they said or didn't say, would you?

A. No, sir.

1636 X-Q. 74. Then you cannnot be sure, can you that they did not converse along a great many different lines, from the few remarks you have repeated as you having heard?

A. I didn't get the meaning of that.

X-Q. 75. I say, they might have had a great deal more conversation than the few remarks you repeated?

A. They might have, although they were there only about half an hour.

X-Q. 76. Were they talking together about a half hour?

A. The three of them were together about half an
1637 hour, whether talking together, I don't know. Mr. Goldstein was sampling consumers.

X-Q. 77. Did you ever hear Mr. Goldstein speak of the Beech-Nut line of products he was selling?

A. Only tobaccos and cigarettes.

X-Q. 78. Did he speak of the tobaccos and cigarettes of the Lorillard Company as the Beech-Nut line of products?

A. No, sir, not that I know of, I never heard him say that.

1638 By Mr. Johnson: Will you please read to the witness again Q. 28 of the direct examination where Mr. Lewis asked Mr. Goldstein if the Lorillard Company put out any other Beech-Nut products.

(Thereupon the said question was read)

By Mr. Johnson:

X-Q. 79. You remember, then, do you, Mr. Tuckwell, Mr. Goldstein referring to other Beech-Nut products of the Lorillard Company at that time?

A. Yes.

X-Q. 80. Did you ever hear him at any other time refer to the group of Beech-Nut products of the Lorillard Company? 1639

A. Mr. Goldstein always would talk about Beech-Nut scrap and Beech-Nut tobacco owing to the big sale of Beech-Nut scrap. He was putting on Beech-Nut cigarettes on Beech-Nut scrap's reputation.

X-Q. 81. In your store did you ever refer to the Beech-Nut scrap tobacco and the Beech-Nut cigarettes together as Beech-Nut products? Did you ever speak to your customer of those two things as Beech-Nut products?

A. Only when they come in and say, "Give me a package of Beech-Nuts" I would ask them what kind of Beech-Nut they wanted, cigarettes, gum or tobacco. 1640

X-Q. 82. Did you have many ask you just for Beech-Nut? Was that question often asked of you?

A. "Give me a package of Beech-Nuts."

X-Q. 83. Was that often asked of you?

A. Yes.

X-Q. 84. And what did you usually say?

A. "What kind of Beech-Nuts do you want?"

X-Q. 85. How many different Beech-Nut products did you carry at that time?

A. Three. 1641

X-Q. 86. What were they?

A. Gum, scrap tobacco and cigarettes.

X-Q. 87. Did you ever see Mr. Goldstein and Mr. Lewis together after that?

A. No, never did.

X-Q. 88. Did each of them come into your store frequently? Did you often see one or the other of them in your store?

A. Yes, quite often.

X-Q. 89. So they might have been in there together without your noticing it, might they not?

1642 A. They might have been.

X-Q. 90. Wasn't it even probable they would have been in there together, if each of them came in so many times, as you say? Quite likely they may have been in there together a number of times?

A. They may have been, but I didn't notice.

X-Q. 91. Did you ever see them together before this meeting you have described?

A. I never saw them before that, not together.

X-Q. 92. Was each one of them coming into your store from time to time before that?

A. Yes, sir, Mr. Lewis used to come in when he wasn't
1643 on the road about every other day, maybe twice a week. Mr. Goldstein when he was in town used to be in every day, and sometimes twice a day.

X-Q. 93. Is it not quite likely they were in there together previous to that meeting, without your noticing it?

A. Well, hardly, because I notice pretty nearly everybody comes in. The store is a little small.

X-Q. 94. You wouldn't be able to say, would you, that it was not possible for them to have met in your store before the meeting you have described, would you?

A. They might have met, but not knowing one ano-
1644 ther—I don't think they knew one another before I introduced them.

X-Q. 95. To go back to this meeting you have described again, there was considerable of their half hour's conversation that you did not hear, as I understand it?

A. Yes.

X-Q. 96. You have said, Mr. Tuckwell, you were employed by the Lorillard Company for seven years. When did you leave that company?

A. November, 1920.

X-Q. 97. And since then have you been in tobacco stores?

A. Calling on retail trade and working in retail stores. 1645

X-Q. 98. You have been in the tobacco business ever since then?

A. Yes.

X-Q. 99. And you have been handling, have you, Lorillard brands.

A. I have been handling the Lorillard brands.

X-Q. 100. Quite a number of them?

A. Yes.

X-Q. 101. When this Beech-Nut cigarette first came to your store then, came into your stock, you knew it was a Lorillard product? 1646

A. Yes, sir.

X-Q. 102. Before it ever came to your store?

A. Yes, sir.

X-Q. 103. Have you handled or do you handle Camels and Lucky Strikes and Fatimas?

A. Yes, sir.

X-Q. 104. Who puts out Camels?

A. R. J. Reynolds.

X-Q. 105. Who puts out Lucky Strike?

A. American Tobacco Company.

X-Q. 106. And who puts out Fatimas?

A. Liggett & Meyers. 1647

X-Q. 107. About how many Beech-Nut cigarettes do you sell a day, do you know?

A. Now?

X-Q. 108. Yes.

A. Three or four packages.

X-Q. 109. Have you sold more than that every day at other times?

A. When Mr. Goldstein was putting them on, yes.

X-Q. 110. When did you sell the most, at what period, I mean?

1648 A. About the 1st of November, I think, Mr. Goldstein gave us permission to.

X-Q. 111. What year?

A. The year they put them out, I think that was 1921, when Mr. Goldstein was here.

X-Q. 112. About how many did you sell a day then, can you remember?

A. Why, that deal was only on one day. We were allowed to sell two packages and give one. That is what they call a factory deal, sold about three thousand that day. That would be about one hundred and fifty packages.

1649 X-Q. 113. Are you pretty familiar with the faces of the people who come into your store?

A. Pretty familiar.

X-Q. 114. Do you know whether many of the same people who bought Beech-Nut cigarettes at first repeated on them?

A. For a while, but they are not now.

X-Q. 115. Did you hear these people say anything about the Beech-Nut cigarettes?

A. They would ask for them and I would give them to them.

X-Q. 116. Did you hear anything said about the
1650 quality of the cigarettes?

A. Never.

X-Q. 117. Where is the gum, the Beech-Nut gum you have spoken of, displayed for sale in your store?

A. On the top of the counter.

X-Q. 118. What is inside of the counter?

A. Cigars.

X-Q. 119. Where are the cigarettes from there?

A. Back of them in a coop like this, painted black (indicating).

X-Q. 120. Just about directly back of the counter where the gum is?

A. No, the gum is at this end and the cigarettes are 1651
in the middle. They have the gum in a big glass jar, you know.

X-Q. 121. You have said on direct examination that you heard a few comments and inquiries about who made the Beech-Nut gum as I understood it. Can you describe any more in detail those incidents? What remarks or questions you had asked you these times you have spoken of?

A. I don't know what you mean.

X-Q. 122. You have already said, in reply to Mr. Cavanagh's question, that several years ago, but not recently you have heard a few comments and inquiries 1652
as to who was putting out the Beech-Nut tobacco?

A. Yes, sir.

X-Q. 123. Do you remember what kind of question they asked?

A. Just asked me who was putting out Beech-Nut tobacco and I told them Lorillard was.

X-Q. 124. They asked you whether the same people were putting it out as were putting out the Beech-Nut gum?

A. Didn't mention the Beech-Nut gum.

X-Q. 125. Do your customers ever ask you who makes the different brands of cigarettes or brands of 1653
tobacco?

A. Very, very seldom.

X-Q. 126. That was unusual then, was it, for these questions to be asked?

A. At that time I was in the employ of the Lorillard Company and they just started to put on Beech-Nut scrap in the state of Wisconsin and those that have asked me would be retailers, wouldn't be customers, because I had nothing to do with the scrap end of it when I was here with Lorillards.

X-Q. 127. Did any of these people who inquired

1654 say why they were interested or why they were curious about who was making them?

A. No, just asked me who was putting them out, just the same as they would any new cigarette.

X-Q. 128. This is tobacco you are speaking of?

A. Yes, sir, the same thing applies to cigarettes.

X-Q. 129. As I understand it, on the direct examination you said you had not heard any of those comments or inquiries in regard to Beech-Nut cigarettes, is that right?

A. Inquiries you were just asking about?

X-Q. 130. Yes, similar inquiries about Beech-Nut

1655 cigarettes.

A. Very seldom.

X Q. 131. You did hear some, you think?

A. Maybe one or two when they were first put out.

X-Q. 132. Then you did hear some of the same kind of inquiries as to who was the maker?

A. At that time I was back of the counter. They could see a carton of Beech-Nut cigarettes on the counter and say, "Who is putting this out, something new? I would say, "Lorillard Tobacco Company."

X-Q. 133. But as you were busily waiting on these several hundred customers as they came into your store

1656 you didn't have much chance to notice what the customers were saying, did you?

A. Well, different remarks they would make, they would direct them at me.

X-Q. 134. Did you make any attempt to remember what remarks or inquiries or comments were made on that subject at the time?

A. Only what I have told you.

X-Q. 135. I mean, at the time did you make any effort to remember or did you make any notes?

A. No, just passed it up same as I would if any-

body asked me, "Have you got anything new to smoke." 1657

X-Q. 136. Did anyone ever ask you to keep any note or memorandum of such questions?

A. No, never.

X-Q. 137. And all you can say is that you do not remember many of such inquiries or comments, is that right?

A. If I had to tell you what the customer said, I could not, because I just passed them right up.

Cross examination closed.

Re-direct Examination. 1658

By Mr. Cavanagh:

R-D. Q. 138. Mr. Tuckwell, how long to your knowledge has the Beech-Nut scrap tobacco of the Lorillard Company been on sale in the Milwaukee teritory?

A. I think in 1918 is when they started to work it.

R-D. Q. 139. Had you seen it on the market here before then?

A. I think there was a few jobbers in Milwaukee had Beech-Nut scrap.

R-D. Q. 140. If you had heard, since the cigarette was introduced here in 1921, numerous comments or inquiries as to who it was made by or whether it was made by any other company than the Lorillard Company, it would have been impressed on your mind, wouldn't it? 1659

A. I think it would.

Re-direct Examination closed.

Deposition closed.

Signature waived.

1660

January 30th, 1923.

Met pursuant to adjournment; parties present as before.

MICHAEL SPHEERIS, a witness called on behalf of defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Cavanagh, deposes and says, as follows:

Direct Examination.

1661 Q. 1. Please state your name, age, residence and occupation?

A. My name is Michael Spheeris, age 38, residence 348-12th Street, Milwaukee, Wisconsin, occupation merchant.

Q. 2. Where is your place of business located?

A. 420 Wells Street, Milwaukee, Wisconsin.

Q. 3. What do you sell in your store, Mr. Spheeris?

A. Tobacco, cigarettes, candy, chewing gum and cigars.

Q. 4. Do you sell the Beech-Nut scrap tobacco and the Beech-Nut cigarettes?

1662 A. I do.

Q. 5. Likewise do you sell the Beech-Nut chewing gum?

A. Yes, sir.

Q. 6. Do you sell any other products of the Beech-Nut Packing Company?

A. No.

Q. 7. Candies or anything of that sort?

A. No, nothing else.

Q. 8. How long have you been selling the Beech-Nut scrap tobacco in your store?

A. Well, I don't remember exactly, but it is pretty 1663
close to three years, I guess.

Q. 9. How long have you been selling the Beech-Nut cigarettes in your store?

A. About a year and a half, I think, ever since they came out here.

Q. 10. Do you know who makes the Beech-Nut scrap tobacco and the Beech-Nut cigarettes?

A. Yes, sir.

Q. 11. What concern?

A. Lorillard.

Q. 12. Now, will you state in your own words when you first put in the Beech-Nut cigarettes just exactly how 1664
you came to put them in and what happened? That is, who brought them to you and what you did.

A. Before the Beech-Nut cigarettes came here we had calls from different people asking if we had cigarettes and we told them they were not in town yet, but when they came in town Lorillard's man, their specialty man, came to us and got in an order.

Q. 13. Do you know who that specialty man was?

A. Mr. Goldstein, a fellow by the name of Goldstein.

Q. 14. And he called upon you to ask you to take an order, did he?

A. Yes, sir. 1665

Q. 15. When he called on you first to get this order, what did he say? Did he make any remarks or anything?

A. He didn't make any remarks of any kind. He mentioned Beech-Nut cigarettes and he asked whether I would allow him to put a poster of Beech-Nut cigarettes in the window.

Q. 16. Will you state whether or not he had the posters with him?

A. He had posters with him, yes, sir, when the cigarettes were in town.

1666 Q. 17. Did you give him an order for the cigarettes at that time?

A. I did.

Q. 18. Will you state whether or not you allowed him to put the posters in the window?

A. I allowed him to put the posters on the window, yes.

Q. 19. What kind of poster was that, do you know?

A. A great big poster says on it, "Beech-Nut cigarettes, made by Lorillards."

Q. 20. You knew he was a Lorillard man when he called, did you not?

1667 A. I did, yes.

Q. 21. Will you state whether or not he made a remark or said anything which would lead you to believe that these cigarettes were made by the same people made the gum?

A. He made no such remarks. I knew they were made by Lorillard's and I knew the gum was made by the Beech-Nut Packing Company, a different company entirely.

Q. 22. Were you yourself ever confused or led into belief that the Beech-Nut scrap tobacco or Beech-Nut cigarettes were made by the same people who made the

1668 gum?

A. No, sir.

Q. 23. And did you ever hear of any remarks or questions asked by any of your customers which would lead you to believe they thought the Beech-Nut scrap and Beech-Nut cigarettes were made by the gum company?

A. None of them ever mentioned anything like that, none of our customers. That is, the consumers came in and said, "Give us Beech-Nut gum" or "Scrap" or "Beech-Nut cigarettes."

Q. 24. So you have never had inquiries of that sort at all?

A. No. 1669

Q. 25. When Mr. Goldstein first called upon you to take that order, will you state whether or not he left any cigarettes with you at the time?

A. He did, yes.

Q. 26. How were those cigarettes packaged?

A. In a carton like this (witness indicates carton of Beech-Nut cigarettes) stands it like that and sets it on the counter like that (indicating).

Q. 27. Will you just describe what he did with the carton of Beech-Nut cigarettes when he left them with you?

A. I remember he gave us a carton for some of the 1670
cigarettes we bought, that is, he was doing it of his own free will. That is, just like giving it away for giving a good sized order.

Q. 28. You gave him a good sized order for cigarettes?

A. Yes.

Q. 29. Did he himself place the card on the counter as you have described it?

A. Yes, sir, he placed the card on the counter.

Q. 30. That is that yellow sign or card?

A. A card like this here (witness takes yellow card and sticks in the end of carton of cigarettes). 1671

Q. 31. When Mr. Goldstein sold you this first order of Beech-Nut cigarettes, will you state whether or not he left any sort of receipt or anything of that sort?

A. Well, that was an order like this here that he left with us (witness handles a yellow slip B of Defendant's Exhibit 10), and this one he signed and turned over to the jobber. We had these two slips, there was a carbon in between, and signed the white one on top. That had the jobber's name mentioned on top here and the amount of cigarettes we ordered. And he left this one with us so we would know what we ordered (witness indicating B of Defendant's Exhibit 10).

1672 Q. 32. Whose name appears at the top of those slips?
A. That is Lorillard's.
Q. 33. Did you pay in cash for those cigarettes at the time?
A. No, we paid the jobber.
Q. 34. But he left you the cigarettes and the receipts?
A. Yes.
Q. 35. Do you know of a store kept by William Weigel at 810 Wells Street, Milwaukee?
A. Yes, sir.
Q. 36. How far from your place of business is that store?
1673 A. About three and a half blocks.
Q. 37. Is that the same Wells Street your store is on?
A. Yes, sir.

(Direct Examination closed.)

Cross Examination.

By Mr. Johnson:

X-Q. 38. What is your business address?
A. 420 Wells Street.
X-Q. 39. What kind of business, retail or wholesale,
1674 do you do in your store?
A. Tobacco, cigarettes and candies.
X-Q. 40. Retail or wholesale?
A. We wholesale everything and retail everything.
X-Q. 41. Do both kinds of business?
A. Yes, we do both kinds of business in the same place.
X-Q. 42. Same store?
A. Yes.
X-Q. 43. Same clerks?
A. Same.

X-Q. 44. Both wholesale and retail business? 1675

A. Yes, sir.

X-Q. 45. About how large is your store, just roughly?

A. It is a small place, twice as big as this room here. (Indicating).

X-Q. 46. About how many feet square, would you say?

A. It is about twenty feet wide and thirty-five feet long, that is a rough guess.

X-Q. 47. How many clerks do you have in there?

A. There is three of us in the store always; that is, changing hands right along.

X-Q. 48. You have three clerks there regularly?

A. No, not regularly, one is there always, but there 1676
is three of us working there.

X-Q. 49. About how many customers come into your store each day?

A. That I couldn't say.

X-Q. 50. Approximately?

A. Maybe five hundred, maybe less, maybe more. That I couldn't say offhand how many.

X-Q. 51. Do you keep a cash register?

A. Yes, we do.

X-Q. 52. Do you take off the total number of sales at the end of a day?

A. Well, we don't pay attention to that. I never look 1677
at how many come in a day.

X-Q. 53. Then do these five hundred—

A. (Interrupting) I mentioned approximately—that is a rough guess.

X-Q. 54. These five hundred approximate people keep you pretty busy, do they?

A. Oh, pretty busy, yes.

X-Q. 55. Do you have much time to talk with each one of them?

A. Once in a while, yes.

1678 X-Q. 56. But as a rule do you exchange remarks with the customer?

A. Yes, sometimes. If a customer starts to talk to me I would give him an answer, whatever he wants to know.

X-Q. 57. But is it the usual thing for a customer to ask you who makes the article he is buying?

A. Well, that I don't say, none ever mentioned to me, maybe it was once or twice, whether it is made by the same people make the Beech-Nut cigarettes, the gum was made by the same people or—well, I always knew that. I explained it to him. Maybe there is one or two
1679 since I have been in business there asked if it was the same people made the Beech-Nut cigarette that made the Beech-Nut gum, but I never had that asked very often.

X-Q. 58. Do you remember what these you mentioned who did ask—do you remember what they said?

A. I remember a fellow once asked me, he said, "Is this the same people is making the Beech-Nut gum?" I said, "Lorillard only makes tobacco, don't make any gum."

X-Q. 59. Do you remember that man's name?

A. No, I couldn't say, I don't remember that.

X-Q. 60. Do you remember what anyone else said?
1680 A. I don't think I ever had any conversation—such conversation with anybody else.

X-Q. 61. How does the customer as a rule make his purchases? Does he walk in and say, "I want a package of Camels", put down his money and walk out again?

A. Yes, and I gave him a package of Camels and he walked out. If he would say anything to me I talked to him, yes, but the most of them walked away. If he doesn't say anything, I don't say anything to him.

X-Q. 62. If he doesn't say anything, do you know what he is thinking about as to who made the article he is buying?

A. I don't know whether he knows it or not. 1681

X-Q. 63. You are not a mind reader, are you?

A. No.

X-Q. 64. In most cases, then, you don't know, do you, who the people think made the Beech-Nut cigarettes or any article they buy, do you?

A. That I couldn't say, whether they know it or not.

X-Q. 65. That is, you don't remember, do you?

A. I don't say I don't remember. I don't know. If anyone asks me a question if I know if the people know what they are buying, who makes the article they are buying, I don't know if the man knows who makes the cigar he buys. 1682

X-Q. 66. Did you make any attempt to remember how many people were asking about whether the Beech-Nut cigarettes were made by the Beech-Nut gum people?

A. Why, I think it was only one or two, when the cigarettes came out, that ever asked me if it was a different company, that is the consumers. If they ever asked, it was one or two. Of course, the Beech-Nut sign was on the window, "Made by Lorillard." There wouldn't be any sense for any man to ask me who made the Beech-Nut cigarettes because it is right on the sign.

By Mr. Johnson: Objection to this answer as not responsive. 1683

Will you read the question.

(Last question read)

By Mr. Johnson:

X-Q. 67. Did you make any attempt to remember how many people asked you about the Beech-Nut cigarettes and tobacco?

A. No, sir.

1684 X-Q. 68. Did anyone ask you to make a note of that?

A. No, sir.

X-Q. 69. Then you have no reason to remember one way or the other, have you, as to that?

A. No reason to remember? What do I know whether Lorillard had any trouble with us here? If there was any such thing I would put it down and take the names and show it to you.

X-Q. 70. Do you remember when it was you made this first purchase of Beech-Nut cigarettes?

A. That was in the year 1921, around in August, if I am not mistaken, between August and July. Either it
1685 was July or August, I don't remember right off, but I remember the time they came here.

X-Q. 71. About how many were you able to sell at that time per week, say?

A. In retail or wholesale?

X-Q. 72. We are speaking of retail now.

A. Probably could sell about a thousand a week, or two thousand.

X-Q. 73. Is that a thousand cigarettes or a thousand packages?

A. A thousand cigarettes, that makes fifty packages.

X-Q. 74. What proportion of your business is whole-
1686 sale? Half of it or three quarters?

A. Ninety per cent.

X-Q. 75. —is wholesale?

A. Yes, and probably more.

X-Q. 76. How did the Beech-Nut cigarettes sell in your store after that, retail, how many a week?

A. Well, not very many, we didn't sell very many.

X-Q. 77. Did the sales increase?

A. They were sold good for a while when they first came out and then dropped off. Now they don't sell at all.

X-Q. 78. Could you tell whether the same customers 1687
were coming back to buy again retail after their first purchases?

A. Well, some, yes. Some they didn't come back.

X-Q. 79. Did you hear any remarks as to how they liked the cigarettes?

A. Well, just like anybody else, some they like it and some they didn't like it.

X-Q. 80. Are you selling them now?

A. I don't think we have any of them now. We don't sell none.

X-Q. 81. When did you last sell any quantity of them?

A. About a year ago. . 1688

X-Q. 82. You haven't sold very many in the last year, is that it?

A. No.

X-Q. 83. Did you know before you bought these first Beech-Nut tobacco and cigarettes for the first time that they were Lorillard products?

A. What? The cigarettes?

X-Q. 84. Both of them, when you first bought the Beech-Nut scrap tobacco did you know it was a Lorillard product before you got it into your store?

A. Yes, sir.

X-Q. 85. Did you know the same thing at the time 1689
of your first purchase of cigarettes?

A. Absolutely.

Cross Examination closed.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 86. When the cigarettes first came out, if you had had a lot of inquiries from customers as to whether

1690 it was made by the Beech-Nut Packing Campany, or the gum people, you would have remembered?

A. If there were a lot of them I would have remembered that.

R-D. Q. 87. How does the Beech-Nut scrap tobacco sell in your store?

A. It sells fair.

R-D. Q. 88. —in comparison with the other scrap brands how does it sell?

A. Good. Best of all the other scrap tobaccos.

Re-direct Examination Closed.

1691

Re-Cross Examination.

By Mr. Johnson:

R-X Q. 89. In regard to the order slips which you spoke of on direct examination, did you say that the jobber's name appears at the top?

A. The jobber's name appears where it says, "Jobber". The manufacturer's name appears on top.

R-X. Q. 90. You buy from jobbers, too, don't you?

A. Yes, sir.

1692 R-X Q. 91. Are you familiar with tobacco jobbers' order slips?

A. I am.

R-X Q. 92. Do most jobbers have an order slip somewhat of this same kind?

A. Well, some they have and some they have not, but none with Lorillard's name on it. They got their own name on it.

R-X. 93. Did they have their name printed at the top?

A. Yes.

R-X. 94. Same as Lorillard's name is printed at the top here (indicating)? 1693

A. Yes, some jobbers they have.

Deposition closed.
Signature waived.

JOHN W. SMITH, a witness called on behalf of Defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Cavanagh, deposes and says, as follows:—

Direct Examination. 1694

Q. 1. Please state your name, age, residence and occupation.

A. John W. Smith, age 27, residence 1206½-9th Street, Milwaukee, Wisconsin, occupation window trimmer.

Q. 2. Are you ever employed by the P. Lorillard Company, tobacco manufacturers?

A. Yes, sir.

Q. 3. Where?

A. At the Milwaukee office.

Q. 4. Here in Milwaukee, Wisconsin? 1695

A. Yes, sir.

Q. 5. How long were you employed by the P. Lorillard Company?

A. Approximately three years.

Q. 6. What were your duties with the P. Lorillard Company?

A. Window trimmer.

Q. 7. Just what did you do in that line?

A. Well, putting in special display with the Lorillard Tobacco Company.

1696 Q. 8. In the windows in various stores?

A. Yes.

Q. 9. Were you employed by the P. Lorillard Company when the campaign of putting the Beech-Nut cigarettes on in the state of Wisconsin or Milwaukee territory was started?

A. I was in their employ before that and during the time they opened up the campaign.

Q. 10. About when was it they opened the campaign?

A. Well, I think about—during the month of September, I remember that. I am pretty sure it was September.

1697 Q. 11. 1921?

A. 1921.

Q. 12. Do you know Mr. Goldstein?

A. Yes, sir.

Q. 13. Was he with the Lorillard Tobacco Company at the opening of their campaign?

A. Yes, sir.

Q. 14. Here in Milwaukee?

A. In Milwaukee.

Q. 15. Did you do any work under him?

A. Not directly under him. I was in a different department from Mr. Goldstein's department.

1698 Q. 16. Will you state whether or not you trimmed any windows with Beech-Nut signs?

A. Yes, sir, I have, that is if it was included in the special display gotten out by the window display department.

Q. 17. Did you ever attend any meetings or were you present at any meetings Mr. Goldstein had with his salesmen and listened to any instructions that he gave?

A. Well, I have been there in the morning when he has given instructions, packing up my things, getting ready to go, but never being directly in the meeting, just what I hear now and then from being around with him.

Q. 18. Can you state what you heard Mr. Goldstein tell these salesmen at these meetings just in your own words? 1699

A. Well, I heard him mention something about this here tangle in Beech-Nut gum and under no circumstances to give any dealer the impression they were connected with that company, the gum company.

Q. 19. You were present when Mr. Goldstein told this?

A. That was my understanding from what I heard.

Q. 20. At those meetings?

A. Yes, I was not paying particular attention to it because I was not on the selling force. 1700

Direct examination closed.

Cross Examination.

By Mr. Johnson:

X-Q. 21. Have you been a window trimmer all your business life?

A. No, sir, just since I started with the Lorillard Company.

X-Q. 22. What did you do before that?

A. Clerical work. 1701

X-Q. 23. With what companies?

A. With the New York Central Railroad before I was in the army.

X-Q. 24. What department of the company?

A. The commercial office in Milwaukee.

X-Q. 25. When did you enter the employ of the P. Lorillard Company?

A. 1919, I think the month of July.

X-Q. 26. Was that when you came out of the army?

A. Shortly after I came out of the army.

1702 X-Q. 27. Are you still with the P. Lorillard Company?

A. No, sir.

X-Q. 28. What are you doing now?

A. Same line of work, but with a different company.

X-Q. 29. Whom are you with now?

A. Well, it is about three companies consolidated together under the Cavala Tobacco Company of Chicago, and doing advertising for about three companies.

X-Q. 30. But you are trimming for the tobacco
1703 trade, are you?

A. Yes, sir.

X-Q. 31. In these morning meetings that you spoke of on your direct examinations were you with the group of men that Mr. Goldstein was talking to?

A. I was in the same office, but only here and there, getting my stuff together, not listening directly to them.

X-Q. 32. Getting your trimming material together?

A. Getting my material together, walking around in the same room, couldn't help hearing different remarks.

X-Q. 33. Did you only hear remarks now and then?

A. You mean at that same morning I spoke of?

1704 X-Q. 34. Any one morning.

A. Well, I have heard a lot of remarks going on, which I probably don't remember.

X-Q. 35. Did you overhear such remarks more than one morning?

A. Well, there was a little session there probably a week long they talked about that more than any other time, I think, when this here first came up.

X-Q. 36. About what week was that?

A. I couldn't say.

X-Q. 37. Was it soon after the start of the special Wisconsin campaign on Beech-Nut cigarettes?

A. That I wouldn't remember. Might have been a 1705
month, might have been a couple of weeks.

X-Q. 38. It was that fall, was it?

A. I don't know. As I say, not being under Mr. Goldstein I didn't pay any special attention to that, because I had my own work to do.

X-Q. 39. What did you hear Mr. Goldstein telling his salesmen?

A. If anybody was to ask him, that was the point, whether they were connected with this Beech-Nut gum company, to tell them positively not.

X-Q. 40. Did you ever go about through the city with Mr. Goldstein on his trips during this campaign? 1706

A. Well, I have made calls with him, because I have an automobile at one time and if he was going my way I would take him up there and probably wait a few minutes until he got through with the dealer he might be talking to, and then we would go on until he finally dropped off somewhere.

X-Q. 41. Did he ever direct your window trimming? I mean, at any particular store?

A. No, I can't say that he has.

X-Q. 42. Did he ever make suggestions how you should put your materials in the window?

A. Not that I remember of hearing him say. 1707

X-Q. 43. Are you familiar with the Beech-Nut gum and hard candies?

A. I don't understand your question.

X-Q. 44. Have you seen around about Milwaukee the Beech-Nut gum on sale and the mint packages?

A. I have seen the gum, I am sure of that, and I have an idea I have seen these little mint packages with their label on.

X-Q. 45. Similar packages?

A. Very similar.

1708 X-Q. 46. Have you seen those in any of the same stores in which you were trimming windows?

A. Well, I guess practically everybody had Beech-Nut gum, if they handled gum at all, and they usually handle gum in cigar stores in which I have been trimming.

X-Q. 47. Did you trim the window at the suggestions of the store where you went, in most cases? Would they suggest the kind of display you make in their window?

A. We would put our display in first and tell them we would put in merchandise they might wish to show in there with it, and they would hand me jars of cigars
1709 and tobaccos which I would put in with our display.

X-Q. 48. Did you ever put in any Beech-Nut gum or hard candies or display matter in regard to them in th same window?

A. No, sir.

X-Q. 49. Were you ever asked to do that?

A. No, sir.

X-Q. 50. Have you ever gone into a store with Mr. Goldstein when he was placing cigarettes or his advertising material?

A. Well, yes, I have, but I can't say it was Beech-Nut. I know of different pieces of advertising he put
1710 up on Turkish cigarettes, but I do not remember any special time he put up Beech-Nut advertising. He may have taken in Beech-Nut cigarettes, but I couldn't say for sure whether Beech-Nut or Turkish.

Cross Examination Closed.

Re-direct Examination. 1711

By Mr. Cavanagh:

R-D. Q. 51. You have assisted Mr. Goldstein by decorating or putting in window display at places they sold Beech-Nut cigarettes here in Milwaukee, have you?

A. By assisting him, you mean?

R-D. Q. 52. Yes, you have put in the advertising in the stores where they sold the Beech-Nut cigarettes?

A. Yes, sir.

Re-direct Examination closed. 1712

Re-cross Examination.

By Mr. Johnson:

R-X. Q. 53. Have you ever been asked as you were going about, as to whether the same people that made the Beech-Nut cigarettes made the gum?

A. Never.

R-X. Q. 54. Have you ever heard any inquiries or comments about that?

A. No, because I have never been selling it, never been brought up to me. 1713

R-X. Q. 55. Have you been with people who were smoking Beech-Nut cigarettes and who were buying them?

A. Yes.

R-X. Q. 56. And you have never heard any inquiries or questions of that kind?

A. No, not that I know of.

Deposition closed.
Signature waived.

1714 MAURICE J. SCHIMMEL, a witness called on behalf of P. Lorillard Company, defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Cavanagh, deposes and says, as follows:

Direct Examination.

Q. 1. Please state your name, age, residence and occupation?

A. My name is Maurice J. Schimmel, age 23, reside at 1522 Fond du Lac Avenue, Milwaukee, Wisconsin, occupation salesman for P. Lorillard Company.

1715 Q. 2. How long have you been with the P. Lorillard Company, Mr. Schimmel?

A. About twenty-two months.

Q. 3. Are you acquainted with Mr. Goldstein of the P. Lorillard Company?

A. Yes, sir.

Q. 4. Were you connected with the P. Lorillard Company during the time the introductory campaign on the Beech-Nut cigarette was being conducted in Milwaukee and vicinity under Mr. Goldstein?

A. Yes, sir.

Q. 5. And about when was that?

1716 A. The campaign was about September 26th, I believe, it began.

Q. 6. What year?

A. 1921, I think. I am not positive.

Q. 7. Did you take any part in that campaign?

A. Yes, sir.

Q. 8. Just tell us in your own words what you did.

A. I called on retailers. I being the only one had a car, I called on retailers in the side streets and putting up advertising of different kind and description and sold these different dealers each a small quantity of

Beech-Nut cigarettes so we could give them a start on it, introductory item with them. 1717

Q. 9. When you called on a dealer or retailer to introduce the cigarettes, tell us just how you proceeded or what you did.

A. "Mr. So-and-so, I am a representative of the P. Lorillard Tobacco Company, doing a little advertising on Beech-Nut cigarettes. I would like to introduce this cigarette to the consumers. We are not trying to place a large quantity with you, just one carton." Then I would try to put up some advertising for the gentleman and proceed on my way to the next one.

Q. 10. If the dealer took a carton of the cigarettes, did you give him any receipt or anything of that sort? 1718

A. Yes, sir.

Q. 11. Are these receipts made out on the blanks like I show you (showing order blank)?

A. Yes, sir.

Q. 12. The white blank marked "A" and the yellow blank marked "B" and the tissue paper sheet?

A. Yes, sir.

Q. 13. When you went into the store what did you carry with you?

A. My sample case containing the cigarettes and advertising. 1719

Q. 14. You always had those with you when you went in the store?

A. Yes, sir.

Q. 15. Did you ever attend any meetings at which Mr. Goldstein gave any instructions to the crew?

A. Yes, sir.

Q. 16. How often?

A. Quite often.

Q. 17. Well, approximately? Once a week or a couple of times a week or what?

A. Most every day, I might say.

1720 Q. 18. What instructions did Mr, Goldstein give you at those meetings?

A. My instructions were that upon entering a store I was to introduce myself as representative of the P. Lorillard Company, manufacturers of Beech-Nut cigarettes and Beech-Nut tobacco and a few Turkish cigarettes, and under no circumstances were we to mention Beech-Nut Packing Company's articles with ours.

Q. 19. Did you ever have any of your customers ask you if these Beech-Nut cigarettes or the Beech-Nut scrap, was made by the Beech-Nut Packing Company, the same people make the gum?

1721 A. Very little, sir, if any.

Q. 20. Do you recall any?

A. No, sir, I don't think I do.

Q. 21. How many customers did you visit a day, approximately?

A. About twenty.

Q. 22. And for about how long a period of time did you visit these customers? That is, how long did your campaign extend, just approximately?

A. Approximately three months.

Q. 23. Will you state whether or not you ever told or intimated to any person that Beech-Nut cigarettes

1722 were made by the same people who made the gum?

A. No, sir.

Q. 24. What kind of advertising was it that you put up in these stores and that you carried with you to put up in the stores?

A. Posters, also enamel signs.

Q. 25. Were they window signs or wall signs?

A. The enamel signs were for outside walls and the displays we carried with us also for the windows.

(Direct Examination Closed.)

Cross Examination. 1723

By Mr. Johnson:

X-Q. 26. Are you still in the employ of the P. Lorillard Company?

A. Yes, sir.

X-Q. 27. What were you doing before you joined them about two years ago, as you say?

A. I represented the American Tobacco Company.

X-Q. 28. How long were you with them?

A. Two months.

X-Q. 29. What did you do before that? 1724

A. I was a shipping clerk.

X-Q. 30. In what kind of house?

A. Tool manufacturing concern.

X-Q. 31. Were you in the tobacco trade before that?

A. No, sir.

X-Q. 32. How long had you been with the P. Lorillard Company at the time this introductory campaign on the Beech-Nut cigarettes began?

A. About seven or eight months.

X-Q. 33. How long did it continue in this distrtict?

A. About three months.

X-Q. 34. Beginning when? 1725

A. September 26th, 1921, continued until about December 16th of the same year.

X-Q. 35. To be concluded about December?

A. About that time. I don't recall just when it did conclude because our vacation came in at that time and that is all we did on that.

X-Q. 36. When you were just describing in direct examination what you did and said when you entered a dealer's establishment to sell him cigarettes, you do not mean that you did exactly that thing in every case, do you?

A. Yes, sir, in every case.

1726 X-Q. 37. Just exactly the procedure you stated?

A. Yes, sir.

X-Q. 38. Were you able to say that you always did that very same thing?

A. Yes, sir.

X-Q. 39. Said the same things?

A. With a few words thrown in—a few other words thrown in here and there, but always introducing myself the same way.

X-Q. 40. You can't remember of one instance where you parted from that procedure to any extent?

A. No, sir.

1727 X-Q. 41. Did you ever receive any written instructions from Mr. Goldstein telling you to be careful not to put these Beech-Nut cigarettes forward as seeming to be the product of the Beech-Nut Packing Company?

A. No, sir.

X-Q. 42. You never received any such written instructions?

A. No, sir.

X-Q. 43. Did you ever receive such written instructions from the P. Lorillard Company home office?

A. No, sir.

X-Q. 44. Through what period of time did these
1728 meetings that you speak of, when Mr. Goldstein talked to you, take place?

A. Every morning.

X-Q. 45. Beginning about when?

A. Beginning right at the time we first had begun our campaign on Beech-Nut cigarettes.

X-Q. 46. You mean September 26th?

A. September 26th, yes, sir.

X-Q. 47. And through what period did those meetings run?

A. Until practically the end of the campaign and on to the next year too. It has been mentioned to the

crew very often we should not mention Beech-Nut 1729
Packing Company's products with Lorillard's.

X-Q. 48. When did Mr. Goldstein leave this district?

A. The first of 1922.

X-Q. 49. His meetings did not run into that year, you don't mean that?

A. No.

X-Q. 50. You mean his successor continued the meetings?

A. Yes, sir, his successor.

X-Q. 51. How often did you say those took place?

A. When Mr. Goldstein was on we received those instructions most every morning, approximately every 1730
morning. I won't say very often, but quite often, I might say, in the morning before we left the office we were carefully instructed not to mention Beech-Nut Packing Company with Lorillard's name.

X-Q. 52. How long did you spend in his office as a rule before getting out in the morning?

A. We would get down to the office at eight and we would leave between eight thirty and a quarter to nine, never later than a quarter to nine. We were always out at a quarter to nine.

X-Q. 53. These meetings were rather informal then, I suppose?

1731

A. Informal, yes sir.

X-Q. 54. Did he go through the same ceremony every morning, tell you these things that you were describing in direct?

A. Yes, sir.

XQ. 55. Did he tell you in those morning meetings that the Beech-Nut cigarettes were made by the P. Lorillard Company?

A. Yes, sir.

X-Q. 56. What was the necessity of telling the Lorillard employees that their own company made the product?

1732 A. He didn't say it in just those words you use, he didn't mention those words. He did say we weren't to mention Beech-Nut Packing Company's name with Lorillard's products. We were not to use that Beech-Nut Packing Company's label with Lorillard's label in calling on these dealers.

X-Q. 57. Did you ever hear Mr. Goldstein refer to the Beech-Nut cigarettes as one of the Beech-Nut line?

A. No, sir.

X-Q. 58. Did you ever hear any of your brother salesmen refer to the Beech-Nut cigarettes as one of the Beech-Nut line of products?

1733 A. No, sir.

X-Q. 59. You have gotten about a good deal, haven't you, Mr. Schimmel, in this Milwaukee district during that campaign and since?

A. Beg pardon?

X-Q. 60. You have moved about a good deal among the dealers, among the public?

A. Yes, sir.

X-Q. 61. Have you heard any quetion asked or any comments or inquiries as to whether the Beech-Nut cigarettes and scrap tobacco were made by the people that made the gum?

1734 A. Very little.

X-Q. 62. But have you heard a few?

A. Once or twice, but very seldom. I did hear once in a while something.

X-Q. 63. Can you tell any of the things that you heard?

A. No, sir.

X-Q. 64. Did you make any attempt at that time to remember these incidents?

A. No, sir.

X-Q. 65. Did anybody ask you to make a note of such incidents?

A. No, sir. 1735

X-Q. 66. You were very busy at that time, weren't you?

A. Yes, sir.

X-Q. 67. Don't you mean that you don't remember any such inquiries except the few exceptions you have mentioned? You mean you don't remember?

A. I don't remember.

X-Q. 68. Do you know the C. H. Beese grocery store on Murray Avenue?

A. No, sir.

X-Q. 69. Did you ever hear of it?

A. No, sir. 1736

X-Q. 70. The C. H. Beese grocery store, 701 Murray Avenue?

A. No, sir.

X-Q. 71. You never went there?

A. No, sir.

X-Q. 72. Did you keep a memorandum or note book of the places you called during that campaign?

A. No, sir.

Cross examination closed.

Re-direct Examination. 1737

By Mr. Cavanagh:

R-D Q. 73. You were asked on cross examination about Mr. Goldstein going through a certain ceremony of schooling the salesmen. Will you please state whether or not he was on that occasion instructing you how to approach people?

A. Yes, sir, to a certain degree.

R-D Q. 74. In what way?

A. To absolutely be sure to mention that we were representatives of the P. Lorillard Company, selling the

1738 Beech-Nut cigarettes and Beech-Nut tobacco, manufacturers of the Beech-Nut tobacco.

R-D Q. 75. Did he mention you should speak of any other Lorillard brands?

A. No, sir.

R-D Q. 76. What brands does Lorillard manufacture in the Turkish lines?

A. Helmars, Turkish Trophies, Dicties and Moguls.

R-D Q. 77. Are all of those well-known brands?

A. Yes, sir.

R-D Q. 78. Did you ever sell any of them?

A. No, sir.

1739 N-D Q. 79. You never sold the Turkish brands?

A. No, sir.

R-D Q. 80. What do you sell chiefly?

A. Beech-Nut cigarettes and Beech-Nut scrap tobacco at the present time.

R-D Q. 81. Who do you work under now?

A. Mr. Frank Hopewell.

R-D Q. 82. You say that on one or two occasions you might have heard people ask you, "Were the cigarettes made by the gum people or Beech-Nut Packing Company?" What did you tell them?

A. Why, they would say to me, "Well, we sell your
1740 Beech-Nut gum", and I would emphatically deny it and say, Beech-Nut gum was not made by P. Lorillard Tobacco Company, it was made by the Beech-Nut Packing Company.

R D Q. 83. How often would that happen?

A. Very few times.

R-D Q. 84. If it had happened very often would that have impressed itself on you that people were making those inquiries?

A. It might.

R D Q. 85. If people asked you the same thing one

hundred times a day or one hundred times a week would you remember it or would you not? 1741

A. Yes, sir.

R-D Q. 86. I asked you, would you or would you not. Will you state whether or not?

A. I would.

R-D Q. 87. Would have what?

A. It would have impressed itself upon me.

R D Q. 88. Will you state whether or not you have ever mentioned to customers those famous Turkish brands of Lorillard Company?

A. I have, sir.

R-D Q. 89. In what way? 1742

A. The dealer would ask me if we made any other well-known cigarette and I would naturally mention Murads and Helmars and so on.

Re-direct Examination Closed.

Re-cross Examination.

By Mr. Johnson:

R-X Q. 90. What was your district during this Beech-Nut cigarette campaign?

A. The territory west of Third Street, I would say, or the northwest end of town. 1743

R-X Q. 91 Was that entirely referring to Milwaukee?

A. Yes, sir.

R-X Q. 92. Did you get outside of Milwaukee very far?

A. No, sir.

R-X Q. 93. Do you know what territories the other members of the crew had?

A. No, sir, I don't remember.

R-X Q. 94. When Mr. Goldstein was going through this morning exercise of his while you salesmen were in

1744 his office, did he tell you to emphasize the quality of the Beech-Nut cigarettes in presenting them to the dealers?

A. I don't remember.

R-X Q. 95. *Did* he tell you to emphasize that the Beech-Nut cigarettes were another of the many other brands?

A. No, sir, he never said.

Mr. Cavanagh: Other brands of what? The question is objected to as indefinite.

A. He never mentioned anything about—he never
1745 told us to say anything about the quality of the other brands, if that is what you are arriving at.

R-X Q. 96. (By Mr. Johnson) As you have been selling the goods of the P. Lorillard Tobacco Company have you found that the people wanted a certain brand, such as the Beech-Nut cigarettes or the Moguls or the Murads, or did they want a Lorillard brand?

A. They would call the brand they wanted, they would call it by name.

Re-cross Examination Closed.

1746 *Re-direct Examination.*

By Mr. Cavanagh:

R-D Q. 97. Will you please state whether or not in these morning instructions or meetings he told you to emphasize that the Lorillard Company made other famous brands and mention them by name?

A. He did not tell us to emphasize the fact we made other brands. However, he did say, where it was necessary to sort of impress upon the quality of Murads and Helmar cigarettes and in this way bring forth the point that Beech-Nut cigarettes were of good quality.

R-D Q. 98. So he did mention these other brands, such as Murads and Moguls at the time he was instructing you about the Beech-Nut, didn't he? 1747

A. Occasionally, yes, sir.

Mr. Cavanagh: That is all.

Mr. Johnson: That is all.

Deposition Closed.

Signature waived.

(An Adjournment is here taken to ten o'clock January 31st, 1923)

January 31, 1923, 10:00 A. M. 1748

Met pursuant to adjournment, parties present as before.

DANIEL PAICOPOULOS, a witness produced in behalf of the defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Preston, deposes and says as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. Dan Paicopoulos, thirty-seven years of age, reside at 722 Wells Street, occupation cigarettes and tobacco. 1749

Q. 2. What is the address of your store here?

A. 405 Wells Street.

Q. 3. How far is your store from 810 Wells Street?

A. About five blocks—four blocks.

Q. 4. Do you sell Beech-Nut scrap tobacco?

A. Yes, sir, I do.

Q. 5. How long have you handled that?

A. Ever since I am in the business, about twelve years.

Q. 6. Do you handle Beech-Nut cigarettes?

1750 A. Yes, sir.

Q. 7. And how long have you handled them?

A. For more than a year.

Q. 8. Do you know what company makes Beech-Nut scrap tobacco and Beech-Nut cigarettes?

A. Sure, I do, P. Lorillard.

Q. 9. Are you handling Beech-Nut chewing gum?

A. I do once in a while.

Q. 10. Do you know what company makes that?

A. No, really I don't know.

Q. 11. Have you ever been under the impression that Beech-Nut chewing gum was made by the same company
1751 makes the Beech-Nut scrap tobacco and Beech-Nut cigarettes?

A. No, sir.

Q. 12. Have you ever heard any remarks or inquiries among your customers which indicated in any way that they were under the impression that Beech-Nut chewing gum was made by the same company makes the Beech-Nut tobacco and the Beech-Nut cigarettes?

A. No.

Q. 13. And if you had heard a great many of those remarks do you think you would have remembered it?

A. Well, sure I would. I can't remember anything
1752 like that, I never heard anything like that.

Q. 14. Do you remember who it was first sold you Beech-Nut cigarettes?

A. Well, if I am not mistaken it was Mr. Goldstein.

Q. 15. When Mr. Goldstein introduced those Beech-Nut cigarettes to you did he tell you that he was a representative of the Lorillard Tobacco Company?

A. Yes.

Q. 16. Did he make any statement which in any way could have led you to believe that the Beech-Nut cigarette was in any way connected with the Beech-Nut gum?

A. Never mentioned anything like that, never mentioned any Beech-Nut gum. 1753

Q. 17. Did Mr. Goldstein have any advertising matter with him when he introduced those cigarettes into your store?

A. Yes, he put up posters in my window.

Q. 18. He put some posters in your window?

A. Yes.

Q. 19. Did you buy any Beech-Nut cigarettes from him at that time for cash, or through the jobber?

A. The first I bought was from the jobber, not for cash, but I gave the order through the jobber.

Q. 20. Did Mr. Goldstein leave you a duplicate of the order you gave him on a blank like the one I now show you, a yellow order slip, (showing same to witness)? 1754

A. He gave me a copy of this.

Q. 21. And whose name appears on the top of that blank?

A. "P. Lorillard."

Q. 22. Is your Beech-Nut scrap tobacco a good seller?

A. Sure, it is a good seller.

Q. 23. Is it as good a seller as any other scrap tobacco that you carry?

A. I don't handle anything else but Beech-Nut scrap.

Q. 24. Beech-Nut is the only scrap tobacco you handle? 1755

A. I have the other, but they don't go as fast.

Direct Examination closed.

Cross Examination.

By Mr. Johnson:

X-Q. 25. Mr. Paicopoulos, is your business wholesale or retail?

1756 A. Wholesale and retail.

X-Q. 26. About what proportion of it is wholesale, would you say?

A. Well, I sell wholesale outside myself and retail here in the store, but I sell the most wholesale out.

X-Q. 27. Do you make sales in the front of the store yourself?

A. No, I deliver stuff, I sell stuff outside to the other stores.

X-Q. 28. Is this one of a chain of stores?

A. What is that?

X-Q. 29. Have you other stores beside this one?

1757 A. No, I say I sell to my customers outside wholesale and retail, retail I sell whatever comes here. Wholesale I go out and get orders as I deliver.

X-Q. 30. How many men have you in the store in which you sell retail?

A. My brother Louis and two of my brother-in-laws.

X-Q. 31. How many do you keep in the store at one time usually?

A. Usually one.

X-Q. 32. And of the business that you do in that front store, about what per cent. of it would you say is wholesale? One-half or three-quarters?

1758 A. Wholesale is three-quarters. I don't do much retail here.

X-Q. 33. About what is the size of your store in the front part, just roughly, how many feet long and wide?

A. Oh, I never measured it.

X-Q. 34. Just roughly, don't you know whether it is twenty by twenty or what it is?

A. I never pay any attention to it. If you walk out you can measure it, I can't say.

X-Q. 35. I would just like to have you say, because you are the owner.

A. About twenty by twenty. I am not sure, I never measured it. 1759

X-Q. 36. About how many customers come in in a day, retail customers?

A. About two hundred or three hundred.

X-Q. 37. That keeps you pretty busy waiting on them?

A. Oh, not much.

X-Q. 38. Do you have much time to talk to each customer?

A. I talk to the customer for what? They come in and say, "Give me a package of this" and I hand them the stuff and they go out. If I know the fellow and they want to talk to me I can talk as much as they want to. 1760

X-Q. 39. How long have you been selling Beech-Nut scrap tobacco?

A. Since I am in business, nine or ten years.

X-Q. 40. During that time since you have been selling Beech-Nut scrap tobacco and Beech-Nut cigarettes have you heard any one asking you who made them or whether the same people made them that made the Beech-Nut chewing gum or peanut butter?

A. No.

X-Q. 41. You never heard anyone asking that or talking about it?

A. No. 1761

X-Q. 42. Did you make any attempt to remember such questions?

A. If somebody asked me I told them P. Lorillard, but I can't remember anybody asking me about that.

X-Q. 43. Then when you say you didn't hear any such questions or remarks you mean you don't remember of them now, is that it?

A. I can remember nobody asking such a question.

X-Q. 44. When did you first buy Beech-Nut cigarettes?

1762 A. A little over a year, I think, at the time they first come on the market. It was over a year, I think. If I look at the bill I can find it.

X-Q. 45. Who first came in to offer them to you for sale?

A. Mr. Goldstein.

X-Q. 46. Did you buy some the first time any man came in to offer them to you?

A. They gave me the price and I bought them.

X-Q. 47. Did you buy them the first time a salesman came in with them?

A. Yes.

1763 X-Q. 48. You are sure that is Mr. Goldstein who came in first?

A. Mr. Goldstein was the man who sold me the first lot.

X-Q. 49. Did he come into your store?

A. Yes.

X-Q. 50. When was that?

A. Well, I can't remember, but it was a little over a year anyway. I can't remember exactly the day.

X-Q. 51. But you do remember, do you, it was Mr. Goldstein who came into your store the first time that you had these cigarettes offered to you?

1764 A. Yes.

X-Q. 52. Did you know Mr. Goldstein at that time?

A. I know him.

X-Q. 53. You say you knew him?

A. Yes.

X-Q. 54. Do you know who he represented?

A. Yes.

X-Q. 55. Who?

A. P. Lorillard.

X-Q. 56. Then before you got the Beech-Nut cigarettes for the first time you knew that they were made by the P. Lorillard Company, did you?

A. Yes.

1765

X-Q. 57. Did you know they were made by the Lorillard Company before you ever saw a package of them?

A. Before I saw them?

X-Q. 58. Before you ever actually saw a package of the cigarettes.

A. Before I saw them I don't know who made them, but at the time they represented the Beech-Nut cigarettes they told me they were made by the P. Lorillard people, and then I knew. Before I had them how can I know?

X-Q. 59. But I mean, before you saw a package of the cigarettes did yor know that these Beech-Nut cigarettes

1766

that were on sale—

A. (Interrupting.) Yes, I knew they were made by P. Lorillard.

X-Q. 60. Now these order slips which Mr. Preston has shown you, did Mr. Goldstein leave one of these yellow duplicate slips with you at that time?

A. Yes.

X-Q. 61. Have you bought anything since then from P. Lorillard Company salesmen?

A. I buy, yes.

X-Q. 62. Have they always left with you one of these yellow order slips?

1767

A. Yes. (Producing paper) I think I have one here now. When I give an order to a salesman they leave one like this (indicating), this is a different company. One he sent to the jobber and my jobber sent me the stuff and I check it up to see if that is the way I gave it to them.

X-Q. 63. You buy from tobacco jobbers some time too, don't you?

A. Well, not all of the time.

X-Q. 64. Who are the Borden Sales people in New York?

1768 A. This is the first order I gave them.

X-Q. 65. Are they tobacco jobbers?

A. No, this is candy, a different line of business, this is all candy.

X-Q. 66. When you have bought from jobers have you had order slips left with you similar to this? Not just like this, I mean, but similar to this with the jobber's name at the top?

A. Yes.

X-Q. 67. Do these tobacco jobbers duplicate order slips have their own name at the top of it?

A. Yes.

1769 X-Q. 68. How did the Beech-Nut cigarettes sell after you put them in?

A. They were good sellers.

X-Q. 69. About how many a week did you sell at first?

A. I sell them at least today yet.

X-Q. 70. About how many a week did you sell during the first part of the time you were selling them?

A. I can't understand that.

X-Q. 71. Do you know about how many Beech-Nut cigarettes a week you sold during the first part of the time when you put them in stock?

A. I can't remember.

1770 X-Q. 72. Did your sales increase?

A. Not now.

X-Q. 73. No, but I mean after the first did the sales increase?

A. Yes.

X-Q. 74. For about how long?

A. Well, they increased for two months, but they don't go now like they started. They don't go as fast as they started. When they put them in they were selling good, after a couple of months don't sell like usual.

X-Q. 75. Did you notice whether many of the same people who came into your store bought a second time

after they had bought once of these Beech-Nut cigarettes? 1771

A. I can't remember.

X-Q. 76. Did you hear any of them say what they thought of them?

A. Well, I can't remember that now.

X-Q. 77. About how many a week are you selling now?

A. Now the only thing—I don't sell much now.

X-Q. 78. Can you say about how many? One carton a week?

A. Sometimes I sell ten cartons a week and sometimes I don't sell in two weeks ten cartons. When I get orders I sell it, if I don't get orders how can I sell it? 1772

X-Q. 79. Do you sell Camel cigarettes?

A. Sure, I do.

X-Q. 80. Who makes the Camels?

A. R. J. Reynolds.

X-Q. 81. Do you sell Lucky Strikes?

A. Yes.

X-Q. 82. Who makes those?

A. American.

X-Q. 83. Have you sold many Camels?

A. Plenty.

X-Q. 84. A great many?

A. Yes. 1773

X-Q. 85. Have you handled the packages yourself?

A. Yes.

X-Q. 86. What is on a package of Camel cigarettes underneath the Camel? What is printed on the Camel package underneath the Camel?

A. The name of the company who made it.

X-Q. 87. Have you sold many Lucky Strike cigarettes?

A. Yes.

X-Q. 88. Have you handled the packages yourself?

A. I handle some myself too,—plenty.

1774 X-Q. 89. What is on the Lucky Strike package underneath the red panel?

A. It says "Made by American Tobacco Company."

X-Q. 90. Have you handled many Fatima cigarettes?

A. Yes, not so many of them as Camels and Lucky Strikes.

X-Q. 91. Have you handled the packages yourself?

A. Yes.

X-Q. 92. What is on the Fatima package underneath the picture of the lady and the scimitar?

A. The name of the people who made it.

X-Q. 93. You sell any of the Beech-Nut Packing Com-
1775 pany's products?

A. Sometimes.

X-Q. 94. What ones have you sold?

A. The Beech-Nut gum.

X-Q. 95. Anything else? Mints or lemon drops or anything like that?

A. No.

(Cross Examination Closed.)

Re-direct Examination.

By Mr. Preston:

1776

R-D Q. 96. Will you please state whether or not you have always known ever since you handled the Beech-Nut scrap tobacco and Beech-Nut cigarettes what company made them?

A. P. Lorillard.

R-D Q. 97. Is a good deal of your time spent among the retail tobacco dealers in the city of Milwaukee?

A. Yes, sir.

R-D Q. 98. Do you spend considerable time in your own retail store here?

A. Yes.

R-D Q. 99. Have you ever in your experience, as far as your memory goes, heard any remarks which indicated that people were under the impression that Beech-Nut tobacco and Beech-Nut cigarettes were made by the same company that made Beech-Nut gum? 1777

Mr. Johnson: Objected to as grossly leading.

A. No.

Re-direct examination closed.

Re-cross Examination. 1778

By Mr. Johnson:

R-X Q. 100. You have already said, Mr. Paicopoulos, that in most cases your customers come in and ask for what they want and pay their money, take the package and go out?

A. Yes.

R-X Q. 101. Is that correct?

A. Yes.

R-X Q. 102. In most cases nothing is said, is that correct?

A. What? 1779

R-X Q. 103. In most cases they don't say anything about who they think make the article they are buying?

A. If anybody asks me I tell them what I know.

R-X Q. 104. But in most cases do they say anything?

A. Well, they tell me that time they ask me if it is a new cigarette who it is made by, they ask me, many of my customers, but after that nobody appeared to ask anything about Beech-Nut who make it, they don't pay any attention to it.

R-X Q. 105. Then, Mr. Paicopoulos, you have had

1780 questions of this kind in regard to the Beech-Nut cigarettes, have you?

A. I told you, when they come they ask me who made it, because it is a new cigarette, they want to know who made it. They ask me who made it, I tell them P. Lorillard. That is alright by that time and then nobody asked anything.

R-X Q. 106. And with the ordinary customer, as you have already said, he walks in up here at the counter and says he wants a package of Camels, let us say, puts down the money, you give him the package and he turns around and walks out, is that right?

1781 A. Yes.

R-X Q. 107. But you can't tell from looking at his face as he comes in or the back of his head as he goes out what he is thinking about or is he thinking about who makes the Camel cigarettes, can you?

A. I cannot.

R-X Q. 108. You are not a mind reader?

A. No.

R-X Q. 109. Unless he says something you don't know what he is thinking in regard to that, do you?

A. I can't say what he has got in his mind, if he asks me any questions I answer him.

1782

Re-cross examination closed.

Re-direct Examination.

By Mr. Preston:

R-D Q. 110. Was it only when the Beech-Nut cigarettes was a new product that you had any inquiries as to who was the maker of those cigarettes?

A. Yes.

R-D Q. 111. When they were a new product did anybody ever ask you if Beech-Nut cigarettes were made by the same company makes the Beech-Nut gum? 1783

A. No.

Deposition closed.

Signature waived.

ALBERT MARKS, a witness called on behalf of P. Lorillard Company, defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Cavanagh, deposes and says, as follows: 1784

Q. 1. Please state your name, age, residence and occupation.

A. Albert Marks, 43, Green Bay, Wisconsin, salesman.

Q. 2. For what concern?

A. P. Lorillard Company.

Q. 3. What line of business is P. Lorillard Company in?

A. Tobacco and cigarette business.

Q. 4. How long have you been with the P. Lorillard Company? 1785

A. Nine years.

Q. 5. Will you name some of the tobacco and cigarette brands manufactured and marketed by P. Lorillard Company?

A. Well, the scrap tobaccos would be the Panhandle, Old Nut, Tomahawk, Honest Scrap, Polar Bear, Open Book, Havana and Beech-Nut tobacco. We don't call that scrap, it is Beech-Nut tobacco. Now, the other tobaccos would be Beech-Nut Chewing tobacco, plug tobacco, Red Cross, Climax, and the smoking tobaccos would be Yacht Club, Stag, Union Leader and Sensa-

1786 tion, and our cigarettes would be Murads, Helmars, Egyptian Dieties, Moguls, Nebos, London Life, Tigers, and Beech-Nut cigarettes. Little cigars would be Between the Acts, Royal Bengals, St. Legers, Sub Rosa, and Old Virginia Cheroots.

Q. 6. I wish you would start at the beginning and come down to date, tell us in your own words just where, since you have been located with the Lorillard Company, you have been stationed, that is, what places or terrtiories and what your work in those territories has been, just your own history.

A. Well, when I started with P. Lorillard Company,
1787 at that time we had different departments. In fact, we did up until 1922. There was a scrap department, a little cigar department, cigarette department and plug and smoking departments, but I was always associated with what we call the scrap department in Chicago headquarters. And in 1919 we started opening up Wisconsin. In fact, we had worked Wisconsin at different points previous to that time, such as Beloit, Janesville, Kenosha and Racine on scrap tobaccos. And in 1919 we came up into the southern part of Wisconsin and into Milwaukee and the company established my headquarters at Milwaukee in the fall of the
1788 year 1919. Then we opened up Milwaukee with our entire line of scrap tobaccos. And the following year we went up the Fox River Valley and what part of the state we would have time to make before the winter set in. And during the end of the year 1921 they launched the Beech-Nut cigarette and we were called in, that is, I was. All of the head men I understand were there of the different sections of the country, other states as well, called into Chicago in preparation for this drive on Beech-Nut cigarettes.

Q. 7. As I understand it you were located in Chicago from the time you first went with the company up until 1919, is that correct?

A. That is correct. 1789

Q. 8. And what were you selling or doing in Chicago, what was your position and duties?

A. Selling the scrap tobacco, Polar Bear and Honest Scrap when I first started selling. Then at different times we were put on special work to help some other department out in smoking tobacco and little cigars. Assigned to that perhaps maybe a month or two in a year, something of that sort, but we were always considered the scrap department.

Q. 9. So you were in Chicago on scrap tobaccos up until 1919, is that right?

A. That is it.

Q. 10. Then you were assigned to the Milwaukee territory in 1919, is that correct? 1790

A. Yes.

Q. 11. What duties were you assigned here for? What was your work when you came here?

A. Up to that time, you mean?

Q. 12. No, here in 1919.

A. On scrap tobaccos, Polar Bear, Honest Scrap and Beech-Nut tobacco.

Q. 13. What was your position?

A. Well, I was retail man up until November, 1919, and in November I was appointed head salesman. 1791

Q. 14. In the scrap tobacco department?

A. In the scrap tobacco department at Milwaukee, my headquarters.

Q. 15. You had nothing to do with cigarettes in 1919, did you, in Milwaukee?

A. No.

Q. 16. What did your territory cover when you were here in 1919 on scrap tobacco?

A. Well, the entire state of Wisconsin and the upper peninsular of Michigan.

1792 Q. 17. You have spoken of handling Beech-Nut scrap in this territory at that time. Just tell us what you did in that connection?

A. Well, I just don't understand what you mean by that.

Q. 18. Did you sell it any place?

A. Oh, yes.

Q. 19. And how long did you continue to work exclusively on the scrap tobacco department after you came here in 1919?

A. Up until the first part of 1922.

Q. 20. And during all of that time you worked ex-
1793 clusively on scrap from 1919 to 1922?

A. No, I worked on cigarettes on September 26th, 1921.

Q. 21. Tell us just what occurred in that connection, how you came to work on cigarettes.

A. Up to that time, up to September we were called into Chicago in regard to putting in this Beech-Nut cigarette, and there were men called in from all over this part of the country, head men, and our boss Mr. Fitzsimmons of the scrap tobacco was in Chicago and there was something said about asking him if he wanted his men in a meeting they were going to have and he
1794 said it was not necessary, that his boys knew all about special work on anything special, they were specialty men and it was not necessary and he dismissed us, for us to come back later in the day and all of the Fitzsimmons men, the scrap department men, were dismissed. The latter part of the day we went back and Mr. Fitzsimmons said there was not anything necessary he could say to us in regards to the work, that we knew exactly what to do and to place the Beech-Nut cigarettes just the same as we had always previously worked our scrap department.

Q. 22. So when was this meeting at Chicago, approximately when?

A. Well, let us see, it was about the 23rd or 24th 1795
of September.

Q. 23. What year?

A. That was 1921.

Q. 24. You had some meeting at Chicago, didn't you?

A. Yes, sir.

Q. 25. Where did you go from Chicago at that time after you left there?

A. To Milwaukee.

Q. 26. You came back to Milwaukee?

A. Yes, we were assigned to territory to work, so many counties. We took the Fox River Valley, that is Sheboygan, Fond du Lac, Oshkosh, Neenah, Menasha, 1796
Appleton, Green Bay and Manitowoc. My boys were here in Milwaukee so we moved up to Sheboygan.

Q. 27. As I understand it, to pursue this matter logically and in order, you were assigned a territory. When and where and by whom were you assigned that territory?

A. By Mr. Fitzsimmons.

Q. 28. At Chicago?

A. At Chicago.

Q. 29. And you came back to Milwaukee?

A. I came back to Milwaukee to instruct my men to get their cars, we had two cars, to open up these towns 1797
they assigned us and we drove through on the two cars and took the interurban here up to Sheboygan.

Q. 30. Has that territory which you were assigned any term or name, such as the Northern District of Wisconsin or Western?

A. They call it the Fox River Valley territory.

Q. 31. And that is the territory to which you were assigned in September 1921?

A. That is right.

Q. 32. Then you went, as I understand it from Milwaukee up to the Fox River Valley, to your territory?

A. Yes, sir.

1798 Q. 33. And you took your crew with you from Milwaukee?

A. Yes, sir.

Q. 34. Where did you make your headquarters for that Fox River Valley territory?

A. Our headquarters were at Milwaukee at all times.

Q. 35. Did you have any sub-headquarters?

A. The only headquarters we had was the hotel we were stopping at while in town. Our headquarters were always in Milwaukee.

Q. 36. But you worked at different towns and stayed in the Fox River Valley on this Beech-Nut cigarette
1799 campaign?

A. Oh, yes.

Q. 37. How many men did you have in a crew?

A. I had four men.

Q. 38. And about when did you start that campaign?

A. About the 26th of September.

Q. 39. What year?

A. 1921.

Q. 40. Can you give me the names of those men you had?

A. Yes, there was Roy Hansen, Urban Zimlicka and a fellow named Lloyd Whitney.

1800 Q. 41. Are all of these men with you now or with the company?

A. No, sir.

Q. 42. Do you know where they are, or where they are located?

A. I don't know anything about them.

Q. 43. Tell me, as near as you know?

A. Morris Miles lives at Lansing, Iowa, and Zimlicka lives at Linden, Wisconsin, and Whitney lives at Marshfield and Hansen lives at Oshkosh.

Q. 44. Were these men or any of them with you prior

to the beginning of the Beech-Nut cigarette campaign, September 26th, 1921? 1801

A. Oh, yes, they were, I would say right off, not exactly knowing the length of time, but they were anyway with me some of them as high as nine months, some of them six months.

Q. 45. Had they sold Beech-Nut scrap through this Wisconsin territory under your directions?

A. Oh, yes, sure.

Q. 46. Now, tell us just how you proceeded to conduct this introductory campaign on Beech-Nut cigarettes in that Fox River Valley territory which was under your charge?

A. Well, we worked the cigarettes just the same as we worked the scrap department, you understand, on the strength of our past success on all of those different brands, that is, our success on our scrap tobacco. 1802

Q. 47. How did you proceed when you were introducing the Beech-Nut cigarette?

A. We would go into a town and I assigned the men different territories of the town, and myself, I would alternate, working with one man and then with another man perhaps half a day or a day, going along with the men to see that their work was done properly. That was my work, to see that a town is properly advertised and to see that we have the proper distribution. 1803

Q. 48. What time did you start out in the morning?

A. Well, we left a call seven o'clock when there was just calling on trade, but if there was any missionary work to be done, any sampling, we left an earlier call, and if there were factories in the town and the consumer was going to work as early as five and six o'clock in the morning. All depends on what factories there were in the town. We not only sold goods but advertised and sampled.

1804 Q. 49. I understand you to say you would go with one of your men in this crew?

A. Positively.

Q. 50. Now, if you went into a store to introduce the Beech-Nut cigarette, what would you do, or what did you do?

A. Went into this store and introduced ourselves—my name.

Q. 51. How?

A. "Is the buyer in?" "Alright, my name is Mr. Marks", and if I had a deal with another man, "This is Mr. Zimlicka, we are representing P. Lorillard Com-
1805 pany, the makers of the celebrated Beech-Nut Tobacco which I see you have on hand", or have had or haven't had, whatever the occasion might be. And, "We are introducing this brand" or whatever it may be, "on the strength of our other brands, Lorillard Tobacco Company being in business ever since 1760, one of the oldest concerns in the United States", we would present our article, whatever we had, for sale. That is about the only thing we would do, any more than talk on the merits of the goods, and insist and stay until we got an order.

Q. 52. What, if anything, did you carry with you when you went in there?

1806 A. We always carried the article, carried it for cash, that was the instructions always to carry the goods we had along for cash, that is, anything special we were pushing. Those goods were supposed to be sold to the dealer, put on a shelf, given a receipt for the same, and telling him that should he require any more of this particular kind of goods he can get it from his wholesale house, the jobbers, that all jobbers in the country handle our line of stuff.

Q. 53. On this Beech-Nut cigarette campaign when you went into a man's store what did you carry with you in connection with the Beech-Nut cigarette?

A. We carried Beech-Nut cigarettes only, that is any commodity to sell, but we had advertising, we had two or three different sorts of posters and then we had metal signs and we had packages, they were regular packages same as the stock, what we called samples, but they were not samples, they were regular fifteen cent packages of Beech-Nut cigarettes. 1807

Q. 54. You had a carton of cigarettes, did you?

A. Oh, yes.

Q. 55. And you sold cartons to the man if he wanted to buy them?

A. Yes.

Q. 56. What I understand you to say, you gave him a receipt? 1808

A. We collected cash, that is the custom.

Q. 57. You collected cash and collected a receipt?

A. Yes. Distribution was what we were working on and we insisted on selling a man the first carton to get it on his shelf, we got a receipt always. The reason why I always insisted on giving a receipt was that my name—in fact, all division managers' names—is stamped on the bottom of each and every order, whether original or duplicate. This dealer was left this receipted bill with my name on there, in case of any misrepresentation on the part of any of the men or anything of the sort they would have my address and enter their complaint, and the P. Lorillard Company's name was on top of it and if they did not refer to me they could refer it to the New York office in any misrepresentation, or give us an opportunity to check up on the sales. 1809

(The witness produces an order slip consisting of three sheets, one a yellow sheet, one a white sheet and one a tissue paper sheet, with his name stamped on the white sheet and the yellow sheet, and it is agreed between counsel that as these order blanks

1810 are similar to the order blank Defendant's Exhibit No. 10 already introduced in the case, and that reference will hereafter be made to Defendant's Exhibit No. 10.

The witness: (Continuing) Now, in case this customer did not care to buy from us, they have their jobbers and deal with their jobbers. Then he signs this order and he gets the duplicate, whether he pays cash or gives the order through the jobber, the original is brought in to me each and every night and turned over to me and I take them to the jobber they are made out for the goods to be delivered.

1811

Q. 58. The carton of Beech-Nut cigarettes which you have brought into the store and would sell to the customers if he wanted to purchase, was it like this carton of ten packages of cigarettes which is here before you and which is also in this case as Defendant's Cross Exhibit No. 9.

A. Positively the same; fac-simile.

Q. 59. And likewise the individual packages of cigarettes, are they like this plaintiff's Exhibit No. 1?

A. Positively the same thing. Our samples were all original stock. They were the original package, there

1812 wasn't any such thing as samples when we first started Beech-Nut cigarettes. The cartons we used as samples were the same as the stock, in fact they were the stock because I would get these packages and charge myself up to the amount of packages I got and credit the jobber I got them for.

Q. 60. Now, you stated that you took some advertising matter into the store when you called on a customer. What did you do with the advertising matter in that store?

A. We asked the storekeeper if we could place it on his window post and if they objected to it we asked him

if we could put it up on the wall on the inside, and not 1813
only that, but we asked him to kindly allow us to take this carton of Beech-Nut cigarettes like Defendant's Cross Exhibit No. 9 here, and place it open on the counter, and in each and every carton of this cigarette there is a little yellow carton card bearing the words "Lorillard's Beech-Nut Perfect Cigarettes, 20 for 15 cents, greatest of them all." Inserting this in the end of the carton and placing it on the end of his show case.

Q. 61. I understood you to testify this manner of introducing Beech-Nut cigarettes to the trade during this campaign, was similar to the procedure you followed in introducing Beech-Nut scrap tobacco to the trade, is 1814
that correct?

A. Yes, sir.

Q. 62. You had taken part in a campaign introducing the Beech-Nut scrap tobacco in this Wisconsin territory, is that correct?

A. That is correct.

By Mr. Johnson: Objection to the leading questions.

Q. 63. (By Mr. Cavanagh) And have you had the same men with you in that introductory campaign on 1815
the Beech-Nut scrap you had with the Beech-Nut cigarette?

A. Yes, sir.

Q. 64. So that they were familiar with the manner of introducing the Beech-Nut scrap?

A. Yes, sir.

Q. 65. What instructions did you give them in introducing the Beech-Nut scrap in connection with the campaign of the Beech-Nut scrap tobacco, if any?

A. Well, sir, instructed them that on the strength of our past success with Beech-Nut tobacco, and Lor-

1816 illard being in business since 1760, one of the oldest and largest concerns in the United States and at all times, I had instructed them in promoting the sales of scrap tobacco to always be careful in mentioning any other competitive brands. Now, my object in that was this, that my early training had been never mention any competitive brands as in so doing my superiors had always said we were advertising the other fellows tobacco and that has always been my strong point, to be loyal to P. Lorillard Company and not mention any other concerns. Loyalty, that was one thing we stuck by and always did insist upon, and that would apply to the ciga-
1817 rette just the same as it would to the Beech-Nut tobacco.

Q. 66. You say it did apply to the cigarette as well?

A. It did apply, and furthermore, that the section we were going to work is a very big Turkish section and P. Lorillard cigarettes were the leading Turkish cigarette in that section and it would be very well for them, and in fact I insisted on them mentioning the different Turkish brands of the P. Lorillard Company for the amount of prestige that we might get in placing the Beech-Nut cigarette, and I have always impressed upon them that the word "P. Lorillard" on tobacco was just the same as "Sterling" on silver, that they should be
1818 well proud of working for an old concern like that and such a large concern. And in not only selling goods, but also sampling the consumers our sale talk came in practically the same to the consumer. We were forever talking P. Lorillard Company, one of the oldest concerns of that kind in the tobacco business, and on the strength of them being the makers of the highest grade Turkish cigarettes in existence.

Q. 67. I understood you to testify you would go into a store with one of your salesmen in various towns during this campaign, is that right?

A. That is right.

Q. 68. Did you work the towns of Green Bay, Manitowoc, and Appleton during this Beech-Nut cigarette campaign? 1819

A. Yes, sir.

Q. 69. You personally called on the trade in those towns?

A. With one of the men or the other, alternating.

Q. 70. Of your crew?

A. Of the crew.

Q. 71. Will you state whether or not you ever told anyone, or left anyone under the impression that the Beech-Nut cigarettes or the Beech-Nut scrap were made by the same concern that makes the Beech-Nut gum 1820 and the Beech-Nut food products, made by the Beech-Nut Packing Company?

A. Did I ever insinuate anything like that?

Q. 72. Yes.

A. Absoltuely not.

Q. 73. Did you ever know any of your men to make any such statement to your knowledge?

A. Absolutely not.

Q. 74. Will you state whether or not if such a statement had been made by any of your men it would be contrary to your orders?

A. Absolutely, they know that. 1821

Q. 75. Will you please state whether or not you heard from any customer or consumer or purchaser any comments or inquiries or questions which would lead you to believe that they thought the Beech-Nut cigarettes and Beech-Nut scrap tobacco were made by the Beech-Nut Packing Company or the concern that makes the gum or food products?

A. No, sir, the brand was too well established up there to do anything of that kind. Lorillard was too well established.

1822 Q. 76. About how many dealers or customers a day would you call on during this campaign?

A. Well, that would average from twelve to fifteen dealers, I would think, and it would be sometimes perhaps more and then again not so many. It all depends on whether it was in a scattered section or congested section.

Q. 77. And how long did you continue this Beech-Nut cigarette campaign?

A. Up until the third week in December of 1921, then we went on our vacation.

Q. 78. Did you ever have any meetings with your
1823 crew for instructions before they started out or at any time?

A. Do you mean on this Beech-Nut cigarette?

Q. 79. Yes.

A. Sure, I did.

Q. 80. How often did you have those meetings?

A. Well, I tell you, we didn't have any meetings because I was with the men all the time, we were with the men every night of the week.

Q. 81. Where were you with them?

A. At the hotel, I was right with the men at all times.

1824 Q. 82. Were the whole crew at the hotel?

A. Yes, the men that were in the town. Some men would be out a day or two, assigned to some town that they couldn't get back, but they were supposed to report.

Q. 83. You had them together frequently?

A. Oh, yes, you might say at all times I was in direct contact with the men, every night.

Q. 84. What instructions did you give them when you were together in connection with this Beech-Nut cigarette?

A. The only instructions I gave them was when we

first started, as I have stated here, with regards to placing this Beech-Nut cigarette with the storekeepers on the same plan and ideas we did the Beech-Nut tobacco, on the strength of being one of P. Lorillard's brands. 1825

Q. 85. And that crew had already worked with you on this Beech-Nut scrap tobacco, as you testified?

A. Absolutely, there wasn't anything to instruct each and every night any more than finding fault perhaps because they hadn't put up enough posters on the man's windows or something of that sort.

Direct examination closed. 1826

Cross Examination.

By Mr. Johnson:

X-Q. 85. Mr. Marks, when did you enter the employ of the P. Lorillard Company?

A. Well, sir, that was in November, 1914.

X-Q. 86. Are you in their employ now?

A. Yes, sir.

X-Q. 87. Have you been with them ever since?

A. Ever since.

X-Q. 88. What line of work were you in before you joined them? 1827

A. Well, sir, I was selling goods, I was selling bottles and corks and labels.

X-Q. 89. Were you in the tobacco business at all before that?

A. No.

X-Q. 90. Where are you stationed now?

A. Green Bay, Wis.

X-Q. 91. In what position?

A. As head salesman.

1828 X-Q. 92. Of any department?

A. No. You see, we haven't got those separate departments any more since 1922.

X-Q. 93. You are head salesman for all of the Lorillard products?

A. The entire line of products.

X-Q. 94. And what is that district?

A. It is what we term the northern part of Wisconsin and the upper peninsula, that would be from Fond du Lac, Wisconsin.

X-Q. 95. And from Fond du Lac north?

A. Yes, not south, don't come south of Fond du

1829 Lac.

X-Q. 96. How do you speak of the district south of your district?

A. We call that the Milwaukee section or southern section, in other words, I guess.

X-Q. 97. I understood you to say that during the Beech-Nut cigarette campaign your crew consisted of four men beside yourself, is that right?

A. That is right.

X-Q. 98. And were these all men who had previously been in the P. Lorillard Company's employ before they entered this campaign?

1830 A. Yes, sir.

X-Q. 99. How long had the newest man been with the P. Lorillard Company, do you know?

A. How long had the newest man?

X-Q. 100. Yes.

A. I would have to look up my records, I would be safe in saying six months anyway.

X-Q. 101. Which one was he?

A. Well, that was a fellow named Hanson.

X-Q. 102. How long was the oldest P. Lorilard Company man in the employ before that?

A. He had been with me since 1920, first of January, 1920. 1831

X-Q. 103. Which one was that?

A. Morris Miles.

X-Q. 104. Did you have these same four men with you right through the campaign?

A. On cigarettes?

X-Q. 105. Yes.

A. Yes.

X-Q. 106. I am speaking of the Beech-Nut cigarette campaign beginning, as you have stated, September 26th, 1921?

A. Yes, September 26th, 1921. 1832

X-Q. 107. And how long did that campaign continue?

A. That continued up until the end of the year, that is, the third week in December. We went on our vacations the same week.

X-Q. 108. Was the introductory campaign resumed after the vacation?

A. No, we worked our regular line.

X-Q. 109. Did you have any other men at all helping you in this special Beech-Nut cigarette campaign beside these four?

A. No, that was all.

X-Q. 110. None others hired temporarily? 1833

A. No, just my own men, that is all.

X-Q. 111. You didn't organize any special missionary crews?

A. No.

X-Q. 112. Are any of these four men who were with you then still with the P. Lorillard Company?

A. No, I don't think so, in fact, I know they are not.

X-Q. 113. Do you know when Mr. Hanson left the employ of the P. Lorillard Company?

A. No, I can't just recall that.

X-Q. 114. Just approximately?

1834 A. Oh, I should judge about a month previous to us going on our vacation that year, the third week in December, 1921.

X-Q. 115. Didn't you just say all of these four men worked with you on through this campaign to the end of it?

A. Yes, all except this Mr. Hanson.

X-Q. 116. Then Hanson left during the campaign, did he?

A. Yes, he left during the campaign.

X-Q 117. Why did he leave?

A. Well, I considered him kind of weak, and I didn't
1835 want to carry him over to the next year, and it is customary, understand to always get rid of any inferior material we have in salesmen always before the vacation not extend them that courtesy and he was not a strong enough salesman for us to carry over.

X-Q. 118. Did you watch his work during this campaign?

A. Yes.

X-Q. 119. Were you with him a good deal?

A. Yes I was with him, I was trying to develop him and he was slow to develop Some men develop very fast and others do not.

1836 X-Q. 120. Did you find that he was a little bit careless in presenting these Beech-Nut cigarettes to the dealers.

A. No, it was not that at all, he followed instructions to the letter, understand, there wasn't any fault in that. The only thing was he couldn't talk. I tried to develop him to approach the customer better but he was a very honest fellow and followed instructions to the letter as far as I ever knew anything about him, but he was not there when it came to putting up the argument. He didn't develop to talk the line of stuff, that was it. Had no conviction.

X-Q. 121. Did you and your crew do the town of Manitowoc and district during that campaign? 1837

A. I assigned men to each section, you understand.

X-Q. 122. Were you and your crew in Manitowoc for a while during that campaign?

A. Yes.

X-Q. 123. Was Mr Hanson with you then?

A. Yes.

X-Q. 124. Did he do a part of the town of Manitowoc for you?

A. Oh. yes.

X-Q. 125. Now, this Mr. Urban Zimlicka, did he stay with you right through the campaign? 1838

A. Yes.

X-Q. 126. When did he leave the employ of the P. Lorillard Company?

A. He left sometime during the following year, in 1922.

X-Q. 127. Do you know why he left the company?

A. Why, yes, I assigned some work to do and he thought it was a little bit—it didn't just appeal to him so I let him go. In other words I sent him out to put up some enamel signs and they were very heavy and some boys don't care to do some of that heavy work, so I found out he was complaining about it and rather than 1839 have any friction at all with any of the crew it is policy to get rid of a man like that.

X-Q. 128. What time in 1922 did you say he left?

A. Well I couldn't say as to that. I would have to look up my records.

X-Q. 129. When did Mr. Lloyd Whitney leave the employ of the P. Lorillard Company?

A. Lloyd Whitney left the employ—he resigned at Manitowoc, this same town.

X-Q. 130. When was that?

A. That was in 1921.

1840 X-Q. 131. What month?

A. Well that was in December too, right up until the last of the campaign.

X-Q. 132. Did he leave you before the campaign ended?

A. Well, right about the time of the end of the campaign.

X-Q. 133. He didn't stay with you then right through to the end?

A. Within a week, I guess.

X-Q. 134. Why did he leave the company?

A. Well, if I remember right, now, I don't know, he
1841 just wanted to leave, that is all. He resigned and I think his statement was at the time that he didn't like the idea of selling cigarettes, that his folks were objecting.

X-Q. 135. How long had he been with the P. Lorillard Company?

A. Well, he had been with me about seven months.

X-Q. 136. Had you been watching his work during this Beech-Nut cigarette campaign?

A. Yes.

X-Q. 137. Had you been with him on his visits to the dealers?

A. Not a great deal. I couldn't be with anybody a
1842 great deal, understand, alternate, I was with one of the men each day.

X-Q. 138. But you were with him—

A. —as much as I was with any of the other men, with the exceptions of perhaps if I had assigned him—he had a car and instead of working the larger towns he would make the smaller towns, perhaps one store or two or three stores, little country towns.

X-Q. 139. This time he resigned in Manitowoc, is that the time you and your crew were doing the Manitowoc neighborhood?

A. Yes, we had finished. It was our second trip 1843
back into Manitowoc, brushing it up. We had finished the territory and were coming back brushing it up again with advertising posters.

X-Q. 140. Had you found he was careless in his manner of presenting these Beech-Nut cigarettes to the dealers?

A. Absolutely not, had no fault to find with Mr. Whitney, he followed instructions to the letter and he was very honest.

X-Q. 141. Did he visit the dealers in parts of Manitowoc?

A. No, he didn't visit any dealers in Manitowoc. 1844

X-Q.142. Are you sure of that?

A. Yes, I am sure of it.

X-Q. 143. Why was that?

A. Not any particular reason except he was assigned outside of town, it just happened to be his lot he was assigned on some outside stuff on account of operating a car. We didn't usually operate the car in the town when the crew was there, understand. We had two cars.

X-Q. 144. Did you keep records of the assignments of your men during your campaign trips?

A. Assignments? I don't just understand what you mean by "assigments." 1845

X-Q. 145. The assignment of districts from day to day, did you keep any records of where you assigned each man each day?

A. Yes, sure, I have those records.

X-Q. 146. You could check up on them, could you, if you were asked to?

A. Well, now, I don't know whether I could or not either. That is the time I was down here in Milwaukee, my headquarters, and it is possible those records at that time have been destroyed when we moved. We burned a

1846 lot of stuff when I moved here rather than carry it along, when I moved up to Green Bay to make my headquarters there.

X-Q. 147. Then during a part of this campaign drive you were not right with your crew, were you?

A. I was in direct communication with them, I was right with them and assigned them and they were perhaps out one day and back that same night.

X-Q. 148. But during this time at Manitowoc, this second time that your crew was in Manitowoc you have spoken of, you have said you were not with them. About how long was that that you were not with them?

1847 A. Did I say I wasn't with them in Manitowoc? I couldn't carry these records around with me. Understand, each and every week when I would come home I would have all of this accumulation to put on file here at home.

X-Q. 149. At Milwaukee?

A. Yes, at Milwaukee headquarters.

X-Q. 150. I want to understand about the second time your crew was in Maintowoc?

A. I was there with my men.

X-Q. 151. You were there with your men during the time they were working Manitowoc the second time?

1848 A. Yes, sir. That is the time Mr. Whitney resigned, understand. He came in and I got him on the phone sometime, I don't remember what phone it was, they were supposed to send in their reports, they got my routes, they are supposed to send in their daily reports for me to send in to the New York office, and I got him on the phone and called him in and when he came in that night he came in pretty late and tired and I suppose he was kind of peeved and one thing and another that is the time he resigned.

X-Q. 152. This Morris Miles, did he stay with you right through the campaign?

A. Oh, yes. 1849

X-Q. 153. When did he leave the employ of the P. Lorillard Company?

A. He left in the fall of 1922, because he was with me after I made my headquarters in Green Bay.

X-Q. 154. Why did he leave the company?

A. Well, Mr. Miles had applied for a position with some other concern and I got wind of it and thought if he was applying for some other position it would only be a question of time I would lose him, so to protect myself I discharged him.

X-Q. 155. Where did he go from the Lorillard Company? 1850

A. That I couldn't say, I can't recall.

X-Q. 156. Can you tell me again the present address, so far as you know, of Mr. Hanson?

A. As far as I know it is Oshkosh, Wisconsin.

X-Q. 157. And of Mr. Whitney?

A. At Marshfield, Wisconsin.

X-Q. 158. During this special Beech-Nut cigarette drive did you observe anything in the way your men were working the territory, or did you hear anything from the dealers that caused you to caution them about the way they presented these Beech-Nut cigarettes?

A. I had no occasion to. 1851

X-Q. 159. You had no complaints of any kind about the way you were offering the Beech-Nut cigarettes to the market?

A. No, none whatever.

X-Q. 160. Then during this campaign their methods were your methods, were they?

A. Absolutely.

X-Q. 161. Didn't you have any other men at all than these four during that campaign?

A. No, that was all.

1852 X-Q. 162. Did you take part in the introductory campaign of the Beech-Nut scrap tobacco?

A. Oh, yes.

X-Q. 163. What district was that?

A. In Illinois.

X-Q. 164. Did you take part in the introductory campaign of Beech-Nut tobacco in Wisconsin?

A. Oh, yes.

X-Q. 165. What part of Wisconsin?

A. Southern part of Wisconsin, that is Kenosha, Racine and Beloit, Madison and the western part over there around Grant County and Milwaukee.

1853 X-Q. 166. Didn't you say on direct examination that you were assigned to the Fox River Valley in that campaign?

A. Yes, I did, but I am talking about the whole year, but I had the whole state and the upper peninsula.

X-Q. 167. On that Beech-Nut scrap?

A. Yes, but it was not until 1921 that I had charge of the state, you understand. I was in 1919 in the southern part of the state.

X-Q. 168. While you were in charge of the drive on Beech-Nut scrap tobacco in Wisconsin, did you call any meetings of your salesmen in order to warn them to be

1854 careful not to present this Beech-Nut tobacco or let it appear it was the product of any other concern but the Lorillard Company?

A. Well, yes, that has always been my instructions, but we had no special meetings, you understand, because I was with the men at all times in their crew work in this tobacco, same as the cigarettes, and my early training had always been to the point to never mention any competitor's name because we had reaped a whole lot of benefit, you understand, from these other tobacco concerns mentioning our commodity, they were advertising us and it has always been my early training to

never mention it, only P. Lorillard Company, never 1855
mention any other concern, regardless of who, because it would be advertising their brands.

X-Q. 169. Can you name any particular time or instance when you talked to your men along that line?

A. Why, it is all of the time.

X-Q. 170. Can't you think of one particular instance, place an approximate time?

A. No, because that was every day's conversation, "Loyalty" never left it a minute. Never had any occasion to call any special meeting in that respect because my men were kept right up with those instructions at all times, never let them forget about it. 1856

X-Q. 171. Either before or during the Beech-Nut cigarette introductory campaign did you call any meetings of your salesmen?

A. I did on the cigarettes. Indeed I did, to outline the work in regards to the same outline we did on the scrap tobacco.

X-Q. 172. Did you particularly warn them to avoid doing anything in offering these cigarettes to dealers, to avoid appearing to present them as the product of any other company than your own?

A. No, not any more than to mention P. Lorillard Company's Beech-Nut cigarettes. 1857

X-Q. 173. Did you ever write your salesmen any letters warning them against that sort of thing?

A. No, I don't recall any.

X-Q. 174. Either during the Beech-Nut tobacco campaign or the Beech-Nut cigarette campaign?

A. No, sir.

X-Q. 175. You never wrote anything?

A. I never had any occasion to write my men because I am always with them, and the same today.

X-Q. 176. Is this Wisconsin district for the purpose of P. Lorillard Company sales and distribution, a part of any larger district?

1858 A. Well, now, I just don't get that.

X-Q. 177. Is this Wisconsin district a part of any larger district for P. Lorillard Company's sales and distribution? A part of some district, for instance, with headquarters at Chicago?

A. No. We have a sales manager in Chicago that has charge of this whole section. We are what you might term a local representative, sort of a head salesman.

X-Q. 178. Did you ever receive from this sales manager in Chicago, to whom I understand you report, any letters or circular letters instructing you and your salesmen to be careful in presenting either the Beech-Nut
1859 tobacco during the time of this campaign or the Beech-Nut cigarettes during their campaign, to be careful not to let them appear as being put forward as the product of another company than your own?

A. No, sir, never.

X-Q. 179. Never received any letters or circulars?

A. Never.

X-Q. 180. Did you receive any letters or circular letters of that character from the P. Lorillard Company home office?

A. Well, now, I got a great many instructions, circular letters of that sort, but I don't recall of ever
1860 receiving anything pertaining to that question you ask me.

X-Q. 181. You don't remember receiving any letter or written instructions from the P. Lorillard Company in regard to your manner of presenting the Beech-Nut tobacco or Beech-Nut cigarettes, cautioning you to avoid letting them appear to be the product of any other company than your own?

A. Well, I don't recall ever receiving them.

X-Q. 182. In your district did you have any competition among your salesmen, special rewards for those

who sell the most during a given length of time or anything similar to that? 1861

A No, sir.

X-Q. 183. Did you or the company offer any bonuses or special money inducements to your salesmen or the jobbers' salesmen to increase the sales during those campaigns?

A. Well, I don't know whether anything special. I think that went on our yearly bonus. You know, we work on a yearly bonus, but nothing special. That would come under the year's work out of the scrap department. We work under a sort of bonus proposition.

X-Q. 184. But I mean during these campaigns and having reference to your sales of the Beech-Nut tobacco or Beech-Nut cigarettes, were there any money inducements offered as additional compensation or commission for the salesmen for sales made during this campaign? 1862

A. If I understand you right, you mean during this campaign for cigarettes, any special inducement?

X-Q. 185. Either one.

A. Only as a yearly bonus, a yearly bonus on increased business in that department, the scrap department.

X-Q. 186. Did you see any circular letters or circulars in your district offering some additional sum like ten cents or twenty-five cents a thousand to salesmen or jobbers' salesmen on the sale of Beech-Nut cigarettes during a given period? 1863

A. No. We never had anything like that.

X-Q. 187. During your experience in selling or conducting the sales of Beech-Nut scrap tobacco did you hear any questions at all or any comments about whether this Beech-Nut scrap tobacco is made by the same people that put out the Beech-Nut gum and Beech-Nut peanut butter and those other Beech-Nut products?

1864 A. Well, I will tell you, I don't just recall of any special place or anything of that kind, but I will be safe in saying I have had perhaps a mighty few ask me that question, but I cannot recall of having very many ask me that.

X-Q. 188. You didn't try to remember such incidents, I suppose, at the time?

A. No, because we really were not interested in anything about anybody else. The only thing, if I was asked that question, as near as I can remember, that I would immediately deny it, of course, and say that this was the P. Lorillard Company, that has always been our

1865 by line, understand, you know.

X-Q. 189. In regard to Beech-Nut cigarettes, did you ever hear any such questions or comments at all?

A. No, I haven't, because the section we worked on, Beech-Nut tobacco, understand, the P. Lorillard Company was so well represented, I can't see why anybody would ask that question. In fact, they never asked me or my men have never mentioned about anyone asking them about it.

X-Q. 190. Did you make any attempt to remember such comments and inquiries at the time?

A. Well, I don't remember of ever hearing and I

1866 don't remember of remembering it.

X-Q. 191. Were you ever asked to make any note of such questions and comments you heard?

A. No, sir.

(Cross Examination Closed.)

Re-direct Examination

By Mr. Cavanagh:

R-D Q. 192. How does the Beech-Nut scrap tobacco sell in your territory, what kind of seller is it?

A. Well, it is the leading seller. 1867

R-D Q. 193. In what lines?

A. In what they term scrap tobacco.

R-D Q. 194. In your cross examination you used the expression, "This was the P. Lorillard Company, that has always been our by-line, you know." What did you mean by that expression?

A. I mean that has always been my early training instructions to use the word "Lorillard's" so there would be no misrepresentation, and we use the word "Lorillard" so they wouldn't associate Beech-Nut cigarettes or tobacco with anybody else but P. Lorillard Company. That is what I meant by that. 1868

R-D Q. 195. In other words, Lorillard is the big thing, is that it?

A. That is what I meant.

R-D Q. 196. Near the close of your cross examination you stated that Lorillard Company was so well represented in this territory. What did you mean by that?

A. Represented by the Beech-Nut tobacco and their Turkish cigarettes.

R-D Q. 197. You mean their representation was so well established, is that it?

A. Yes. 1869

R-D Q. 198. Now, these four men you have stated that you had in your crew, this Hanson, Miles Whitney and Zimlicka, are no longer with the company?

A. No.

R-D Q. 199. Will you state whether or not any of these men were discharged from the Lorillard Company on account of any failure to follow your instructions in the marketing of Beech-Nut cigarettes or Beech-Nut scrap tobacco?

A. No, sir, except this Zimlicka on account of resenting doing the particular work he was assigned to of putting up enamel signs.

1870 R-D Q. 200. Will you state whether or not you ever knew of any of your men disobeying your instructions as you recited them in your examination?

A. Never knew any of them to.

R-D Q. 201. What would have happened to them if they had disobeyed your instructions in that respect?

A. They understood we would discharge them.

R-D Q. 202. When were you introducing the Beech-Nut scrap in Illinois, which you referred to in your cross examination?

A. That started in the year 1916.

R-D Q. 203. When did you first do any work at all
1871 in this Wisconsin territory for the Lorillard Company?

A. Well, it was in the latter part of 1916, 1917, 1918 and 1919.

R-D Q. 204. You were up through this section of the country?

A. In the southern part, not up here, down around Racine, Kenosha and Beloit. We didn't come up here, there were other men in here.

R-D Q. 205. You were not up in the Fox River Valley during those years?

A. No.

R-D Q. 206. As early as 1916 you were not up in the
1872 Fox River Valley?

A. No, indeed.

(Re-direct Examination Closed.)

Re-cross Examination

By Mr. Johnson:

R-X Q. 207. When did you conduct the drive on Beech-Nut scrap tobacco in the Fox River Valley territory in Wisconsin?

A. In 1920.

R-X Q. 208. What part of 1920? 1873

A. Well in fact, the latter part of 1919 and all of 1920.

R-X Q. 209. When did that drive on Beech-Nut scrap tobacco commence in that territory?

A. 1919. Do you mean in Wisconsin?

R-X Q. 210. Yes.

A. 1919.

R-X Q. 211. What part of the year what month?

A. Well we came up in Wisconsin just about July and August, 1919.

R-X Q. 212. How have the Beech-Nut cigarettes sold from the beginning when you introduced them in Wis- 1874
consin?

A. Well, it is kind of discouraging, not very good.

R-X Q. 213. When were the sales the largest?

A. When they first put them out, when the jobber was placing them.

R-X Q. 214. Has the quality of the cigarettes proved disappointing?

A. No, I have never had any complaint about the quality of the goods. The only complaint we ever had all the way through was they were too mild, they were not strong enough. It seemed as if the consumer up here is used to Peerless, a stronger tobacco, and Beech- 1875
Nut cigarette in this market is too mild for them.

R-X Q. 215. How are the Beech-Nut cigarettes selling right now?

A. They are not selling.

(Re-cross Examination Closed.)

Re-direct Examination

By Mr. Cavanagh:

R-D Q. 216. What do you mean by "not selling", that there is not a package of them sold?

1876 A. They are just stagnant. There is still some of them being sold, here and there you find a store sells a package occasionally, understand, but there is nobody selling them in the terms of selling compared with any other commodity in the way of cigarettes.

R-D Q. 217. Was Beech-Nut scrap on the market when you first came to that Fox River territory in July, 1919?

A. Well, it was on sale, yes, but it was not 100%.

Deposition Closed.
Signature Waived.

1877

STIPULATION.

IT IS STIPULATED by and between counsel for the respective parties that if ALBERT MARKS, a witness who previously testified on behalf of P. Lorillard Company, were recalled, he would testify in connection with his previously given deposition as follows:

That the names of Roy Hanson and Urban Zimlicka were given by me by mistake, as members of my crew working the Fox River Valley territory from September to December, 1921, in the introductory campaign on
1878 Beech-Nut cigarettes. Instead of these names I should have given the names of John Dickens of LaCrosse, Wisconsin, and a man named Oldenberg of Linden, Wisconsin. John Dickens was employed by the P. Lorillard Company from about June, 1921, (right through the Beech-Nut cigarette campaign in Wisconsin) and was with them until some time in 1922 when he left to take a position selling insurance. He was not discharged. Dickens worked in my crew right through the introductory campaign on cigarettes from September to December 16th, 1921. I heard no complaints as to his work or his methods. I understand that his address is now La

Crosse, Wisconsin. Mr. Oldenberg entered the employ 1879
of the P. Lorillard Company about six months before the opening of the Beech-Nut cigarette campaign in Wisconsin and left its employ somewhere around February or March, 1922, in order to go into a bank somewhere in Wisconsin I believe his address is Linden, Wisconsin. Oldenberg worked in my crew in the Fox River Valley territory, Wisconsin, during the introductory campaign on Beech-Nut cigarettes from September 26th to December 16th, 1921. I heard no complaints as to his work or his methods. The facts described in regard to the work and methods of my crew in this introductory campaign on Beech-Nut cigarettes apply to Dickens 1880
and Oldenberg as members of that crew, the same as previously given in regard to the names Roy Hanson and Urban Zimlicka. I simply got the names of Hanson and Zimlicka of the Beech-Nut scrap introducing crew mixed with Dickens and Oldenberg of the cigarette crew, but upon looking at a memorandum after finishing my examination I discovered the mistake.

FRANK HOPEWELL, a witness produced in behalf of of P. Lorillard Company, defendant, being first duly sworn, in response to interrogatories propounded 1881
to him by Mr. Cavanagh, deposes and says, as follows:

Q. 1. Please state your name, age, residence and occupation?

A. Frank Hopewell, age 30, residence Milwaukee, Wisconsin, 1220-37th Street, occupation salesman for P. Lorillard Company.

Q. 2. Where is your business place located?

A. Well, I have no business place, I have a place what we call an office or storeroom, 401 University Building, Milwaukee.

1502

1882 Q. 3. How long have you been with the P. Lorillard Company?

A. Since July 6th, 1912.

Q. 4. What is your present territory?

A. My present territory consists of—you couldn't just call it the southern half of Wisconsin as it cuts off Ozaukee County, which is the nearest county immediately north of here, runs diagonally across the state.

Q. 5. It includes Milwaukee city or county?

A. It includes Milwaukee and such towns as Madison, La Crosse, Chippewa Falls and Eau Claire, it takes in those following towns.

1883 Q. 6. Southern and western part of Wisconsin?

A. That is true, sir.

Q. 7. Now, what is the present title of your position here?

A. Division manager.

Q. 8. Do you have tobacco salesmen under you?

A. I do.

Q. 9. What products of the Lorillard Company do you sell and distribute in your territory?

A. The ones that I have the supervision of the sale of are the Murad cigarette and Helmar cigarette, Egyptian Dieties, Turkish Trophies and Beech-Nut. The to-

1884 baccos would be Climax, Union Leader, Comet, Havana Blossom, Pioneer, Tiger Fine Cut The little cigars would be Between the Acts, Royal Bengals, Hoffman House, Van Bibber, Flexo Giants.

Q. 10. What scrap tobacco do you market here?

A. Beech-Nut, Honest, Polar Bear, and now Open Book.

Q. 11. About how many men do you have under you here as salesmen?

A. My allotment in salesmen is eight. I have other men under me that trim windows. My salesmen allotment is eight.

Q. 12. And you have eight to-day? 1885

A. No, sir, I am one short to-day, I have seven.

Q. 13. When did you become division manager of this Wisconsin territory, including Milwaukee?

A. Division manager in Wisconsin territory the first of 1921. I was division manager before that, but not in Wisconsin.

Q. 14. Do you know who your predecessor was here in Milwaukee?

A. Yes, sir, Mr. Everett Meyer. Possibly I better put a little explanation in there, with your consent. Mr. Everett Meyer was my predecessor here in the plug and smoking departments. Since that time these depart- 1886
ments have all been consolidated and have all been put under my supervision.

Q. 15. Who had the cigarettes?

A. William Goldstein had the cigarettes in 1921 and a Mr. Barth of Chicago had the little cigars in 1921.

Q. 16. You have mentioned the Beech-Nut cigarette as being one of the cigarettes of P. Lorillard Company. Will you state whether or not Lorillard Company conducted a campaign of introducing this cigarette in this Milwaukee territory?

A. Yes, they did.

Q. 17. When? 1887

A. Starting the latter part of September, 1921.

Q. 18. When did you start work for the Lorillard Company in this Milwaukee territory? When did you come here to go to work in Milwaukee?

A. August, 1912 is the first I came to Milwaukee to work for Lorillard.

Q. 19. Then, as I understand it, you have worked in Milwaukee from 1912 down to to-day?

A. With the exception of one year, 1920, when I was in Texas for the P. Lorillard Company.

1888 Q. 20. And you became division manager here when?

A. In 1921.

Q. 21. What time?

A. 1st of January.

Q. 22. And you have been division manager ever since?

A. I have.

Q. 23. So you knew there was a campaign on in these Beech-Nut cigarettes in 1921?

A. I did.

Q. 24. Did you take any part in that campaign at all?

1889 A. I did.

Q. 25. Tell us what you did.

A. My territory was allotted me on the Beech-Nut campaign, the western half of the state. I had supervision of the salesmen that covered that section during this campaign..

Q. 26. So you did not work Milwaukee in this campaign?

A. I did not.

Q. 27. Will you name some of the principal cities that you did work in your western territory?

A. The larger points I presume you want, Madison,
1890 Janesville, Beloit, La Crosse, Chippewa Falls, Eau Claire, that would be the larger points.

Q. 28. How many men did you have under you in a crew?

A. In that crew I had six men, to the best of my knowledge.

Q. 29. And what city or point did you make your headquarters?

A. Madison, Wisconsin.

Q. 30. Has the Lorillard Company any plants down there or establishments?

A. They have warehouses in Madison, yes, sir.

Q. 31. Who are they in charge of? 1891

A. Mr. George Gary.

Q. 32. How long did you conduct this Beech-Nut campaign in this territory, the western half of the state, with Madison as your headquarters?

A. The latter part of September to the latter part of December, 1921.

Q. 33. Did you give this crew of yours, any instructions as to how they should conduct a campaign in the introduction of this Beech-Nut cigarette?

A. Yes, sir. The morning they started working on Beech-Nut cigarettes I had a little conference with all of them in the Cardinal Hotel at Madison, Wisconsin. 1892

Q. 34. What instructions did you give them?

A. I instructed them to carry so many cigarettes under their arms or on their person to sell for cash to the dealers that they called on.

Q. 35. How were these cigarettes put up or packaged?

A. They were packed two hundred in a carton with a yellow slip in each carton. The carton was to be torn open and the yellow slip inserted and put on the dealer's counter where they sold the merchandise.

Q. 36. Is the yellow slip you refer to like this one which is in this carton of Beech-Nut cigarettes, Defendant's cross Exhibit No. 9? 1893

A. That is the identical slip, sir.

Q. 37. Will you read the words on that yellow slip?

A. "Lorillard's Beech-Nut Perfect Cigarettes, twenty for fifteen cents, greatest of them all."

Q. 38. And that is the carton?

A. That is the carton and the yellow slip I was referring to.

Q. 39. How many of these cartons would a man carry out with him in the morning?

A. He would take ten cartons.

1894 Q. 40. And what other instructionns did you give him?

A. When he sold that cigarette he was, if possible, to get in advertising matter, and all the advertising matter in the dealer's store and on his windows that he possibly could.

Q. 41. Will you state whether or not he also carried advertising matter with him?

A. They did, sir.

Q. 42. Of what did this advertising matter consist?

A. At the time of our introductory work on Beech-Nut we were working very fast and did not want to
1895 spend so much time on elaborate window displays, we were putting up posters, we had a big white poster and a yellow poster.

Q. 43. Was anyone's name on this poster?

A. Yes, sir, there is a regular picture or reproduction of a package of Beech-Nut cigarettes on this yellow poster which said, "Lorillard's Beech-Nut Cigarettes," or the name "Lorillard."

Q. 44. How often did you have these meetings of your crew?

A. These meetings, I would work these men, for instance, I would give you an example, out in Madison, I
1896 would route them out in different ways so as to meet my boys in LaCrosse ten days after they had finished Madison. The salesmen were to each take smaller towns they were to cover and as soon as I would meet them in LaCrosse I would then hold another meeting with them and that would be continued at all of the larger points.

Q. 45. Did you go around or in company with any of the salesmen when they called on stores or the trade?

A. I did, sir.

Q. 46. Will you please state whether or not you gave them any instructions as to how to approach and introduce the cigarette to the storekeeper or purchaser? What did you tell them to say, if anything?

A. I told them to tell them that was a cigarette manufactured by the P. Lorillard Company, and we also manufacture other brands of cigarettes and tobaccos as Climax, Union Leader, Murad, Beech-Nut chewing tobacco, in fact we would pick out a brand of ours that was selling the best in that particular territory or town in which we were working, letting that good selling brand be our prestige in putting in this cigarette. 1897

Q. 47. You sold Beech-Nut scrap tobacco through that territory and here in Milwaukee?

A. I have, sir.

Q. 48. What kind of seller was that and what kind of seller is it? 1898

A. Beech-Nut chewing tobacco I would say, and in fact I know, to be the best selling chewing tobacco of that description in Wisconsin to-day.

Q. 49. Did you ever know of any of these salesmen of yours in that campaign or at any other time, in the sale of Beech-Nut cigarettes, to disobey your instructions as to approaching customers?

A. No, sir, not to my knowledge.

Q. 50. Did you ever hear of any comments or inquiries or remarks from customers or consumers of the trade which would lead you to think they were under the impression the Beech-Nut scrap tobacco or Beech-Nut cigarettes were made by the Beech-Nut Packing Company, the same people who make the Beech-Nut gum and food products? 1899

A. I did not.

Q. 51. Did you ever hear of any of your salesmen so representing to customers that the Beech-Nut cigarettes or the Beech-Nut scrap tobacco were made by the Beech-Nut Packing Company, the manufacturers of Beech-Nut gum?

A. I did not, for one particular reason, they were instructed absolutely and under no circumstances to

1900 misrepresent at any time who made Beech-Nut cigarettes or Beech-Nut chewing tobacco.

Q. 52. What were they told to tell the consumer and the trade?

A. I had understood, in fact I had understood from Mr. Everett Meyer, who was my immediate superior in 1921, there was a little controversy between the Beech-Nut Packing Company and P. Lorillard Company relative to the name "Beech-Nut" and I took particular time to call the attention of the salesmen under my supervision to the fact that under no consideration were they to let a dealer be under the opinion the Beech-Nut chew-
1901 ing tobacco or cigarettes were manufactured by any other than P. Lorillard Company.

Q. 53. Now, when you in this introductory campaign sold a carton of cigarettes to a purchaser did you give him any receipt or anything?

A. Yes, sir.

Q. 54. Will you describe that receipt and what you did, just the procedure?

A. That receipt is a yellow copy of the one of our regular retail order blanks.

Q. 55. I show you some slips which are in this case as Defendant's Exhibit No. 10. Can you identify that
1902 and tell me what it is?

A. That is an order blank, a regular order blank we use every day in selling tobacco, that the salesmen use to take the order on.

Q. 56. Did you use such a blank during your campaign?

A. A blank identical to this was used through the campaign.

Q. 57. Just tell us how you operated it in your territory?

A. Well, sir, each division manager I expect—

Q. 58. (Interrupting.) Just what you did.

A. What I did and what all of my salesmen were instructed to do when he sold an order for cash was to put his date on, where it says "Jobber" he was to put in "Cash," the name of the dealer, his address and town and put sold such and such a number of Beech-Nut cigarettes, received payment so much, and then signed his name. He was to leave the white copy on a cash order with the retail dealer, retaining the tissue copy for his own reference, mailing or giving to me the yellow copy. 1903

Q. 59. And whose name appears on the white sheet and yellow sheet on that exhibit?

A. "P. Lorillard Co., Inc., 119 West 40th Street, New York, N. Y." 1904

Q. 60. As I understand from your testimony prior to the beginning of the Beech-Nut cigarette campaign, you were stationed here at Milwaukee?

A. Yes.

Q. 61. You were not selling cigarettes, is that right?

A. I was not selling cigarettes.

Q. 62. What kind of tobacco were you selling?

A. Plug and smoking tobacco.

Q. 63. Did you sell the Beech-Nut scrap tobacco?

A. Why, I did sell Beech-Nut chewing tobacco, but it was not under my supervision in 1921.

Q. 64. Just tell us how that happened? 1905

A. We sold all Lorillard Company products, regardless of whether under our supervision or not, anything manufactured by P. Lorillard Company that we could go into a store and take orders on, we took them.

Q. 65. Although it was not under your direction?

A. Although it was not under my supervision.

Q. 66. How long had you been selling Beech-Nut tobacco in this Milwaukee territory?

A. Just the Milwaukee territory or state of Wisconsin?

1906 Q. 67. State of Wisconsin.

A. I have sold it since 1916.

Q. 68. Did you ever sell any of it in such towns as Sheboygan and Manitowoc?

A. No, sir, that was a very poor scrap tobacco territory in those days, that was mostly sold in the southern part of the state.

Q. 69. Did you ever sell any up there?

A. Yes, I have sold it up there. The Prange Brothers at Sheybogan bought Beech-Nut scrap tobacco going back at least to 1918, and Reinken & Sons Company at Manitowoc, Wisconsin, bought Beech-Nut scrap, at
1907 least in 1918.

Q. 70. Now, just briefly, I understand that you have now consolidated under your charge both cigarettes, smoking and chewing tobacco, is that correct?

A. That is true.

Q. 71. When did that change or consolidation of these various subdivisions of goods take place?

A. January 1st, 1922.

Q. 72. So far the Milwaukee territory now you have charge of all of the tobacco products of P. Lorillard Company?

A. All with the exception of the Muriel cigar.

1908 Q. 73. That is, you do not include the cigars?

A. I include the little cigars.

Q. 74. But, I mean the larger.

A. No.

Direct Examination Closed.

Cross Examination. 1909

By Mr. Johnson:

X-Q. 75. When did you first enter the employ of the P. Lorillard Company?

A. July, 1912.

X-Q. 76. In what part of the country?

A. Indiana.

X-Q. 77. How long did you stay there?

A. Until August, 1912.

X-Q. 78. Where did you go then?

A. To Wisconsin.

X-Q. 79. In what month? 1910

A. August, 1912.

X-Q. 80. And what kind of work did they put you into here?

A. I was in what was then called the plug and smoking department.

X-Q. 81. Have you been with them ever since?

A. I have been with them ever since.

X-Q. 82. And in Wisconsin all of the time?

A. No, sir. The year of 1920 I was in Texas for the Lorillard Company.

X-Q. 83. Was that on introductory campaign work? 1911

A. No, I had charge of the northern half of the state, on the general line.

X-Q. 84. When did you become division manager in the Milwaukee district?

A. In 1921, January 1st.

X-Q. 85. Then were you division manager in the Milwaukee district at the time this Beech-Nut cigarette campaign was begun and started?

A. For the plug and smoking department, yes, sir.

X-Q. 86. When you say "division manager" you mean for just the plug and smoking department?

1912 A. For the plug and smoking department.

X-Q. 87. Then you were taken off of your regular work and put on this special Beech-Nut cigarette campaign were you?

A. I was.

X-Q. 88. Would you mind just quickly give the names of those six men who were in your crew in Madison?

A. E. P. Gimmig, W. L. Foley, L. W. Wilson, H. E. Buchanan, Fred Knoebber. That is all worked under my direct supervision, while there was a Mr. M. J. Schimmel who was a man of mine, but during that campaign I transferred him over to William Goldstein.

1913 X-Q. 89. Then for this campaign you had how many men?

A. Only five that I really worked on that western half of the state.

X-Q. 90. Do you know when Mr. Gimmig entered the employ of the P. Lorillard Company?

A. It was sometime in 1920. I did not employ him myself, I cannot give you the exact date.

X-Q. 91. Was he with you right through the Beech-Nut cigarette campaign?

A. He was.

X-Q. 92. Right to the finish?

1914 A. He was.

X-Q. 93. Is he still in the employ of the Lorillard Company?

A. He is not.

X-Q. 94. Do you know when he left?

A. Yes, sir, he resigned in February, 1922.

X-Q. 95. Do you know why?

A. He accepted another position.

X-Q. 96. Do you know when Mr. Foley entered the employ of the P. Lorillard Company?

A. He was transferred to me, but when he entered the employ I cannot tell you.

X-Q. 97. He was with the company previous? 1915

A. Previous to my coming to Wisconsin.

X-Q. 98. Was he right with you through the cigarette campaign?

A. He was.

X-Q. 99. Is he still in their employ?

A. He was three months ago. I received a letter from him, he was still in the P. Lorillard Company's employ at Los Angeles, California.

X-Q. 100. Was Mr. L. W. Wilson in the employ of the P. Lorillard Company at the time you got him for the campaign?

A. Yes, sir. 1916

X-Q. 101. Had he been with them long?

A. He had been with them about five months previous to entering upon this campaign.

X-Q. 102. Was he with you during the campaign?

A. He was.

X-Q. 103. Is he still with the P. Lorillard Company?

A. He is.

X-Q. 104. Where?

A. In La Crosse, Wisconsin.

X-Q. 105. Mr. Buchanan, do you know when he joined the P. Lorillard Company?

A. About July, 1921. 1917

X-Q. 106. Was he with you right through the campaign?

A. He was.

X-Q. 107. Is he still with the Lorillard Company?

A. He is.

X-Q. 108. Whereabouts?

A. Eau Claire, Wisconsin, is his headquarters.

X-Q. 109. Mr. Knoebber, do you know when he joined the Lorillard Company?

A. February, 1921.

1918 X-Q. 110. Was he with you right through the campaign?

A. He was.

X-Q. 111. Is he still with the company?

A. He is.

X-Q. 112. Do you know where?

A. Madison, Wisconsin, is his headquarters.

X-Q. 113. Mr. H. E. Buchanan was the newest man of that lot?

A. Yes.

X-Q. 114. Did you have any other men at all under you in that Beech-Nut cigarette campaign?

1919 A. Not in that Beech-Nut cigarette campaign, no, sir.

X-Q. 115. Or helping you in any way?

A. No, sir.

X-Q. 116. Did you ever write any notice to your salesmen that were under you to meet for instructions in getting ready, or in conducting this Beech-Nut cigarette campaign?

A. Yes, I wrote them to meet me in Madison the morning we started out on this campaign. After leaving Madison I routed them so I would know what time they would get into these towns, and it was not neces-

1920 sary for me to write to them to meet me at any certain point.

X-Q. 117. Have you copies of these letters in your files?

A. No, I haven't, sir.

X-Q. 118. Did you ever have any occasion to write to them during the campaign instructing them to be careful in presenting these Beech-Nut cigarettes in order not to give the idea they were a product of the Beech-Nut Packing Company?

A. I had no occasion to write them on that.

X-Q. 119. Did you ever receive any letter or circular

letter from the P. Lorillard Company yourself or your 1921
salesmen to that same effect?

A. I received none.

X-Q. 120. You never received any written instructions or warning at all from the Company in that regard?

A. I did not.

X-Q. 121. In regard to these order slips, I understand you have been a good many years now in the tobacco trade. Have you during that experience seen a good many order slips of the jobbers?

A. Yes, I have seen jobbers order slips.

X-Q. 122. Have you seen any jobbers order slips of 1922
a general character similar to these you have described of the Lorillard Company, with the name of the jobber at the top?

A. Yes, I have seen them, but it looks nothing like that.

X-Q. 123. I don't mean exactly the same.

A. It has the jobber's name at the top, true.

X-Q. 124. Have you gotten about the country in your district and about among the dealers to a great extent since the time that these Beech-Nut cigarettes were first put on in Wisconsin?

A. I have. 1923

X-Q. 125. Have you heard any questions asked or any comments at all about whether anyone was questioning who the maker of the Beech-Nut cigarettes was?

A. No. I never saw at any time where there was any confusion about who made Beech-Nut cigarettes.

X-Q. 126. But have you had any questions asked you by dealers or consumers as to whether the Beech-Nut cigarettes were made by the same people made the Beech-Nut gum and peanut butter?

A. I never had a question of that kind put to me by a consumer in my life.

1924 X-Q. 127. Or a dealer?

A. Or a dealer.

X-Q. 128. Did you make any attempt to remember such a thing?

A. I believe I would have remembered it if it had really happened.

X-Q. 129. You never heard one single question?

A. I never heard a dealer that ever asked me—

X-Q. 130. Or a consumer?

A. Or a consumer ever asked me if the Beech-Nut Packing Company made Beech-Nut cigarettes or Beech-Nut tobacco.

1925 X-Q. 131. Did you hear any discussion on that point?

A. Well, whether I have heard Beech-Nut gum discussed along with possibly my being interested in the sale of Beech-Nut chewing tobacco and cigarettes, yes, possibly. In fact, yes.

X-Q. 132. Can you remember any of those instances?

A. Why, yes, I can remember where dealers—not only dealers, but where I am well acquainted with the dealer, in his conversation he would say, "If this Beech-Nut cigarette of yours will sell as well as your Beech-Nut tobacco it will be a good seller" and he would go on and say, "Beech-Nut gum sells well too." There was

1926 no confusion with that dealer though, that they were made by the same company whatsoever.

X-Q. 133. Did the dealer in such a case tell you there was no confusion in his mind?

A. Why, no, I don't expect him to take particular time and attention to tell me. If there wasn't any confusion naturally he wouldn't tell me.

X-Q. 134. How do you know what was in his mind?

A. I wouldn't know what was in his mind.

X-Q. 135. Did you have any such questions asked or hear any such comments or discussion in regard to the Beech-Nut scrap tobacco?

A. No, sir.

X-Q. 136. In all your experience beginning from the time they were first introduced? 1927

A. No, sir, because in that country Beech-Nut chewing tobacco was selling before we introduced Beech-Nut cigarettes.

X-Q. 137. No, but I mean in regard to the scrap tobacco, did you hear any such questions or discussions as to whether they were made by the same company, that made the Beech-Nut gum?

A. I did not.

X-Q. 138. I don't mean in 1921.

A. I know what you mean.

X-Q. 139. At any time. 1928

A. At any time I have been selling Beech-Nut chewing tobacco, I did not.

X-Q. 140. In presenting these Beech-Nut cigarettes to the trade and the public did you emphasize the quality of the cigarettes?

A. Why, you possibly mean when I am sampling the consumer?

X-Q. 141. At any time.

A. Oh, we would naturally tell them it was a good cigarette and it was a cigarette that deserved our patronage.

X-Q. 142. Did you emphasize the word "quality"? 1929

A. No, sir, I never emphasized personally the word "quality."

X-Q. 143. Has the quality of the Beech-Nut cigarette proved disappointing?

A. Well, sir, we know that Beech-Nut cigarettes are not selling as they were in 1921 when we introduced them.

XQ. 144. Have you heard any remarks on the quality, or complaints?

A. I believe that every new cigarette ever introduced you will find so many people dislike them, and

1930 you will ask them why they dislike them and they have all their particular reasons why they dislike them.

Mr. Johnson: Please read the question to the witness.

(Last question read.)

A. You will hear some say they were too strong, some say they were too mild, others that they were too sweet, others say they parched their throat and burned their tongue.

X-Q. 145. Now, about the quality of the Beech-Nut
1931 cigarettes, that is what I am interested in.

A. I have heard all of those complaints on Beech-Nut cigarettes.

X-Q. 146. How did the sales go when the Beech-Nut cigarettes were first put on?

A. During the introductory period the Beech-Nut cigarettes were selling, everyone tried them, we advertised them extensively.

X-Q. 147. Did they increase for a time?

A. They increased for a time during the introductory work, naturally they increased.

X-Q. 148. For how long?

1932 A. They increased all through our campaign from September to December, 1921, because we were all on introductory work there.

X-Q. 150. And after that how did the sales compare?

A. They didn't show any increase after that.

X-Q. 151. Did you find you got many repeat orders?

A. Yes, we got repeat orders.

X-Q. 152. Did you find that in order to keep the business up you had to go out and get new trade to a large extent?

A. Yes. Understand, when we were putting on the Beech-Nut cigarettes at first we only worked towns for

instance of eight hundred population or better. After covering those we went back and got the smaller towns, that is, of more varied distribution and all during that time naturally our Beech-Nut cigarettes continued to sell and sell very well. 1933

X-Q. 153. How are they selling now?

A. Well, I would say poor.

X-Q. 154. Are they selling in your district in any appreciable quantities, any considerable quantities?

A. No, I have no large buyers today on Beech-Nut cigarettes.

Cross Examination closed. 1934

Re-direct Examination.

By Mr Cavanagh:

R-D. Q. 155. You testified on cross examination in substance that you recollect that a dealer said to you that if the Beech-Nut cigarettes would sell as well as Beech-Nut tobacco they were alright, or something to that effect?

A. Yes, that they would be alright.

R-D Q. 156. This dealer knew you were the Lorillard man, didn't he? 1935

A. Absolutely. In fact, there is very few dealers in that section didn't know me and have known me for years.

R-D Q. 157. You are pretty well known throughout that territory?

A. I am very well known throughout that section.

R-D Q. 158. I understood you to say that the scrap tobacco was a large seller throughout that section?

A. A very large seller.

1936 R-D Q. 159. That is the Beech-Nut scrap?

A. Beech-Nut chewing tobacco, yes sir.

Re-direct examination closed.

Re-cross Examination.

By Mr. Johnson.

R-X Q. 160. Have you been division manager in this Milwaukee district since the Beech-Nut cigarette campaign finished?

A. Yes, sir.

1937 R-X Q. 161. I mean, did you resume your duties at the end of that campaign in December, 1921?

A. Yes.

R-X Q. 162. Did you know an employee of the P. Lorillard Company named W. C. Jackson?

A. I did.

R-X Q. 163. Do you know when he left the P. Lorillard Company?

A. I cannot give you possibly the exact date, but I can give you approximately when.

R-X Q. 164. Just approximately.

A. That was about either May or June of 1922.

1938 R-X Q. 165. Do you know why he left?

A. Yes, sir.

R-X Q. 166. Will you please tell us?

A. I discharged him.

R-X Q. 167. For what reason?

A. Because I found him incompetent.

R-X Q. 168. What month was that?

A. It was either—I believe it to be either May or June, but without my records I cannot tell you, to be exact, but it was either the fore or middle part of 1922.

R-X Q. 169. In what way in general did you find him incompetent?

A. Well, sir, it is not my purpose to run down any man, I am not going to attempt to do it here, whether Mr. Jackson says it is or not. Mr. Jackson came to me with a very good recommendation and transferred over to me, but I found his work not at all satisfactory, that is, not up to my standards. He didn't work in a way I would have him work and his actions throughout the day were not as I would have them. 1939

R-X Q. 170. Did you find any instances of his not following your instructions?

A. I did.

R-X Q. 171. Did you know a man named Monahan in the employ of the P. Lorillard Company? 1940

A. No, sir.

Re-cross examination closed.

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 172. Will you please state whether you ever knew Mr. Jackson or any other salesman of the P. Lorillard Company to represent the Beech-Nut cigarettes or the Beech-Nut scrap tobacco as being the product of the Beech-Nut Packing Company? 1941

A. I did not.

R-D. Q. 173. If you had ever heard of any such man, you as division superintendent, what course would you have taken?

A. I would have discharged him immediately.

Deposition closed.

Signature waived.

An adjournment is here taken to February 1st, 1923, at ten o'clock a. m.

1942

February 1st, 1923.

Met pursuant to adjournment, parties present as before.

BENJAMIN A. MOSHER, a witness produced in behalf of P. Lorillard Company, defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Preston, deposes and says, as follows:

Q. 1. Will you please state your name, age, residence and occupation?

1943

A. Benjamin A. Mosher, of legal age, 644-1st Street, occupation pharmacist.

Q. 2. And what is the address of your drug store?

A. 701 Wells Street.

Q. 3. Mr. Mosher, how long have you been located at this business address?

A. This address here since October 22nd, 1922.

Q. 4. And where were you prior to that time?

A. 327 Reed Street.

Q. 5. What was your occupation there?

A. Same thing.

1944

Q. 6. Have you handled Beech-Nut scrap tobacco?

A. Yes.

Q. 7. For how long a time, approximately, in both places?

A. Oh, about a year and a half.

Q. 8. And have you handled Beech-Nut cigarettes?

A. Yes, sir.

Q. 9. Do you know what company makes those two products?

A. Yes, sir.

Q. 10. What company?

A. Lorillard.

Q. 11. Do you handle Beech-Nut chewing gum? 1945

A. Yes, sir.

Q. 12. Will you state whether or not you were ever under the impression that Beech-Nut scrap tobacco and Beech-Nut cigarettes were manufactured by the same company makes the Beech-Nut gum?

A. No, I was never under that impression.

Q. 13. About when was it that you first put in Beech-Nut cigarettes?

A. I don't remember the exact date they came out. We put them out the first day they were distributed here, I don't remember what the day was. There was a certain time, they wouldn't sell them before that time 1946 and they all came out on the same day.

Q. 14. From whom did you first purchase Beech-Nut cigarettes?

A. Badger Tobacco Company.

Q. 15. Now, will you tell us briefly in your own words what occured when you put those cigarettes into your store?

A. Well, the Badger tobacco man happened to be here and he asked us if we were going to handle Beech-Nut cigarettes, and I had never heard of them, and he said they were going to be a big seller and that they were put out by the P. Lorillard Company and at that time he 1947 remarked they were going to have one truck which did nothing but deliver Beech-Nut cigarettes on that day. I don't remember just what day it was. That is how we happened to put them in over there.

Q. 16. Mr. Mosher, did that truck deliver the cigarettes to you?

A. Yes, but I didn't see the truck.

Q. 17. Will you state whether or not the Badger Tobacco Company agent who called on you made any remark which in any way might have indicated that Beech-

1948 Nut cigarettes were put out by the same company makes the Beech-Nut gum?

A. No, he didn't make any remark.

Q. 18. Did he tell you they were manufactured by the *Lorillard Company?*

A. By the Lorillard people.

Q. 19. Will you state whether or not a Lorillard agent ever called upon you in connection with Beech-Nut cigarettes?

A. Yes, he did. I don't remember just how long after we got them in. I think it was about a month or so.

1949 Q. 20. And did you have any conversation with him at that time?

A. Yes, he asked us how they were moving and he put in the window display for us.

Q. 21. Will you state whether or not he made any remarks which could in any way be confusing as to who made the cigarettes?

A. No, he never made any.

Q. 22. Have you ever heard any remarks or comments or inquiries among your customers which indicated to your mind that any of them were under the impression the Beech-Nut scrap tobacco and Beech-Nut cigarettes

1950 were made by the same company makes the Beech-Nut gum?

A. No, I have never heard such remarks. I will tell you where confusion might arise, a time when people might come and ask for Beech-Nut and you would ask, "Gum or cigarettes?" I don't know whether or not that would cause confusion. They may have asked us, "Beech-Nut cigarettes" too.

Q. 23. But you have never had any remarks which indicated confusion as to who made the respective products?

A. No, not as to who made them.

Q. 24. Will you state what you would think of a man who asked for Beech-Nut cigarettes, and wanting Beech-Nut cigarettes, would accept a package of Beech-Nut chewing gum in place of the cigarettes? 1951

A. *What I would think of him? I would think he* would be crazy or something or else he doesn't know what he wants, one of the two.

Q. 25. Do you regard tobacco and chewing gum as having any relation to one another?

A. None whatever.

Q. 26. Mr. Mosher, do you handle Ideal perfume?

A. Yes, sir.

Q. 27. Do you handle Ideal brushes? 1952

A. Yes, sir.

Q. 28. Will you state whether or not those two articles are made by the same concern?

A. No, they are not.

Mr. Johnson: Objection as hearsay, incompetent, irrelevant and further objection unless the labels or wrappers specified are introduced in evidence.

Mr. Preston: As has been several times stated on the record, samples of all of these labels are in the possession of counsel for Lorillard Company 1953 and will be introduced in evidence at a later date.

Q. 29. (Mr. Preston.) Do you sell Red Cross toothache drops?

A. Yes, sir.

Q. 30. Do you sell Red Cross kidney plasters?

A. Yes, sir.

Q. 31. Will you state whether or not those two articles are made by the same concern?

1954 Mr. Johnson: Same objection, and it is stipulated this objection will apply to each question and answer along this line without repetition.

A. No, they are made by different concerns.

Q. 32. (By Mr. Preston.) Do you handle Velvet tobacco?

A. Yes, sir.

Q. 33. Do you handle Velvet rubber goods?

A. Yes.

Q. 34. Will you state whether or not those are made by the same concern?

1955 A. No, they are made by different concerns.

Direct Examination Closed.

Cross Examination.

By Mr. Johnson:

X-Q. 35. What kind of a store have you at 701 Wells Street?

A. Drug store.

X-Q. 36. Do you keep other lines besides drugs?

A. What do you mean?

1956 X-Q. 37. Name some of the characters of goods you keep besides drugs?

A. Candies, cigars, ice cream, perfume, newspapers, periodicals, hairnets, and so forth.

X-Q. 38. What kind of a store were you in at your other address?

A. Also a drug store.

X-Q. 39. Was that at 327 Reed Street?

A. Yes, sir.

X-Q. 40. Did you keep about the same lines?

A. Same thing, yes.

X-Q. 41. About what size is your store room here, 1957
just roughly?

A. About 30X45, something like that.

X-Q. 42. Now many clerks do you have here?

A. Registered clerks or altogether?

X-Q. 43. That wait on customers.

A. Four of us.

X-Q. 44. How many do you have working at a time, as a rule?

A. Usually two at a time.

X-Q. 45. About how many custommers do you have a day? Could you make an estimate?

A. About two hundred. 1958

X-Q. 46. Do you keep a cash register?

A. Yes, sir.

X-Q. 47. Doesn't that keep a record?

A. It does, but I never pay any attention to it, although it is a good thing to pay attention to.

X-Q. 48. Did you look at yesterday's?

A. I can't, because I have never watched it since I have been here. Probably I have kept it back once or twice and meant to watch it, but I didn't do it.

X-Q. 49. Do you wait on customers yourself?

A. Yes, sir.

X-Q. 50. Does it keep you pretty busy, as a rule, 1959
when you are on duty?

A. Well, in the evenings, but daytimes there is not much doing around here.

X-Q. 51. Is the store you were in before you took this one—did you say that was at 327 Reed Street?

A. Yes.

X-Q. 52. About what size was that property?

A. It was about 60X25.

X-Q. 53. Was it a larger store than this one?

A. It was longer, much longer.

1960 X-Q. 54. What was your position in that store?

A. I was half owner.

X-Q. 55. Did you wait on customers yourself?

A. Yes, sir.

X-Q. 56. How many clerks did you have there?

A. Four.

X-Q. 57. How many on duty at a time, as a rule?

A. Two.

X-Q. 58. Do you know about how many customers came in there a day?

A. About the same amount as here.

X-Q. 59. Did it keep you pretty busy waiting on them
1961 when you were on duty?

A. Fairly so, yes.

X-Q. 60. Was any part of your business over there wholesale or jobbing?

A. No, sir.

X-Q. 61. Is it here?

A. No, sir.

X-Q. 62. Entirely retail?

A. Retail business, yes, sir.

X-Q. 63. Do you remember ever having talked to customers about who makes the article they are buying?

A. Not very often.

1962 X-Q. 64. Did you make any attempt to remember any questions that were asked or any remarks that you heard as to whether the Beech-Nut cigarettes or scrap tobacco were made by the same company that made the Beech-Nut chewing gum?

A. No, I never heard any remarks made.

X-Q. 65. Did you make any attempt to remember them?

A. What do you mean, "Attempt to remember."

X-Q. 66. Did you try to remember any such incidents?

A. I never had any incidents like that.

X-Q. 67. Did anyone ask you to make a note of them or remember them? 1963

A. No.

X-Q. 68. When a customer comes in to make a purchase what does he do? Does he usually walk up to the counter and say, "I want a package of Camel cigarettes" for instance, put down his money and take the goods and walk out again?

A. Yes. Don't even repeat the word "cigarettes" any more.

X-Q. 69. Just "Camels"?

A. Yes.

X-Q. 70. And he doesn't as a rule say anything else? 1964

A. No.

X-Q. 71. In a case like that you have no way of knowing what he thinks about who makes the article he is buying?

A. No.

X-Q. 72. If he doesn't tell you you wouldn't know such a thing, would you?

A. No, I wouldn't know what he thought about who makes them.

X-Q. 73. Who is the man first sold you Beech-Nut cigarettes?

A. Badger Tobacco Company. 1965

X-Q. 74. Do you know the name of the man came in?

A. William Cohn, he is a part owner.

X-Q. 75. What is the nature of their business?

A. Wholesale tobacco.

X-Q. 76. Did you give him an order for Beech-Nut cigarettes the first day he came in, and offered them for sale?

A. Yes, sir.

X-Q. 77. Did he tell you at that time they were made by the P. Lorillard Company?

A. Yes.

1966 X-Q. 78. So you knew, did you, before you ever got in a package of the cigarettes that they were made by the Lorillard Company?

A. Yes, sir.

X-Q. 79. When did you first start to handle Beech-Nut scrap tobacco?

A. Beech-Nut scrap?

X-Q. 80. Yes.

A. We didn't have that until later on over there.

X-Q. 81. Later on in what?

A. Well, we didn't have it at the time we had the cigarettes.

1967 X-Q. 82. How long have you yourself been handling the Beech-Nut scrap?

A. About a year, I think.

X-Q. 83. And did you say you handled Beech-Nut cigarettes before you did the scrap tobacco?

A. Yes.

X-Q. 84. Who was the Lorillard man you have spoken of as coming in?

A. I don't know.

X-Q. 85. Didn't you know his name?

A. No.

X-Q. 86. Did you ever hear his name mentioned?

1968 A. No, sir.

X-Q. 87. Was he a Jewish fellow?

A. I don't remember. I never pay any attention to cigarette men, they come in and go, probably two or three a week.

X-Q. 88. Do you handle Camel cigarettes?

A. Yes, sir.

X-Q. 89. Have you handled many of them in your experience?

A. Yes, sir.

X-Q. 90. Can you tell me what is on the package, on the Camel cigarette package underneath the picture of the camel?

A. I can't tell, I never noticed, I don't smoke them. 1969

X-Q. 91. Have you sold a great many of these, you say?

A. Yes.

X-Q. 92. You couldn't say at all what is underneath the picture of the camel?

A. No.

X-Q. 93. Have you sold Lucky Strike cigarettes in your experience?

A. Yes.

X-Q. 94. Have you sold many of them?

A. I have sold enough, an awful lot.

X-Q. 95. Can you tell me what is underneath the red design on the label? 1970

A. No.

X-Q. 96. Have you handled the Fatima cigarettes?

A. Yes, sir.

X-Q. 97. Have you sold many of them?

A. Quite a few. That is about the order they came, Fatimas, Lucky Strikes—Fatimas not as many as the others.

X-Q. 98. But you have sold quite a few?

A. Yes.

X-Q. 99. Have you handled the packages of all these three yourself? 1971

A. Yes, sir.

X-Q. 100. Can you tell me what is underneath the picture of the lady with the scimitar on the Fatima packages?

A. No, sir.

X-Q. 101. In selling cigarettes, Mr. Mosher, did you find or have you found that people ask for them using the name of the maker?

A. Never.

X-Q. 102. Have you had people ask you when they were buying, for Lorillard's Beech-Nut cigarettes?

A. No, sir.

1972 X-Q. 103. Or Lorillard's Murad cigarettes?

A. No, sir.

X-Q. 104. Or Lorillard's Mogul cigarettes?

A. No, sir.

X-Q. 105. Or the American Tobacco Company's Lucky Strikes?

A. No, sir.

X-Q. 106. Have you found that it is the brand of the cigarette that sells the cigarette?

A. Yes.

X-Q. 107. You have found that right through, haven't you, it is the brand the people know and not the maker?

1973 A. Yes.

X-Q. 108. It is the brand the people ask for?

A. Yes, sir.

X-Q. 109. Do people ask just for Beech-Nuts or the Beech-Nut?

A. Yes, a package of Beech-Nuts.

X-Q. 110. And in a case like that, what do you do?

A. Ask them whether they want gum or cigarettes.

X-Q. 111. Do many people ask you that just for Beech-Nut?

A. Nine out of ten women will ask for Beech-Nut gum, men will probably say, "A package of Beech-Nuts."

1974 In fact, if a woman came in and asked for Beech-Nuts you would give her gum.

X-Q. 112. Have you had any remarks such as you have mentioned, as, "Are there Beech-Nut cigarettes too?"

A. No.

X-Q. 113. Can you think of any particular instances of such remarks as that from your customers?

A. No, I never heard them make those remarks.

X-Q. 114. Didn't I understand in your direct you to say that some people have made such comments as that?

A. I said there may be confusion in some people's mind, but they never expressed it to me. No doubt there may be confusion in some people's mind, but I never have run across anybody expressed it to me. 1975

X-Q. 115. How did Beech-Nut cigarettes sell when you first put them in?

A. Sold very good at first.

X-Q. 116. About how long did it continue?

A. About three months.

X-Q. 117 And about how many cigarettes a week did you sell during that time?

A. About one thousand.

X-Q. 118. How many are you selling now a week, Beech-Nut cigarettes? 1976

A. Don't sell five packages here.

X-Q. 119. How many in a package?

A. Twenty. As far as the cigarettes are concerned, some sell better in one locality and some better in another. Take over there, we never sold any Chesterfield cigarettes. Here it is one of the biggest sellers, so you can't tell by that.

X-Q. 120. You are not selling them in quantities?

A. Not here.

X-Q. 121. Do you know how it is over at the other store? 1977

A. No.

X-Q. 122. Have you heard any comments by people as to the quality of Beech-Nut cigarettes?

A. At first when they came out I heard some comments about their being pretty good cigarettes, not lately I haven't.

Cross Examination Closed.

1978 *Re-direct Examination.*

By Mr. Preston:

R-D Q. 123. Mr. Mosher, I understood you to say on cross examination that the Lorillard man that called on you in connection with Beech-Nut cigarettes did not mention his name. Can you state positively that he did not mention his name to you?

A. I don't think I said he didn't mention his name. He asked me if I knew his name. He probably introduced himself when he came in.

1979 A-D Q. 124. You meant you didn't remember his name?

A. I don't remember his name.

R-D Q. 125. Did you ever know of a food products company that made tobacco products?

A. No, sir.

R-D Q. 126. Do you use any sort of tobacco products yourself?

A. Cigars once in a while.

R-D Q. 127. As a tobacco user would you prefer to have a tobacco product made by a straight tobacco company or one made by a company that made all sorts

1980 of food products as well as tobacco?

A. Well, I don't think that would make any difference, as far as that is concerned, although it would seem unusual they would make all kinds of products.

R-D Q. 128. I also understood you to say, Mr. Mosher, on cross examination, that consumers bought tobacco products because of the brand. Now, can you say that tobacco consumers don't know what company makes the brand of cigarettes they smoke?

A. No, I wouldn't say that.

Re-direct Examination Closed.

Re-cross Examination. 1981

By Mr. Johnson:

R-X Q. 129. Have you handled any other Beech-Nut Packing Company products besides chewing gum?

A. Not here; over there we used to have mints.

R-X Q. 130. What did you have over there, mints and lemon drops?

A. Lemon drops.

R-X Q. 131. Where were they displayed with reference to your tobacco?

A. The tobacco was on this side over there and our candy goods over here (indicating). Of course, I believe you will find some stores like here, we have our chewing gum case and mints case on the tobacco counter. Of course, we keep our mints back here, but in some cases we have them on the cigar case, we don't have them like that over there (indicating). 1982

R-X Q. 132. Did you ever make a Beech-Nut window display?

A. Yes, sir.

R-X Q. 133. Did you put any display matter of the Beech-Nut chewing gum and mints and those other hard candies you have mentioned along with the display matter of the Beech-Nut cigarettes and tobacco? 1983

A. No, sir.

R-X Q. 134. Have you ever seen a window display like that?

A. No, I have never seen it.

Re-cross Examination Closed.

1984 *Re-direct Examination.*

By Mr. Preston:

R-D Q. 135. Mr. Mosher, on top of your tobacco case have you a display of fountain pens?

A. Yes, sir.

R-D Q. 136. Have you garters displayed on the top of your fountain pen case?

A. Yes, sir.

R-D Q. 137. Have you razors displayed on top of your tobacco case?

1985 A. Yes.

Deposition Closed.
Signature waived.

STIPULATION

It is stipulated by and between counsel for the respective parties that store run by Benjamin A. Mosher, a witness called on behalf of the P. Lorillard Company, is located about one block from the store run by William Weigel at 810 Wells Street.

1986

I. J. LINDENBAUM, a witness called on behalf of defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Preston, deposes and says, as follows:

Q. 1. Mr. Lindenbaum, what is your name, age, residence and occupation?

A. I. J. Lindenbaum, twenty-eight, residence 125-16th Street, occupation cigar manufacturer and tobacco retailer.

Q. 2. What is your business address? 1987

A. 603 Wells Street, Milwaukee, Wisconsin.

Q. 3. How long have you been engaged in the retail tobacco business?

A. Since the 1st of November, 1921.

Q. 4. At that time did you locate at your present business address?

A. No, sir, at that time I moved from 1520 Fond du Lac Avenue to 603 Wells Street.

Q. 5. Will you state whether or not your present business address is 603 Wells Street?

A. My present address, yes.

Q. 6. Do you handle Beech-Nut scrap tobacco? 1988

A. Yes, sir.

Q. 7. Do you handle Beech-Nut cigarettes?

A. Yes, sir.

Q. 8. Do you handle Beech-Nut chewing gum?

A. Yes.

Q. 9. When did you first put Beech-Nut scrap tobacco in your stock?

A. The first thing when I moved in here, November the 1st, 1921.

Q. 10. When did you first put Beech-Nut cigarettes into your stock?

A. The same day. 1989

Q. 11. Do you remember who the salesman was who first sold you Beech-Nut scrap tobacco and Beech-Nut cigarettes?

A. I believe the first man was Mr. Goldstein.

Q. 12. When Mr. Goldstein made that first visit to you did he tell you that he was a Lorillard agent?

A. Yes, sir.

Q. 13. Have you always known that Beech-Nut scrap tobacco and Beech-Nut cigarettes were products of the P. Lorillard Company?

A. Yes, sir.

1990 Q. 14. Have you ever heard any remarks or inquiries or comments among your customers which indicated in any way that they were under the impression Beech-Nut scrap tobacco and Beech-Nut cigarettes were made by the same people that made the Beech-Nut chewing gum?

A. No, sir.

Q. 15. Did you ever know of a food products concern that made tobacco products?

A. Never.

Q. 16. Did you ever know of a tobacco concern that made food products?

1991 A. No, sir.

Q. 17. Will you state whether or not you regard them as separate lines, food and tobacco?

A. Yes.

Q. 18. Mr. Lindenbaum, when Mr. Goldstein first put Beech-Nut tobacco products into your stock did he put in any advertising matter?

A. Yes.

Q. 19. What was it?

A. Beech-Nut tobacco and a lot of Beech-Nut cigarettes. I think during that time they were having a campaign on Beech-Nut cigarettes and also he put in
1992 some signs of Murads and Helmars and some others.

Q. 20. Do you sell Chesterfield cigarettes?

A. Yes, sir.

Q. 21. Do you sell the Chesterfield pipe?

A. Yes.

Q. 22. Will you state whether or not those two articles are made by the same concern?

A. No, sir, Chesterfield cigarettes are made by Liggett & Meyer, Chesterfield pipes I think are made by the Lincoln Company.

Mr. Johnson: Objected to as incompetent, irrel- 1993
evant and hearsay only.

It is stipulated that this objection will apply to all questions and answers along this same line without repetition.

The Witness: C. P. F. is the name of the company the Chesterfield pipe is put out by.

Q. 23. (By Mr. Preston.) Will you state whether or not if you had heard any considerable number of remarks which indicated any confusion as to the maker of Beech-Nut tobacco and Beech-Nut cigarettes, you would have remembered it? 1994

A. I would remember it, but I never heard any complaint, I never heard anybody say anything. I read sometime in the papers that the people had some trouble but as far as somebody coming around here in the store and making any complaint, I never heard any.

Direct Examination Closed.

Cross Examination.

By Mr. Johnson:

X-Q. 24. What kind of a store have you here, Mr. 1995
Lindenbaum?

A. Tobacco and cigarettes.

X-Q. 25. Do you keep anything else?

A. No, sir, only smoking supplies and I keep chewing gum and candy.

X-Q. 26. Do you do any wholesale or jobbing trade also?

A. A little, yes.

X-Q. 27. Do you manufacture cigars?

A. Yes, sir.

X-Q. 28. Where do you do that?

1996 A. Back of my retail store.

X-Q. 29. What is about the size of your retail store?

A. About 16x14.

X-Q. 30. It is a small shop then, is it?

A. Yes, a small, little store.

X-Q. 31. How many clerks do you keep there?

A. Well, don't keep any special but there is a fellow helps me out once in a while.

X-Q. 32. How many do you keep in your store at this time, usually?

A. One.

X-Q. 33. About how many customers a day do you

1997 have?

A. That is hard telling that.

X-Q. 34. Do you know what your cash register tells you each night?

A. Between two hundred and fifty and three hundred people, I would estimate, about that. Of course, I can't tell you just exactly.

X-Q. 35. And what proportion of your business you do in your front shop is wholesale or jobbing?

A. Most I do is retail.

X-Q. 36. What proportion of it is wholesale, would you say, one half or one quarter?

1998 A. I don't know. Maybe one quarter.

X-Q. 37. Are you kept pretty busy waiting on your customers?

A. Yes, in the early mornings. Afternoons and during the day there is not much doing.

X-Q. 38. When a person comes in to make a purchase what does he do, as a rule? Does he walk up to your counter and ask for Camel cigarettes, let us say, put down his money, take his package and go out?

A. Yes, sir, calls for the brand that he wants and I give it to him and he goes away.

X-Q. 39. He doesn't say anything, as a rule, does he, except to ask for what he wants? 199

A. He just asks for what he wants. Of course, if he stops and talks here a little, some people talk different things.

X-Q. 40. But the usual customer?

A. Yes, he comes in and asks for the brand of the article he wants and I give it to him and he goes away. That is, the majority of the people.

X-Q. 41. Can you tell from his face as he comes in or the back of his head as he goes out what he is thinking as to who makes the article he has purchased?

A. Well, sir, I don't think I could tell that, but there is a very few people that know the article he is using, where other people are making them. 200

X-Q. 42. Then unless he tells you, you have no way of knowing whether there is any confusion in his mind on that subject or not, have you?

A. No, sir, but there is some people have wanted to know, for instance when he likes the brand, who are the people put up this brand.

X-Q. 43. Have you had many questions or comments in regards to the Beech-Nut cigarettes or scrap tobacco from people who wanted to know whether or wondered whether they were made by the same people, made the chewing gum? 200

A. No, sir.

X-Q. 44. Have you ever heard any questions or discussion of that at all?

A. No, sir, never heard anything at all.

X-Q. 45. Did you make any attempt to remember such things if you should hear them?

A. Well, sir, if I should hear something I would remember it, but I don't think I ever heard that.

X-Q. 46. But you can't remember entirely sure, can you? You can't rememer any?

2002 A. No, I could be sure I didn't hear that, as near as I remember I never heard any discussion or anything of the kind.

X-Q. 47. Have you handled Camel cigarettes?

A. Yes.

X-Q. 48. Have you handled many of them?

A. Plenty.

X-Q. 49. Great quantities of them?

A. Yes.

X-Q. 50. Have you handled the packages yourself?

A. Yes.

X-Q. 51. Can you tell me what is on the front of the
2003 Camel cigarette package underneath the picture of the Camel? Can you tell me what is on the cigarette package underneath the camel?

A. The Camel is there, that is all.

X-Q. 52. No, underneath?

A. I think it is "Camel Cigarettes," that is what it says, isn't it?

X-Q. 53. I am asking you.

A. Of course, I never pay any attention to that.

X-Q. 54. Have you handled Lucky Strike cigarettes?

A. Yes, sir.

X-Q. 55. Have you handled many of them?

2004 A. Yes, sir.

X-Q. 56. Great quantities of them?

A. Yes.

X-Q. 57. Have you handled the packages yourself?

A. Yes.

X-Q. 58. Can you tell me what is on the panel of the red device, underneath the red device?

A. No, sir, never paid any attention to that.

X-Q. 59. Have you handled the Fatima cigarettes?

A. Yes, sir.

X-Q. 60. Have you handled many of them?

A. Not so many, but we have quite a few of them, according to the sales we make. 2005

X-Q. 61. Have you handled the packages in your own hands?

A. Yes, sir.

X-Q. 62. Can you tell me what is on the front of the Fatima cigarette package underneath the picture of the woman?

A. No, sir.

X-Q. 63. You don't remember any of these?

A. No.

X-Q. 64. How long have you been in the tobacco business? 2006

A. You mean the retail business?

X-Q. 65. Retail business?

A. Started November 1st, 1921.

X-Q. 66. How long have you been in the tobacco trade?

A. In the tobacco trade I have been since 1914, about eight years.

X-Q. 67. What were you doing during that time?

A. Manufacturing only.

X-Q. 68. And wholesaling?

A. Yes.

X-Q. 69. How have the Beech-Nut cigarettes sold since you put them in? 2007

A. Very slowly.

X-Q. 70. Did they sell better at any part of the time than any other?

A. Well, sir, I put in once a case of Beech-Nut cigarettes in the window and run a little sale of them. Of course, I sold quite a few. Since I took them out they sell very slow.

X-Q. 71. About when is that you had your largest sales?

A. That was around—well February, 1922, February or March, something like that.

2008 X-Q. 72. About how many a week did you sell during that time?

A. I think I used to sell about four or five thousand cigarettes a week.

X-Q. 73. Cigarettes?

A. Yes.

X-Q. 74. How many are you selling now?

A. Now I believe we will sell about six hundred a month, about six hundred cigarettes a month.

X-Q. 75. Have you heard any complaints on them?

A. Oh, yes, complaints. They have been made too dry or something. There is all kinds of complaints
2009 about them.

X-Q. 76. Did many people buy them the second time?

A. Oh, yes, they did because there is some people I believe smoke them steady, but a very, very few.

X-Q. 77. Have you found in your experience that when a customer comes in that he very often asks for Lorillard's Beech-Nut cigarettes, or American Tobacco Company's Lucky Strikes, or Liggett & Meyers' Fatimas, or Reynolds' Camels?

A. No, sir, he just says for the brand, don't ask for the company.

X-Q. 78. Have you found it is the brand that sells the
2010 cigarettes?

A. Yes, sir.

Cross Examination Closed.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 79. Mr. Lindenbaum, will you state whether or not when you say it is the brand that sells the ciga-

rettes you mean that people buy the cigarette because of its name? 2011

By Mr. Johnson: Object to that as leading.

A. They go according to the brand, they call for the brand.

R-D Q. 80. (By Mr. Preston.) Will you state whether or not you mean by that that a man buys a Camel cigarette because its name is "Camel?"

A. Yes, sir.

By Mr. Johnson: Object to that question as leading. 2012

R-D. Q. 81. (By Mr. Preston.) You use tobacco yourself, Mr. Lindenbaum?

A. Smoking?

R-D. Q. 82. Yes.

A. Yes.

R-D Q. 83. Do you smoke cigars?

A. Yes.

R-D Q. 84. What brand of cigar do you smoke?

A. I smoke almost every brand in the market. I am not so particular what I get, I simply smoke the cigar I get hold of. 2013

R-D Q. 85. You smoke a cigar because you like the name of the cigar?

A. No, sir. As I said before, I don't smoke one cigar, I just smoke all different cigars to find out the different tobacco that the people are putting in there, just to find out for my own experience.

R-D Q. 86. To find out what the quality of the cigar is?

A. Yes.

R-D Q. 87. Is the name of the cigar a matter of any interest to you?

2014 A. Yes, sir, of course, if there is a name that is well advertised, you certainly like to handle this brand because the public calls for it.

R-D Q. 88. I am speaking of your experience as a consumer, not a dealer. Do you smoke a cigar because you like the name of it or because you like the tobacco that is in it?

A. Well, as I said before, I don't stick to one cigar because I like the name of it, I like the tobacco in it, but the public when they get to like a cigar they call for this certain name, whichever they like. You couldn't go to work and give them anything else, he wants this
2015 brand and you have got to give it to him.

R-D Q. 89. Mr. Lindenbaum, is Beech-Nut scrap tobacco a good seller?

A. Yes, sir, I could say that is my fourth seller.

R-D Q. 90. Do you mean your fourth seller in scrap tobacco?

A. In scrap tobacco of the leading brands.

R-D Q. 91. It is the fourth?

A. Fourth seller.

R-D Q. 92. Has there ever been any doubt in your mind as to who made Beech-Nut scrap tobacco and Beech-Nut cigarettes?

2016 A. I always know it is put up by the P. Lorillard Company.

Re-direct Examination Closed.

Re-cross Examination.

By Mr. Johnson:

R-X Q. 93. What other Beech-Nut Packing Company products do you keep or have you handled besides chewing gum?

A. None at all, just the only thing I handle is Beech- 2017
Nut—

R-X Q. 94. Not the Beech-Nut peppermints?

A. No, sir, I don't handle the other brands.

R-X Q. 95. Where do you display your Beech-Nut chewing gum for sale with reference to the Beech-Nut cigarettes and tobacco?

A. Well, I got all of the Beech-Nut gum put in one little case. That is entirely in a different place from the cigarettes or from the tobacco, because I don't put the chewing gum and the tobacco together.

R-X Q. 96. About how far in number of feet is that from where the Beech-Nut cigarettes are? 2018

A. About six feet.

R-X Q. 97. About how far in feet from where your Beech-Nut tobacco is?

A. About the same.

R-X Q. 98. Have you made Beech-Nut window displays at any time?

A. Beech-Nut cigarettes?

R-X Q. 99. Any Beech-Nut window displays?

A. Yes, I have had some window displays of Beech-Nut cigarettes and Beech-Nut tobacco, but they never made any displays of Beech-Nut chewing gum.

R-X Q. 100. Did you ever put any chewing gum or 2019
advertising matter concerning it in the window at the same time you had the other display?

A. No, because I will tell you the reason why, this gum we got to pay more money for it so therefore we are not displaying in any place where the public should see it because we have to pay more money for that and we get the same price we get for Spearmints and Juicy Fruits and the other brands of gum, so most of the time I am trying to keep away from that because it costs more money and we get the same price as for the others, and

2020 I don't see why we should go to work and pay more money and get the same price for it.

By Mr. Johnson: Object to the last part of the answer as unresponsive.

R-X Q. 101. (By Mr. Johnson) Did you find the people demand the Beech-Nut chewing gum?

A. Yes.

R-X Q. 102. Is that the reason you keep it?

A. Yes.

R-X Q. 103. They demand the Beech-Nut brand gum?

2021 A. Yes.

Re-cross Examination Closed.

Re-direct Examination.

By Mr. Preston:

R-D Q. 104. Why do you keep Beech-Nut scrap tobacco?

A. Because it is a good seller.

Deposition Closed.

2022 Signature Waived.

STIPULATION

It is stipulated by and between counsel for the respective parties that the store run by I. J. Lindenbaum, a witness called on behalf of the P. Lorillard Company, is located about two blocks from the store run by William Weigel at 810 Wells Street.

An adjournment was here taken to February 2nd, 1923, at ten o'clock a. m.

2023

February 2nd, 1923, 10 A. M.

Met pursuant to adjournment, parties present as before.

JOHN GLASSPIEGEL, a witness called on behalf of the P. Lorillard Company, defendant, being first duly sworn, in response to interrogatories propounded to him by Mr. Preston, deposes and says, as follows:

Q. 1. Will you state your name, age, residence and occupation? 2024

A. John Glasspiegel, legal age, 1730 Wright Street, occupation merchant of novelties.

Q. 2. And what is the address of your store?

A. 212—3d Street.

Q. 3. Mr. Glasspiegel, you handle tobacco here, do you not?

A. Yes, sir.

Q. 4. Will you name some of the other classes of stuff you handle in your store?

A. Well, I handle tobaccos and novelties, souvenirs, watches, jewelry, leather goods, ivory wear, shaving brushes, shaving materials, razor blades, mouth organs, 2025 candy, jokers' articles, tricks, jokes and puzzles, clocks and playing cards.

Q. 5. Mr. Glasspiegel, do you handle Beech-Nut scrap tobacco?

A. Yes, sir.

Q. 6. About how long have you handled that?

A. I should say in the neighborhood of about two years.

Q. 7. Do you handle Beech-Nut cigarettes?

A. Yes, sir.

2026 Q. 8. When did you first put them into your stock?

A. When they first went onto the market, about a year ago, I should judge.

Q. 9. Do you know what company manufactures Beech-Nut scrap tobacco and Beech-Nut cigarettes?

A. P. Lorillard Company.

Q. 10. Do you remember, Mr. Glasspiegel, who the salesman was first sold you Beech-Nut cigarettes?

A. William Goldstein was the fellow.

Q. 11. Will you state whether or not you knew Mr. Goldstein to be a Lorillard man?

A. Yes, sir.

2027 Q. 12. Did Mr. Goldstein leave any advertising matter with you when he made the first visit?

A. Yes, sir.

Q. 13. Will you state whether or not in introducing the Beech-Nut cigarette into your store Mr. Goldstein made any remark which in any way led you to believe that Beech-Nut cigarettes had any connection with Beech-Nut chewing gum?

A. None whatever.

Q. 14. Mr. Glasspiegel, you handle Beech-Nut chewing gum?

A. Yes, sir.

2028 Q. 15. Have you ever heard any remarks or inquiries among your customers which indicated that they were under the impression Beech-Nut chewing gum and Beech-Nut cigarettes were manufactured by the same company?

A. No, sir.

Q. 16. Did you purchase any of the Beech-Nut cigarettes for cash from Mr. Goldstein on that first visit?

A. I don't recollect whether it was for cash or whether it was shipped through a jobber.

Q. 17. Did Mr. Goldstein give you a duplicate slip of your order?

A. Whenever he took an order to be shipped through 2029
a jobber I was handed a duplicate slip. I have here at present a duplicate slip from the Liggett & Meyers concern. This order was taken yesterday by their representative and it is customary for the salesman when he comes in in taking an order to give you a copy and give the other copy to the jobber.

Q. 18. Mr. Glasspiegel, do you remember whether or not Beech-Nut cigarettes were ever sampled in your store?

A. Yes, sir.

Q. 19. Did you overhear any of the salesmen's talk to the consumers whom he was sampling? 2030

A. Yes, I overheard the talk.

Q. 20. Will you tell us just in your own words what you remember him to have said to those consumers?

A. In introducing the cigarette it was mentioned that the cigarette was put out by the P. Lorillard Company, the same people who make the so-called Turkish brands, it was a new brand of cigarette being introduced on the market and in the way of an introduction anybody who bought two packages was presented with a third one free.

Objection by Mr. Johnson to this question and 2031
answer as hearsay only.

Q. 21. Did you ever know of a tobacco company that manufactured food products?

A. I don't know of any.

Q. 22. Do you regard food products and tobacco as in the same or different classes of products?

A. Well, that is a question. Food products is a necessity and tobacco is sort of a luxury. That is my classification of it.

Q. 23. Is Beech-Nut scrap tobacco a good seller?

2032 A. Well, it runs about fourth on the list.

Q. 24. Of scrap tobaccos?

A. Of all of the tobaccos. I only handle one scrap and that is Beech-Nut.

Q. 25. Whose product does the name "Beech-Nut" mean to you?

A. Well, the only concern I know of who backs the product of Beech-Nut is the P. Lorillard Company.

Q. 26. Do you sell the Velvet tobacco?

A. Yes, sir.

Q. 27. Do you sell Velvet puzzles?

A. Yes, sir.

2033 Q. 28. Do you sell Ever-Ready razor blades?

A. Yes, sir.

Q. 29. Ever Ready flashlights?

A. Yes, sir.

Q. 30. Are those two articles made by different companies or the same?

A. They are made by different companies.

By Mr. Johnson: Objection to these last questions as irrelevant and immaterial and object to the answers as hearsay evidence only.

It is stipulated that this objection shall apply to
2034 each and every question asked along this same line, without repetition.

Q. 31. (By Mr. Preston.) Mr. Glasspiegel, do you sell Ideal candy?

A. I do.

Q. 32. Do you sell Ideal key rings?

A. Yes, sir.

Q. 33. Do you sell Ideal metal tweezers?

A. Yes, sir.

Q. 34. Are any of those Ideal products manufactured by the same company? 2035

A. No.

By Mr. Johnson: Same objection as hearsay evidence only and it is stipulated that this objection shall apply to all questions and answers along this same line, without repetition.

Q. 35. (By Mr. Preston.) Mr. Glasspiegel, do you sell Comfort matches?

A. Yes, sir.

Q. 36. Do you sell Comfort collar clips? 2036

A. Yes, sir.

Q. 37. Are they made by the same or different companies?

A. Made by different companies in different countries.

By Mr. Johnson: Objection to this in addition to above objections to the admission of this evidence unless the labels and wrappers or the goods mentioned are offered in evidence.

By Mr. Preston: As has been repeatedly stated in this record, samples of all these articles are in possession of counsel for Lorillard Company and will be introduced in evidence at a later date. 2037

Direct Examination Closed.

Cross Examination.

By Mr. Johnson:

X-Q. 38. Are you proprietor of this store at 212-3rd Street, Milwaukee?

A. I am.

2038 X-Q. 39. How long have you been proprietor?

A. At this particular address seven years.

X-Q. 40. Has it been the same character of store all that time?

A. Yes.

X-Q. 41. *What were you doing before that?*

A. I had another store of its kind at 420 Grand Avenue.

X-Q. 42. Store of similar kind?

A. Same nature.

X-Q. 43. How long did you have that?

A. A year and a half, or rather eight months to be
2039 exact. The building came down.

X-Q. 44. Have you been in any other businesses?

A. Well, previous to that I followed up the newspaper business.

X-Q. 45. Have you ever been in the tobacco business exclusively?

A. No.

X-Q. 46. About what is the size of your store at 212-3rd Street?

A. About 20x50.

X-Q. 47. Have you a tobacco, cigar and cigarette stand in that store?

2040 A. Yes, sir.

X-Q. 48. Where is it located in that store?

A. In the most prominent place.

X-Q. 49. Describe, if you please, in what portion of the store?

A. It is in the northwest corner of the store, taking up approximately ten foot by six foot.

X-Q. 50. Do you do any wholesale or jobbing business in cigarettes or tobacco?

A. We wholesale at retail prices.

X-Q. 51. How many clerks do you have in the store?

A. Two.

X-Q. 52. How many on duty at a time? 2041
A. Two.
X-Q. 53. Is that besides yourself?
A. Yes, sir.
X-Q. 54. Do you wait on the counter yourself?
A. Yes, sir.
X-Q. 55. How many clerks do you keep in the store as a rule, at a time?
A. There are two here at all times and sometimes three with myself.
X-Q. 56. Have you a photograph gallery in one part of your store?
A. Yes, sir. 2042
X-Q. 57. About how many customers have you coming in here a day?
A. Between three and four hundred, as an average for the week.
X-Q. 58. Three or four hundred a day?
A. Yes, sir.
X-Q. 59. Do they keep you pretty busy?
A. Yes, sir.
X-Q. 60. Do you as a rule have any conversation with the people who come in to buy tobacco and cigarettes?
A. No, sir.
X-Q. 61. Will you please tell me what a customer who 2043
comes in for tobacco and cigarettes usually does? Does he walk up to your counter, ask for a package of Camels, let us say, put down his money, take the package and walk out?
A. Yes, sir.
X-Q. 62. Does he as a rule ask you who makes the article that he is buying?
A. No, sir.
X-Q. 63. Have you heard any questions or comments or remarks as to whether the Beech-Nut scrap tobacco

2044 and Beech-Nut cigarettes are made by the Beech-Nut gum people?

A. Not to my recollection.

X-Q. 64. Have you made any attempt to remember such things?

A. No, sir.

X-Q. 65. Have you had any reason to try to remember such things?

A. No, sir.

X-Q. 66. No one ever asked you to?

A. No, sir.

X-Q. 67. Then when you say you never heard any
2045 such remarks, what you mean is you don't remember hearing any?

A. I would say that I never heard the question arise as to whether both products came from the same concern or different concerns.

X-Q. 68. But you never tried to remember such things?

A. No.

X-Q. 69. Didn't you say that you first bought the Beech-Nut cigarettes from Mr. Goldstein?

A. He was the one introduced the brand to me.

X-Q. 70. When was that?

2046 A. Beech-Nut cigarettes, about a year ago.

X-Q. 71. About a year ago this month?

A. I wouldn't say this month, I would say approximately about a year ago.

X-Q. 72. Did you buy from him the first time he came in offering them for sale?

A. I can't remember.

X-Q. 73. Now then, this time you described, when he came in, you are not sure whether that is the first time or not, are you? This time you described on direct examination?

A. The first time he approached me with the question 2047
of Beech-Nut cigarettes, I don't know whether I bought from him the first time or not.

X-Q. 74. Did Mr. Goldstein ever sample Beech-Nut cigarettes in your store?

A. Yes.

X-Q. 75. What did Mr. Goldstein say when he was sampling Beech-Nut cigarettes in your store?

A. His remark was he was representing the P. Lorillard concern, the same people who had a national reputation as distributors and manufacturers of Turkish brands.

X-Q. 76. Did he say that to you? 2048

A. He said that to the customers, as they came in.

X-Q. 77. When was that?

A. About a year ago.

X-Q. 78. Could you name any particular time when he was doing that in your store?

A. Well, Saturday, before dinner. I don't remember the exact date.

X-Q. 79. And about what month?

A. I couldn't say exactly the month, I should say about a year ago January or February.

X-Q. 80. Were you waiting on customers at the time?

A. Yes, sir. 2049

X-Q. 81. How long did you say your store is?

A. About 20—50—20 wide by 50 long.

X-Q. 82. And you wait on customers in all parts of the store?

A. Yes, sir.

X-Q. 83. So during the time when Mr. Goldstein was making these remarks while sampling the Beech-Nut cigarettes you were pretty busy, weren't you, especially on a Saturday?

A. Well, I took care of the trade as the opportunity presented itself and I had assistance.

2050 X-Q. 84. You didn't hear everthing he said, did you?
A. I didn't make it my business to hear it.
X-Q. 85. And you didn't try to remember what he said, did you?
A. No, sir.
X-Q. 86. Have you handled Camel cigarettes?
A. Yes, sir.
X-Q. 87. Have you handled very many of them?
A. Yes, sir.
X-Q. 88. A great many?
A. A great many.
X-Q. 89. Have you handled the packages in your own
2051 hands?
A. Yes, sir.
X-Q. 90. Can you tell me what that is on the front of the package of Camels underneath the picture of the camel?
A. I couldn't say.
X-Q. 91. Have you handled the Lucky Strike cigarettes?
A. Yes, sir.
X-Q. 92. Very many of them?
A. Quite a lot.
X-Q. 93. Have you handled them in your own hands?
2052 A. Yes, sir.
X-Q. 94. Can you tell me what is on the front of the Lucky Strike, on the package?
A. I never took particular notice. I have seen it at times, but I didn't make it my business to remember them.
X-Q. 95. Have you handled Fatima cigarettes?
A. The same answer goes for the Fatima.
X-Q. 96. You have handled a great many of them in your own hands?
A. Quite a lot.

X-Q. 97. And cannnot recall what is underneath the picture of the lady on the front of the package? 2053

A. I can't remember.

X-Q. 98. How many years have you been handling tobacco and cigarettes?

A. About eight.

X-Q. 99. Do your customers ask for them by the brand? That is, do they ask for Camels or Beech-Nuts?

A. They ask for the brand, for the name, whether it is Camels, Lucky Strike, Chesterfields or Beech-Nuts, it doesn't make any difference what cigarette it is. A cigarette smoker as a rule asks for the name of the brand.

X-Q. 100. And does that same thing apply to chewing tobaccos? 2054

A. Yes, sir.

X-Q. 101. Did you ever have any customer ask you for Lorillard's Union Leader?

A. No, sir.

X-Q. 102. Or Lorillard's Moguls?

A. No, sir.

X-Q. 103. Or Lorillard's Murads?

A. No, sir.

X-Q. 104. Or American Tobacco Company's Lucky Strikes?

A. No, sir. 2055

X-Q. 105. You never heard any customer ask for cigarettes or tobaccos by the name of the maker?

A. No, sir.

X-Q. 106. Have you found then that tobacco and cigarettes sell by the brands?

A. I have found that tobaccos and cigarettes sold by the title.

X-Q. 107. Do you handle Beech-Nut chewing gum?

A. Yes, sir.

X-Q. 108. How long have you handled it?

A. About a year.

2056 X-Q. 109. Do you handle any other of the Beech-Nut Packing Company's goods, such as mints or hard candies?

A. No, sir.

X-Q. 110. Did you ever handle any of them?

A. No, sir, not to my knowledge.

X-Q. 111. Did you ever handle any other Beech-Nut Packing Company goods besides the chewing gum?

A. I am not familiar with the Beech-Nut Packing Company's nor do I know of any of their products outside of the chewing gum, since you mention it.

X-Q. 112. Did you ever use any of the Beech-Nut
2057 products outside of the three you have mentioned, in your home?

A. Not to my knowledge.

X-Q. 113. How long have you known about the Beech-Nut chewing gum?

A. That is a mighty hard question.

X-Q. 114. Did you know about it before you stocked it?

A. It is possible that I have.

X-Q. 115. Have you seen advertising of the Beech-Nut Packing Company, such as Beech-Nut peanut butter, Beech-Nut jams, Beech-Nut bacon, Beech-Nut chewing
2058 gum, in magazines, newspapers and billboards, streets cars and such places?

A. Yes, sir.

X-Q. 116. You know then that there are a great number of Beech-Nut products of the character I have just mentioned on the market, don't you?

A. My knowledge of the particular brands, such as "Beech-Nut" is very limited.

X-Q. 117. But you have seen this advertising?

A. I have seen one or two of the ads you mention.

X-Q. 118. Showing a varied line of goods put out under the Beech-Nut name?

A. Not a varied line, I say my knowledge is limited under those brands, of the brands that you mention I know of about two or three. 2059

X-Q. 119. When did you first put in the Beech-Nut scrap tobacco?

A. I have handled the Beech-Nut scrap for possibly three or four years. I have handled it in a little way previous to about two years ago. Not enough to really be noticeable.

X-120. Do you remember who first came in and sold it to you?

A. I don't know of any direct representative of any concern. It went in with the rest of the order to the jobber. 2060

X-Q. 121. Did any salesman ever come into your store before a year ago, offering to you Beech-Nut scrap tobacco or cigarettes?

A. Well, I should say that the Beech-Nut scrap is put to me in a more direct method, about two years ago.

X-Q. 122. What do you mean "a more direct method"?

A. By a more direct method I mean there was a certain amount of advertising, a certain amount of sampling being done on the scrap tobacco about three years ago which induced me to buy through the representatives, the order being placed through the jobber. 2061

X-Q. 123. Do you remember any salesman coming in at that particular time when you were seeing this advertising, at this time you have just mentioned?

A. Yes.

X-Q. 124. Offering you the Beech-Nut Scrap tobacco?

A. Yes.

X-Q. 125. Do you remember what he said?

A. No. I do not.

2062 X-Q. 126. Did I understand that that was about two years ago?

A. On the Beech-Nut scrap?

X-Q. 127. Yes.

A. Yes.

X-Q. 128. You buy from tobacco jobbers, don't you, Mr. Glasspiegel?

A. Yes, sir.

X-Q. 129. Quite frequently?

A. Quite frequently.

X-Q. 130. Do they as a rule give you such an order slip or receipt, such as the slip you say Mr. Goldstein
2063 left you?

A. The jobber doesn't issue any copy to me; in most cases I send my order in over the telephone.

Cross Examination closed.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 131. Mr. Glasspiegel, will you state whether or not if you had heard remarks indicating that your customers thought Beech-Nut cigarettes were made by
2064 the same company made Beech-Nut gum, in any considerable number, you would have remembered it?

A. Yes, sir.

R-D Q. 132. Was this sampling of Beech-Nut cigarettes in our store done shortly after you first put the cigarettes into your store?

A. Yes, sir.

R-D. Q. 133. Do you remember whether at that time there was a drive on in Milwaukee putting Beech-Nut cigarettes on the market?

A. Yes, sir.

Re-direct Examination closed.

Re-cross Examination: 2065

By Mr. Johnson:

R-X Q. 134. Was this sampling you have just referred to about a year ago?

A. About a year ago.

R-X Q. 135. And was there a big drive on at that time on the Beech-Nut cigarettes?

A. There seemed to be, yes, sir.

Deposition closed. Signature waived.

2066

State of Wisconsin }
County of Milwaukee } ss.:

I, HENRY F. WELLER, a Notary Public within and for the State and County aforesaid, do hereby certify that the foregoing depositions of William Goldstein, Charles Tuckwell, Michael Spheeris, John W. Smith, Maurice J. Schimmel, Daniel Paicopoulos, Albert Marks, Frank Hopewell, Benjamin A. Mosher, I. J. Lindenbaum and John Glasspiegel were taken before me in behalf of P. Lorillard Company, defendant, pursuant to notice and agreement at the office of Francis X. Boden, 1012-1013 Majestic Building, Milwaukee, Wisconsin, beginning at 2.30 o'clock P. M. January 29, 1923; that each of the aforesaid witnesses was by me duly sworn; that the testimony of said witnesses was taken by me in shorthand and thereafter reduced by me to typewriting; that the foregoing pages contain a true and accurate transcript of my stenographic notes; that the plaintiff was represented by H. McClure Johnson of Offield, Poole, Hinton & Scott; that the defendant was represented by Richard B. Cavanagh of Meyers, Cavanagh & White- 2067

2068 head and Thomas L. Preston, during the taking of said testimony; that the testimony was concluded February 2, 1923, at about 12:00 o'clock noon; and that the signature of each witness was waived; that I am not connected by blood or marriage with either of said parties or interested directly or indirectly in the matter in controversy.

I further certify that I have been paid the sum of $388.50 for taking, transcribing and certifying the foregoing testimony, and that the same is a fair, just and reasonable charge.

2069 HENRY F. WELLER,
Notary Public in and for
Milwaukee County, Wisconsin.

2070

2071

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Co.,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.

In Equity
No. 3056.

IT IS STIPULATED by and between counsel for the respective parties that if FRED W. KEMP were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows: 2072

Direct Examination.

My name is FRED W. KEMP, I am of lawful age, and am part owner of the Century Drug Store located in the business district of Milwaukee, Wisconsin, that is, on Third Street near Grand, and next to the Wisconsin Hotel, one of the leading hotels in Milwaukee. In this drug store we sell, besides drugs and medicines, cigars and tobacco and a great many other articles, and while employing a varied number of clerks at different times 2073 have at least eight clerks and a cashier.

We sell the Beech-Nut cigarettes and the Beech-Nut chewing gum. I have never heard any comments, remarks or inquiries to the effect, or which would lead me to believe, that customers or purchasers were under the impression that the Beech-Nut cigarettes were made by the same concern that makes the Beech-Nut gum.

I am acquainted with Mr. Goldstein who formerly represented P. Lorillard Co. in Milwaukee. During the time that the introductory drive was on on Beech-Nut cigarettes in the fall of 1921 here in Milwaukee, Mr.

2074 Goldstein called at the store at least half a dozen times and talked with me about the cigarettes, for I had put the same in the store, having first purchased them from Mr. Goldstein. He told me Lorillard was the maker of the cigarettes and in no way whatsoever misled me on the subject or made any remark which I would construe as indicating that the Beech-Nut cigarettes were made by the same people made the Beech-Nut chewing gum. When he first put in the cigarettes he left certain advertising matter at the store and put up some posters advertising the Beech-Nut cigarette.

2075 On

Cross Examination

he would testify

This is a large and very busy store. I am in the store the greater part of the time and wait on the customers myself when the other clerks are busy. I am so busy that I haven't much opportunity to hear what the customers at the cigarette counter are saying and I have made no effort to remember any inquiries, comments, remarks or discussion in regard to whether the Beech-Nut cigarettes were made by the Beech-Nut gum people, and I
2076 had no reason to do so. I knew Mr. Goldstein before the campaign on Beech-Nut cigarettes was started in the fall of 1921, and knew that the Beech-Nut cigarettes were made by the Lorillard Company before I ever saw a package of the cigarettes themselves.

On

Re-direct Examination

he would testify

If I had heard any such inquiries, comments, or remarks in appreciable number or frequently, I would have remembered the same.

2077

IT IS STIPULATED by and between counsel for the respective parties that if ROBERT A. KIEFER were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination.

My name is ROBERT A. KIEFER, I am of lawful age, and am proprietor of the Kiefer Drug Company, 238 West Water Street, Milwaukee, Wisconsin, which is in the business section of the city.

In this store are usually employed at least half a dozen clerks. We handle the Beech-Nut scrap tobacco and the Beech-Nut cigarettes, and I knew, even before the introductory campaign on the Beech-Nut cigarettes in Milwaukee, in the fall of 1921, that the Beech-Nut cigarettes were a product of the P. Lorillard Company. 2078

I am acquainted with Mr. Goldstein, agent for the P. Lorillard Company, and knew that Mr. Goldstein was assisting in the introduction of the Beech-Nut cigarette in Milwaukee in the fall of 1921 on behalf of P. Lorillard Company. I have never heard any comments, remarks or inquiries from customers or others to the effect, or which would lead me to believe that the Beech-Nut cigarettes were made by the same concern that manufactures Beech-Nut gum and the Beech-Nut mints. 2079

On

Cross Examination.

he would say:

I have a corner drug-store and have a good trade in drugs and many other lines, including tobacco and cigarettes. I am in the store most of the time and wait on

2080 customers along with my clerks. I am kept very busy and haven't much opportunity to hear anything that may be said by customers at the tobacco and cigarette counter. I have made no effort to remember any inquiries, remarks or comments with regard to whether the Beech-Nut tobacco and cigarettes are made by the same people that make the Beech-Nut gum and mints, and had no reason to do so.

On

Re-direct Examination.

2081 he would testify:

If I had heard any such inquiries, remarks or comments in appreciable number or frequently, I would have remembered the same.

IT IS STIPULATED by and between counsel for the respective parties that if RUDIE KORTBEIN were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination.

2082

My name is RUDIE KORTBEIN, I am of lawful age, resident of Milwaukee, Wisconsin. I am the manager and buyer for the cigarette and tobacco department of the Economy Drug Company at 706 Oakland Avenue, Milwaukee, Wisconsin, which is a block or so from the grocery store of C. H. Beese located at 701 Murray Avenue, Milwaukee, Wisconsin.

I handle Beech-Nut cigarettes and Beech-Nut chewing gum. I have always known that these products were made by different companies. I first bought Beech-Nut cigarettes from a tobacco salesman in the fall of 1921.

This salesman represented himself to be an agent for 2083
the Lorillard Tobacco Company and in his conversation with me made no remark which I would construe as indicating that the Beech-Nut cigarette was made by the company which manufactures Beech-Nut chewing gum. He had advertising matter with him at the time and put up some posters advertising Beech-Nut cigarettes in my store. I bought some of the Beech-Nut cigarettes from this salesman, ordering them to be sent through a tobacco jobber, and did not pay the salesman cash for this order. I have never heard any remarks, inquiries or comments among my customers which indicated to me that they were under the impression that 2084
Beech-Nut cigarettes and Beech-Nut chewing gum were manufactured by the same concern.

On

Cross Examination.

he would testify:

I am employed in a corner drug store in a residence district of Milwaukee. There is usually one other clerk in the store besides me. Our store handles not only drugs but toilet articles and many other lines, including 2085
candies and tobacco and cigarettes. The cigarette counter is near the front of the store, on the same side of the store with the candies. I wait on the counter and make sales to customers in all parts of the store. I am kept pretty busy and haven't much opportunity to hear what customers are saying, if anything, in the store. I have made no effort to remember any inquiries, remarks or comments as to who made the Beech-Nut cigarettes, and had no reason to do so. When I say I have heard no such inquiries, remarks or comments, I mean I do not remember having heard any. I did not know the sales-

2086 man who came in to sell the Beech-Nut cigarettes the first time, and could not describe him. My store is on Oakland Avenue car line. I have never seen this same salesman since.

On

Re-direct Examination.

he would testify:

If I had heard any such inquiries, comments, or remarks in appreciable number, or frequently, I would
2087 have remembered the same.

IT IS STIPULATED by and between counsel for the respective parties, that if J. E. BERNHEIMER were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination.

My name is J. E. BERNHEIMER, I am of lawful age, and I have four cigar stores in the city of Miluawkee, my main cigar store where I usually stay being at 414 East
2088 Water Street in the City of Milwaukee, which is in the downtown or business section of the city. I do a retail business exclusively in three of what I might call my branch stores, but in addition to a retail business I do a small wholesale business at the store above mentioned, that is, at 414 East Water Street.

I have handled the Beech-Nut scrap tobacco for the past four years, and it is the best selling scrap tobacco that I have. I always knew that it was made by the P. Lorillard Company. Mr. Goldstein, then connected with the P. Lorillard Company at Milwaukee, Wisconsin, in-

troduced the Beech-Nut cigarette into my stores in the 2089
fall of 1921, during the introductory campaign on this cigarette. He stated that the Lorillard Company was putting out this cigarette and I ordered them through him. I knew Mr. Goldstein before the Beech-Nut cigarette ever appeared on the market, as he was the Lorillard salesman here in Milwaukee. Mr. Goldstein, when he introduced the cigarette, left with me certain advertising matter, including posters advertising his Beech-Nut cigarettes.

I knew the cigarettes were made by the Lorillard Company, and Mr. Goldstein made no remarks to me which would leave me under the impression that the 2090
Beech-Nut cigarettes were made by the Beech-Nut Packing Company.

I have never heard of any comments, remarks or inquiries on the part of customers or consumers which would lead me to believe that they were under the impression that the cigarettes and scrap tobacco were made by the Beech-Nut Packing Company, or the concern that makes the Beech-Nut gum.

On

Cross Examination

he would testify: 2091

My main store at 414 East Water Street is a long and narrow room, the rear half of which is used for my wholesale trade and the front part for the retail. In this store I have one clerk beside myself. I am kept pretty busy and haven't much opportunity to hear what people are saying in my store. I have made no effort to remember any inquiries, remarks or comments in regard to whether the Beech-Nut cigarettes and scrap to-

2092 bacco are made by the same people make the Beech-Nut gum, and have had no reason to try to remember them.

On

Re-direct Examination

he would testify:

If I had heard any such inquiries, comments, or remarks in appreciable number, or frequently, I would have remembered the same.

2093

2094

IN THE UNITED STATES DISITRICT COURT 2095

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Co.,
Plaintiff,
vs.
P. Lorillard Company,
Defendant.
} In Equity No. 3056.

STIPULATIONS.

IT IS STIPULATED by and between counsel for the respective parties, that if RAY P. FLEMING were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows: 2096

Direct Examination

I am manager of a tobacco store at 231 Cherry Street, Green Bay, Wisconsin. We had the Beech-Nut scrap tobacco on sale, to the best of my knowledge, at least as early as May, 1917, and I make this statement because I went into the United States army in May, 1918, and we had the scrap on sale for a year before that. We had the Beech-Nut gum on sale before 1918, and we had the 2097
scrap tobacco on sale before we had the Beech-Nut gum on sale. This is the reason for fixing the date at about May, 1917, or prior thereto. I first bought the scrap tobacco from Johannes Bros. at Green Bay and it is the best selling scrap tobacco we have had, with Mail Pouch second. I know that the scrap tobacco is made by P. Lorillard Company and I never had any comments or inquiries from customers or consumers which would lead me to believe they thought the Beech-Nut scrap tobacco was made by the same concern makes the Beech-Nut chewing gum.

2098 On

Cross Examination

he would testify:

I have a small store in which I sell tobacco, cigars, cigarettes and small confections exclusively. I have been in the tobacco business for a number of years. I do not remember what salesman first came in with the Beech-Nut scrap tobacco or first sold it to me. That was so long ago that I cannot remember the details except I got it from Johannes Bros. I look after my store myself and
2099 wait on customers. I am kept pretty busy. I have made no efforts to remember any inquiries, remarks or comments as to who made the Beech-Nut scrap tobacco and had no reason to do so.

On

Re-direct Examination

he would testify:

If I had heard any such inquiries, comments, or remarks in appreciable number or frequently, I would have
2100 remembered the same.

IT IS STIPULATED by and between counsel for the respective parties, that if RAY VAN ROSMALEN were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination.

My name is RAY VAN ROSMALEN, I keep a tobacco store at 432 Monroe Avenue, South, Green Bay, Wisconsin. I know the Beech-Nut scrap tobacco and I know it to be a

product of the Lorillard Company, as I had this scrap tobacco on sale for about two years before Mr. Marks' crew came through Green Bay on a drive on this Beech-Nut scrap tobacco in the year 1919. I have had the Beech-Nut cigarettes on sale since the campaign on the same in the fall of 1921, and so far as I know I believe I am the first one in Green Bay who put in these Beech-Nut cigarettes. I also have Beech-Nut gum for sale. I am acquainted with Mr. Marks and know him to be a salesman for the Lorillard Tobacco people. When the salesman or agent introduced the Beech-Nut cigarette in the fall of 1921 he also had certain advertising matter advertising this cigarette, with him, and put same up in my store. He made no misrepresentations to me which would lead me to believe or leave me under the impression that the Beech-Nut cigarettes were made by the same concern that makes the Beech-Nut gum, which I also handle, as stated. I have heard no comments, remarks or inquiries from customers or consumers which would lead me to believe that they thought the gum and the cigarettes or scrap tobacco were made by the same concern. 2101 2102

On

Cross Examination 2103

he would testify:

My store is a small tobacco store. I have been in the tobacco business for some years. I do not remember who first sold Beech-Nut scrap tobacco to me or the accompanying circumstances. I did not know the salesman who first sold me the Beech-Nut cigarettes and could not discribe him except that it was not Mr. Marks, with whom I am personally acquainted. I take care of my own store and wait on customers myself. I am kept

2104 pretty busy and haven't much time to talk to customers. I made no effort to remember any inquiries, remarks or comments as to who made the Beech-Nut scrap tobacco or Beech-Nut cigarettes and had no reason to do so. When I say I heard no such inquiries, comments or remarks, I mean I do not remember any.

On

Re-direct Examination

he would testify:

2105 If I had heard of such inquiries, comments, or remarks in appreciable number or frequently, I would have remembered the same.

IT IS STIPULATED by and between counsel for the respective parties, that if A. G. VACLAVIC were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination

My name is A. G. VACLAVIC, of lawful age, and I am manager and buyer for the grocery and tobacco depart-
2106 ments of the Two Rivers Mercantile Company at Two Rivers, Wisconsin, and have been for a number of years past and was during the year 1921 and 1922 and am still the buyer in these departmennts. I do not do a big business in the Beech-Nut scrap tobacco as we do not do much of a tobacco business and we do not handle cigars or cigarettes.

I do not recollect any Lorillard men, or crew men calling at this store to put in this cigarette during the fall of 1921. The only time that I remember a Lorillard man coming into this store to sell the Beech-Nut cigarettes

was in 1922. We did not handle the cigarettes and did 2107
not buy any, but this salesman gave us on exchange Beech-Nut scrap tobacco for Buzz tobacco, a Lorillard brand that was not moving, that was a very slow seller, in this store. He had advertising matter with him and he put some up. When he exchanged the Beech-Nut scrap for the Buzz tobacco it was plain to me that he was a Lorillard man and I knew him to be a Lorillard man. So far as I know tobacco is always sampled at my counter at the tobacco department, and I am the only man clerk there and I never said to a Beech-Nut Packing Company man, "Why don't you pass Beech-Nut cigarettes around instead of gum and mints". I have always 2108
known that the cigarettes were made by the P. Lorillard Company.

On

Cross Examination

he would testify:

The Two Rivers Mercantile Company has a large general store at Two Rivers, Wisconsin, handling clothing, kitchen supplies, small hardware, as well as groceries and many other things, and it occupies a large ground floor 2109
space. Its grocery department occupies a pretty good sized space at the rear. Our tobacco stand is small. We do not do much in tobacco and I haven't paid a great deal of attention to it. There are other clerks in the grocery and tobacco department and have been ever since the middle of 1921. We handle a number of Beech-Nut Packing Company's products, such as Beech-Nut peanut butter, Beech-Nut spaghetti and Beech-Nut jams and other Beech-Nut products.

The salesman from the Beech-Nut Packing Company comes in from time to time to take our orders and has

2110 been in a good many times since September, 1921. I have not necessarily been here in the store every time a Beech-Nut Packing Company salesman has been in. I have talked a good many times with the salesman for the Beech-Nut Packing Company. I cannot be sure whether their salesman, Mr. O. M. Wesling, has been in here or not. I may have talked to Mr. Wesling, but cannnot say for sure. I do not recall ever having made the remark, "Why don't you pass Beech-Nut cigarettes around instead of gum and mints", or a remark similar to that of Mr. Wesling or any other salesman, but I really can't remember.

2111 On

Re-direct Examination.

he would testify:

While I have said I really can't remember making such remark, the best of my present recollection is I made no such remark.

2112

2113

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Co., Plaintiff,
vs.
P. Lorillard Company, Defendant.
In Equity, No. 3056.

STIPULATIONS. 2114

IT IS STIPULATED by and between counsel for the respective parties, that if E. F. PETERSEN were called as a witness on behalf of P. Lorillard Company, defendant, he would testify as follows:

Direct Examination.

My name is E. F. Petersen, I am a grocer by occupation and a member of the firm of Petersen Brothers conducting a grocery store at 421 North 8th Street, Manitowoc, Wisconsin, and am a brother of H. N. Petersen who testified as a witness on behalf of the Beech-Nut Packing Co. Some months before the Beech-Nut cigarette was introduced into the city of Manitowoc in the fall of 1921, I purchased an order of Beech-Nut Scrap Tobacco from a salesman who said he was from P. Lorillard Co., tobacco manufacturers, and put this Beech-Nut scrap tobacco on sale. He made no misrepresentations to me as to who was the manufacturer of this tobacco, and I never had any inquiries as to whether or not this Beech-Nut scrap tobacco was made by the Beech-Nut Packing Company, the same people

2115

2116 that made Beech-Nut Food Products and the Beech-Nut Gum. I knew it was a product of P. Lorillard Co.

On

Cross Examination.

he would testify:

I do not know the salesman who first sold me the Beech-Nut Scrap Tobacco; the occurrence described took place so long ago that I cannot remember exactly, but to the best of my recollection it took place as I have described; that I do not recall ever having mentioned
2117 to my wife, Mrs. Amelia Petersen, or my brother H. N. Petersen, the first visit of this Beech-Nut Scrap Tobacco salesman or what he said to me, or did, at that time; that when I am in my store I am pretty busy taking care of customers, and made no effort to remember any inquiries, comments or remarks made in regard to the Beech-Nut Scrap Tobacco, and when I say I did not hear any such inquiries, comments or remarks I mean I do not remember having heard any.

On

2118 *Re-direct Examination*

he would testify:

If I had heard any such inquiries, comments or remarks in appreciable numbers or frequently, such would have been impressed upon my memory.

2119

IT IS STIPULATED by and between counsel for the respective parties, that if R. ZECHEL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is R. Zechel, I am a druggist by profession and keep the North End Drug Store which is located on North 8th Street, Manitowoc, Wisconsin, about two blocks from the grocery store of Petersen Brothers at 421-North 8th Street, Manitowoc, Wisconsin. When the 2120
Beech-Nut cigarettes were first introduced into Manitowoc about the fall of 1921, a salesman called and I purchased a small order of these Beech-Nut cigarettes, paying cash, and this salesman put up in the store certain posters advertising these Beech-Nut cigarettes. He had these posters with him at the time. He stated he was from the P. Lorillard Company, and made no misrepresentations in this respect. Besides, since I got the cigarettes I have always known they were made by P. Lorillard Company because I saw the name of this concern on a pack of the cigarettes when they were first shown to me by the salesman.

2121

I have never heard any comments, inquiries or questions as to whether these Beech-Nut cigarettes were made by the same people that make the Beech-Nut Food Products or the Beech-Nut gum.

On

Cross Examination

he would testify:

My drug-store is on a corner of the main street of Manitowoc. I have a good trade for the size town; I

2122 keep one clerk to wait on the counter besides myself. I am kept so busy with my customers that I hadn't much opportunity to hear or remember whether any inquiries, comments or remarks about who made the Beech-Nut cigarettes were made in my store, and I made no effort to remember such things, if they occurred. I didn't know the salesman who first sold me the Beech-Nut cigarettes and cannot describe his appearance.

On

Re-direct Examination

2123 he would testify:

That if there had been any appreciable or frequent inquiries, comments or remarks as to whether the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum, I would have remembered the same.

IT IS STIPULATED by and between counsel for the respective parties, that if H. A. LEVENHAGEN were called as a witness on behalf of P. Lorillard Co., defend-
2124 ant, he would testify as follows:

Direct Examination.

My name is H. A. Levenhagen, of lawful age, and I conduct a barber shop at #110 North 8th Street, Manitowoc, Wisconsin. In this barber shop I also sell Beech-Nut Scrap Tobacco, Beech-Nut Cigarettes and Beech-Nut Chewing Gum. I first bought the cigarettes from a salesman of a crew who were introducing the cigarette in the Town of Manitowoc in about the fall of 1921. He said he was salesman for P. Lorillard Com-

pany and he positively told me that the gum people did not make the cigarettes. He was perfectly open and above board about it. He had advertising matter relating to the Beech-Nut cigarette with him, and he put up some of these advertising signs in this barber shop here. My barber shop is about three blocks, on the same street, North 8th Street, from the grocery store conducted by Petersen Brothers at 421 North 8th Street, Manitowoc, Wisconsin. I have heard no comments, inquiries or remarks from people to the effect, or which would lead me to believe, that they thought the Beech-Nut cigarettes or Beech-Nut scrap tobacco were made by the same people that make the Beech-Nut chewing gum, all three of which products I handle in my barber shop. 2125 2126

On

Cross Examination

he would testify:

I did not know the salesman who came in the first time with Beech-Nut cigarettes and could not describe him. We had some discussion about the Beech-Nut chewing gum and the Beech-Nut cigarettes and their relation or non-relation to each other. My place of business is primarily a barber shop, but I have a cigar and tobacco and candy stand in the front part of it. I run the barber shop myself and tend the counter in front when I am there. I have made no particular effort to remember inquiries, comments or remarks as to who makes the Beech-Nut cigarettes and have never made any notes of such things. I mean, I do not remember any such inquiries, comments or remarks. 2127

2128 On

Re-direct Examination

he would testify:

If I had heard any such remarks frequently or in appreciable numbers I would have remembered the same.

IT IS STIPULATED by and between counsel for the respective parties, that if JEROME MEYER were called as a witness on behalf of P. Lorillard Co., defendant, he
2129 would testify as follows:

Direct Examination.

My name is Jerome Meyer, I conduct a grocery store at 435 North 7th Street about one block and a half from the grocery store of Petersen Brothers at 421 North 8th Street, Manitowoc, Wisconsin. In the fall of 1921 a salesman called upon me to have me put in Beech-Nut cigarettes, and represented himself to be from P. Lorillard Company. He made no misrepresentations as to who manufactured the cigarettes and I gave him an
2130 order for a small quantity, as I remember it a couple of cartons of these Beech-Nut cigarettes, and these were to be sent me through my jobber, and they were duly delivered through the jobber. This salesman had advertising matter relating to the Beech-Nut cigarette with him and left some of it at the store. I also handle certain products of the Beech-Nut Packing Company, such as the Beech-Nut gum and Beech-Nut Peanut Butter

I know that the Beech-Nut cigarette is made by P. Lorillard Company, and I have never heard any comments, inquiries, or questions from customers or con-

sumers to the effect, or which would lead me to believe, 2131
that they thought that the Beech-Nut cigarette was made by the same people that make the Beech-Nut gum and the Beech-Nut peanut butter.

On

Cross Examination

he would testify:

I am the proprietor of the "Meyer Grocery" and deal in groceries, meats, bakery goods, notions, newspapers, candies, tobacco and cigarettes. My place of business 2132
is on a corner, and I keep one clerk besides myself. Both I and my clerk wait on customers in all parts of the store, including the tobacco stand. I haven't a great deal of time to listen to remarks or discussions that take place in my store and have made no particular effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut cigarettes. When I say I did not hear any inquiries, comments or remarks, I mean I do not remember hearing any such inquiries, comments or remarks. I do not know who the salesman was who first came in, selling the Beech-Nut cigarettes, and I cannot describe him. 2133

On

Re-direct Examination

he would testify:

If I had heard any such comments, or inquiries or remarks frequently or in appreciable numbers I would have remembered the same.

2134 IT IS STIPULATED by and between counsel for the respective parties, that if ROBERT LILL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is Robert Lill, of lawful age, and I conduct a small retail store and manufacture cigars at 821 South 8th Street, Manitowoc, Wisconsin. My retail store, or the place where I sell tobacco and cigarettes and cigars is in the front of the building, while I manu-
2135 facture cigars of my own brand in a room in the rear of this little front room. I am in the tobacco business exclusively, and while I handle Beech Nut scrap tobacco and Beech-Nut cigarettes, I do not handle Beech-Nut gum for my business is exclusively tobacco.

I have handled the Beech-Nut scrap tobacco certainly since 1917, and I am under the impression, but cannot say for certain, some time before that. My store is three blocks from the store of Petersen Brothers, grocery store, at 421 North 8th Street, Manitowoc, Wisconsin.

I bought Beech-Nut cigarettes of a salesman of a
2136 crew who were introducing the cigarettes in Manitowoc in the fall of 1921, and he represented himself to be a salesman of P. Lorillard Co., tobacco manufacturers. I know of the Lorillard Company and know of their products. This man left a lot of advertising matter including posters and big framed signs, one of which is a three panel wooden frame sign, and I still have this at the store. He had a lot of Beech-Nut cigarettes with him at the time. I have always known that Lorillard was the manufacturer of these cigarettes and of the Beech-Nut scrap tobacco. I know that Lorillard is an old established concern, and that it is the general custom for the Lorillard salesmen who call on me to say

whom they represent and to name other of the Lorillard brands when they introduce the cigarette. I have never heard any comments or inquiries from customers or others to the effect, or which would lead me to believe, they thought that the Beech-Nut scrap tobacco or Beech-Nut cigarettes were made by the same people make the Beech-Nut Gum or Beech-Nut Peanut Butter or other Beech-Nut food products. 2137

On

Cross Examination

he would testify: 2138

I don't know the salesman who first came in to sell me Beech-Nut cigarettes, and I couldn't describe him except to say that it was not Mr. Marks of the P. Lorillard Company, whom I know. My retail shop at the front of my place of business is a small place and my cigar factory adjoins it in the rear. I am a cigar-maker and employ others in my cigar manufacturing in the rear room. I wait upon the counter in my retail shop myself. I have made no particular effort to remember any remarks, comments or inquiries as to whether the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum. When I say I did not hear any such inquiries or discussion I mean I do not remember hearing any. 2139

On

Re-direct Examination

he would testify:

If I heard any such comments, inquiries or remarks frequently or in appreciable numbers I would have remembered the same.

2140 IT IS STIPULATED by and between counsel for the respective parties, that if A. MCEVENEY were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. McEveney, I am of lawful age, and I conduct a grocery store under the name Central Grocery, at 10th and Franklin Streets in the City of Manitowoc, Wisconsin. For several years I have been selling and am now selling Beech-Nut Scrap Tobacco and know it
2141 to be a product of P. Lorillard Company. When the Beech-Nut cigarettes were introduced into this territory in the fall of 1921, I bought some of these cigarettes from a salesman who represented himself to be from P. Lorillard Company, and he had with him certain advertising matter relating to these cigarettes. I know, and have known for years, that the P. Lorillard Company are the largest tobacco manufacturers. This salesman said that Lorillard was putting out this new Beech-Nut cigarette, and that they were the same people made the Beech-Nut scrap tobacco and other cigarettes such as the Helmar's. I have never heard any comments or
2142 inquiries or remarks from customers or consumers to the effect, or which would lead me to believe, they were under the impression that the Beech-Nut scrap tobacco or the Beech-Nut cigarettes were made by the same people who make Beech-Nut gum and the Beech-Nut peanut butter and other food products. I know of the store of Petersen Brothers on North 8th Street, this grocery store being about six blocks or so from my place of business.

In my store I carry various commodities of different character bearing the same name. For example, Badger tobacco and Badger corn, Crescent Hominy and Crescent Mapleine, and I also carry White House Corn Syrup, and Black Diamond Bird Food, and Anchor

IT IS STIPULATED by and between counsel, that objection is made to that portion of the witness's stipulated testimony which refers to other named products, such as the "Crescent," "Badger," "White House," "Black Diamond" and "Anchor," aforementioned, on the ground that same is irrelevant and immaterial.

On

Cross Examination

he would testify:

I am the proprietor of the "Central Grocery," which is on a corner, and do a neighborhood business. My store room is pretty good sized and I keep a general line of groceries and allied goods as well as tobacco, cigars and cigarettes. I have one clerk beside myself. I attend the counter myself. I have made no particular effort to remember any inquiries, remarks or comments as to whether the Beech-Nut cigarettes and scrap tobacco are made by the same company makes the Beech-Nut gum. When I say I never heard any such inquiries, remarks or comments, I mean I do not remember any. I did not know the salesman who came in the first time to sell the Beech-Nut cigarette and I could not describe him except to say that it was not Mr. Marks, with whom I am personally acquainted.

On

Re-direct Examination

he would testify:

If I heard any such inquiries, remarks or comments frequently or in appreciable numbers I would have remembered the same.

2146

IN THE DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Company, Defendant.
In Equity No. 3056.

2147 DEPOSITIONS taken on behalf of P. Lorillard Company, defendant, pursuant to notice and agreement of counsel, before Alice M. Rankin, a Notary Public in and for the County of Cook and State of Illinois, acting as Special Examiner by consent of counsel, beginning on Wednesday, February 7, 1923, at 10:30 o'clock a.m., at Chicago, Cook County, Illinois.

Present:

MESSRS. CHARLES C. BULKLEY and H. MCCLURE JOHNSON, on behalf of Plaintiff;

2148 MESSRS. R. B. CAVANAGH and T. L. PRESTON, on behalf of defendant.

WHEREUPON the following proceedings were had:

STIPULATION.

IT IS HEREBY STIPULATED by and between counsel for the respective parties to the above entitled cause that the following depositions to be taken on behalf of P. Lorillard Company, defendant, may be taken by Alice M. Rankin in shorthand and be later transcribed by her into typewriting.

2149

WADE H. BROWN, a witness called on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Cavanagh:

Q. 1. State your name, age, residence and occupation.

A. My name is Wade H. Brown; I live at 4808 West End Avenue, Chicago. I am district manager for the P. Lorillard Tobacco Company.

2150

Q. 2. How long have you been employed by the P. Lorillard Company?

A. Well, I have been with P. Lorillard since July, 1912.

Q. 3. How long have you been district manager for the P. Lorillard Company?

A. Since the beginning of 1921.

Q. 4. And what territory have you for this company?

A. At the present time?

Q. 5. At the present time.

A. Well, I have from Madison Street south, the rest of Cook County, Illinois, straight west to the DuPage County line, and Lake County, Indiana.

2151

Q. 6. How long have you had this territory?

A. Well, I have had this territory since the beginning of 1922.

Q. 7. And what territory did you have before that?

A. Previous to that, the year of 1921, I had all of Cook County and Lake County, Indiana.

Q. 8. And when you had all of Cook County, in which Chicago is situated, and Lake County, what goods did you handle or species of goods did you handle for the Lorillard Company?

2152 A. In 1921?

Q. 9. Yes.

A. I had the tobacco department.

Q. 10. What do you mean by the tobacco department?

A. Well, I had the plug and smoking department. At that time the scrap tobacco was in a separate department, such as the scrap, chewing tobacco, etc.

Q. 11. Did you have any cigarettes under your control?

A. I had no cigarettes until September the 6th, 1921.

Q. 12. And then what did you have? Tell us in your own words, to shorten this examination.

2153 Q. 13. And what part did you take in this work?

A. We opened the State of Indiana on Beech-nut cigarettes September the 6th, 1921, and I worked twenty counties in Indiana from the 6th of September until the 26th of September of the same year; and on the 26th of September of 1921 we opened up the State of Illinois on Beech-nut cigarettes.

A. Of Indiana?

Q. 14. Of Indiana,—on this Beech-Nut cigarette.

A. Well, I took my crew of men which I had at the time, of six men, and we devoted all of our time to Beech-Nut cigarettes the balance,—that is, from Sep-

2154 tember the 6th until vacation period,—of that year, 1921.

Q. 15. When was the vacation period?

A. Well, the nearest I can say was about the 17th of December. I couldn't say just for sure.

Q. 16. So, to be brief, from September until about the middle of December?

A. Yes.

Q. 17. You were engaged in introducing the Beech-Nut cigarette on a drive or introductory campaign?

A. Yes, sir.

Q. 18. Is that correct?

A. Yes, sir.

Q. 19. And you did this with the aid of a crew? 2155
A. Yes, sir; six men.
Q. 20. Were you in charge of that crew?
A. I was in charge of that crew.
Q. 21. Now, in order to shorten this examination as much as possible, will you just give an outline or statement, in your own words, as to just precisely what practice or general scheme of work you did or follwed in introducing the Beech-Nut cigarette during this introductory campaign?
A. Well, I had each and every one of my salesmen to carry a thousand Beech-Nut cigarettes to sell for cash. In addition to the tin signs which we had at the time and 2156
posters and samples, each salesman carried one carton of Beech-Nut cigarettes, as you see, of ten packages, that is, two hundred cigarettes, to sample daily.

Mr. Cavanagh: The witness calls attention to a carton of Beech-Nut cigarettes.

A. Now, my instructions were to these men if they sold out the thousand Beech-Nut cigarettes they were carrying to sell for cash, to go in to the nearest jobber in their territory and pick up more and continue selling them for cash. In selling these cigarettes for cash they, 2157
of course, carried a retail order book, and they gave each and every dealer they sold a duplicate copy of the order. Now, if the retailer insisted on the cigarettes coming through the jobber, we took the order and sent the orders to the jobbers and they, in turn, filled the orders. And their instruction was, which they followed out at the time, there was a little card that said "Beech-Nut," a little advertising on it, and they opened the carton up and set it on the counter of every store they sold these cigarettes in that we sold for cash; and put up posters, tin signs in front. In other words, put all the

2158 advertising we could display in that man's store and in his window.

Q. 22. I call your attention to some blanks which are fastened together,—there is also a piece of tissue paper,—and which are in this case as defendant's exhibit No. 10 and ask you if you recognize those blanks, and, if so, tell me what that exhibit is.

A. Well, this is the original order and there is a tissue we place in between the yellow and the original copy.

Q. 23. How did you work with that thing, what did you do?

A. We used a carbon in between.

2159 Q. 24. What did you have it for?

A. Take the orders for Beech-Nut cigarettes on this order blank.

Q. 25. Who did you take the orders from?

A. From the retailers.

Q. 26. Did you leave him any part of that?

A. We left him this yellow duplicate here. The salesman retained the little tissue. It remained in the order book, the white slip, where they was sold for cash, this original ordinarily was destroyed. We had no more use for it. But where the order went through the jobber, this is the order that the jobber received and the

2160 retailer received this (indicating), and the little duplicate remained in the order book,—the tissue.

Q. 27. You have referred in your examination to giving instructions. Just what instructions did you give and how? Just describe the procedure.

A. My instructions to the salemen were, when they went into a store, to represent themselves as being with the Lorillard Tobacco Company, and then take out their cigarette and begin explaining the quality. For instance, we would say: "This is a Burley Virginia and a little Turkish tobacco in this cigarette, which makes a very mild blend of a cigarette, and there is no doubt but what

you will like the cigarette because we are winning on the mildness of the cigarette." And in sampling we tell the consumer that we are representing the P. Lorillard Tobacco Company, just the same as we would tell them we were representing them in calling on the trade. 2161

Mr. Johnson: Objection by Mr. Johnson to this line of testimony as to what the salesmen would do, on the ground it is hearsay evidence only.

It is stipulated that this objection shall apply to all questions and answers along this same line without repetition.

The objection is to the witness' testimony as to what the salesman for Lorillard would do or say. 2162

Q. 28. Now, how often did you give instructions to your salesmen?

A. Well, on an average of twice a week.

Q. 29. Under what circumstances? Just tell us how you did it.

A. Well, I would call them together and just tell them —give them a little talk on Beech-Nut cigarettes, and tell them to sample them thoroughly, advertise and put up their posters wherever they could possibly get them up, and by all means always to put the carton on the counter, display them up where the consumer can see them. 2163

X-Q. 30. Did you personally visit any retailers, or what we might call the trade, and sell any of these cigarettes for cash?

A. Yes.

Q. 31. And when you went in to introduce the cigarette yourself, what did you tell the retailer as to the cigarette, what was your method of introduction?

A. My method, if I was not acquainted with that retailer—I am acquainted with a lot of them—I would say:

2164 "Brown is my name. I am representing the P. Lorillard Tobacco Company. We are introducing a new cigarette, Beech-Nut, a very fine quality cigarette made of Burley Virginia, and a little Turkish tobacco." And I would explain to them about the drive and the way we were sampling thoroughly and advertising throughout the country and that the brand I had heard so far in the eastern states was going very big, and that we expected to make that brand just as big a brand as we had our Beech-Nut chewing tobacco.

Q. 32. Did you ever take part in any drive or ever personally sell the Beech-Nut chewing tobacco to the
2165 trade?

A. Not when we were introducing it, because it was in a separate department.

Q. 33. Who had that department?

A. A party by the name of August Meyer.

Q. 34. Where were his headquarters?

A. Chicago.

Q. 35. Will you give me, if you can, the names of the men who constituted your crew when you were introducing the Beech-Nut cigarette in what I call the fall of 1921?

A. Yes, sir. Mr. Dagen, Mr. Rehder, Mr. Browning,
2166 Mr. Burgeson, Mr. Bartel and Mr. Adams.

Q. 36. As I understand, you have just a part of Cook County and Chicago now for the Lorillard tobacco and cigarettes; is that right?

A. Yes, sir.

Q. 37. And at the present time, since 1922, you have been selling tobacco and cigarettes?

A. Yes, sir, beginning of 1922, I have sold all scrap tobacco, Beech-Nut chewing and Beech-Nut cigarettes.

Q. 38. Did you sell any Turkish cigarettes?

A. No, I never sold any Turkish cigarettes; that is in another department.

Q. 39. Who has the other part of Cook County here? 2167
A. Mr. Gay; Mr. J. Gay, Jr.
Q. 40. Where is he located?
A. 414 Rush Street.
Q. 41. Have you heard any comments, inquiries or remarks from customers or consumers to the effect or which would lead you to believe that they were under the impression that the Beech-Nut cigarettes or the Beech-Nut scrap tobacco were made by the same people that make the Beech-Nut chewing gum, Beech-Nut peanut butter and other food products?
A. Well, when I first began introducing the Beech-Nut cigarettes I had possibly a half a dozen dealers that 2168
asked me if we made the Beech-Nut gum and I told them no, we did not; that the Lorillard Tobacco Company made the Beech-Nut cigarettes, Beech-Nut chewing tobacco, Climax, Murad, Helmar and brands of that kind, and that we were in the tobacco business and not the gum or food business.
Q. 42. When was it you heard these inquiries that you referred to in your last answer?
A. Well, that was during the first of our campaign. That was in,—from September, I would say, from September the 6th,—between September the 6th and December, middle of December, December 17th, at which 2169
time we went on our vacation.
Q. 43. Prior to starting the Beech-Nut cigarette drive in September, 1921, did you attend any conference or meeting with any of the officials or employes of the Lorillard Company here in Chicago?
A. Yes, sir, I did.
Q. 44. Tell us just what took place at that and under whose auspices it was held?
A. Mr. Fitzsimmons, who was in charge of the scrap department at that time all over the United States, and Mr. Edward Meyer who had charge of the plug depart-

1598

2170 ment and the smoking department. Would you want the territory he had?

Q. 45. You can just state in your own words. Make it as brief as you can.

A. Well, he had Indiana, Michigan, Ohio, Illinois as far south as Bloomington, Wisconsin, Minnesota and South Dakota. That was all.

Now, in this little conference I remember very distinctly Mr. Fitzsimmons making this remark: "There shouldn't be any trouble in the world of getting a wonderful distribution on Beech-Nut cigarettes at once, because Beech-Nut chewing tobacco is a well known brand
2171 throughout nearly all the United States and a big seller, so we ought to get a thorough distribution in a very short while."

Q. 46. When you were introducing the cigarette, the Beech-Nut cigarette, with this sales crew, will you state whether or not you ever accompanied any of the members of that crew into the stores where you were attempting to sell cigarettes?

A. Absolutely. I worked with each and every one of my retail men I had on the Beech-Nut crew. I would go out and pick up a man on the streets that we had assigned him, to a certain street to work, and work with him a
2172 half a day or maybe I would work with him a whole day occasionally and instruct him and work right with him as to just how to market this cigarette.

Q. 47. How did you find he followed your instructions when you were absent?

A. When I was with these men they carried out my instructions a hundred per cent., and I checked these men up. I would go out and check behind them to see if they were putting up the advertising and doing their work as they should.

Mr. Cavanagh: Direct examination closed.

Cross Examination. 2173

By Mr. Johnson:

X-Q. 48. How long have you been with P. Lorillard Company, Mr. Brown?

A. I was with them ten years last July.

X-Q. 49. Will you give, just briefly, an outline of what positions you have held with them and in what part of the country?

A. Well, from the time I was employed by Lorillard in July, 1912, I was a retail salesman for them until—Now, I can't give you the date on this. 2174

X-Q. 50. Just approximately.

A. Yes. Approximately up until, well, I would say 1916; and from 1916—

X-Q. 51. In what parts of the country during that time?

A. I was working under Edward Meyer and he had charge at that time of just Wisconsin and Illinois as far south as Bloomington, northern Pennsylvania and Michigan at that time.

X-Q. 52. Yes.

A. And up until 1916 I worked a little territory out here in the northwest corner of Illinois of eight counties, 2175 and I was promoted to be his assistant, I will say in 1916; and from then until the first of 1921 I covered that entire territory as his assistant, working with retail men who were stationed in those different states and having so many counties to work in.

X-Q. 53. And what department?

A. In the plug and smoking department at that time. And the first of 1921 I was in charge of this territory, the Chicago territory, which includes Cook County and Lake County, Indiana. At that time Mr. Meyers was transferred to Boston.

2176 X-Q. 54. How long did you hold that position?

A. As his assistant?

X-Q. 55. No. As head of the—

A. Department?

X-Q. 56. Yes, sir.

A. Well, from the first of 1921 until right now, the present date. Now, the first of 1922 they split this territory and gave Mr. Gay the other part of Cook County.

X-Q. 57. Previous to the beginning of this Beech-Nut cigarette campaign, had you handled cigarettes at all?

A. No. Never handled cigarettes. That was in a separate department, cigarettes were.

2177 X-Q. 58. In regard to this crew that you have named of six men, Mr. Dagen, can you give me his initials?

A. Yes. Frank C. Dagen.

X-Q. 59. Do you know when he joined the Lorillard Company, approximately?

A. Yes. In July, 1916. But now the others I can't give you the correct date on, but I remember his because I looked it up this morning.

X-Q. 60. Let's take them in order.

A. All right.

X-Q. 61. What department had he been in?

A. Well, he had been in the plug and smoking de-
2178 partment.

X-Q. 62. Had he been working with you?

A. Yes, sir.

X-Q. 63. Is he still with the Lorillard Company?

A. Yes, sir.

X-Q. 64. Mr. Rehder, what are his initials?

A. L. O. Rehder.

X-Q. 65. Will you go back to Mr. Dagen? Do you know what his address is now?

A. His home address?

X-Q. 66. Yes.

A. No.

X-Q. 67. Does he live here? 2179

A. Yes, he lives on Wrightwood Avenue, Chicago. I have a record of that over at the office.

X-Q. 68. Do you know when Mr. Rehder joined the Lorillard Company?

A. That I cannot say because he had been with them ever since the dissolution, and that was in the fore part of 1911, I think.

X-Q. 69. He had been with them—

A. He was with them longer than I have.

X-Q. 70. A number of years?

A. Yes, a little longer than I have been with them.

X-Q. 71. What department had he been in? 2180

A. In the plug and smoking department.

X-Q. 72. Had he been working with you?

A. Oh, yes.

X-Q. 73. Is he still with the P. Lorillard Company?

A. Yes, sir.

X-Q. 74. Do you know his address now?

A. He lives on Maple Avenue; I do not know his address.

X-Q. 75. What town?

A. Chicago.

X-Q. 76. Do you know Mr. Browning's initials?

A. J. F. Browning. 2181

X-Q. 77. Do you know when he joined the Lorillard Company, just approximately?

A. Well, I would say he has been with us about two years, I would say he joined us—

X-Q. 78. You mean two years before September, 1921?

A. No, two years back; I would say he joined us in August or September, 1921.

X-Q. 79. Did you take him on special for the cigarette campaign?

A. No; no. I hired him for the plug and smoking department.

2182 X-Q. 80. Before the campaign?

A. Oh, yes.

X-Q. 81. Is he still with the Lorillard Company?

A. Yes, sir, he is still with me.

X-Q. 82. Does he live in Chicago?

A. He lives in Chicago.

X-Q. 83. Mr. Burgeson, what were his innitials?

A. P. L.

X-Q. 84. Do you know when he joined the Lorillard Company?

A. He has been, I would judge Burgeson has been with us about four years, we will say. He was with us
2183 previous to the campaign.

X-Q. 85. In what department?

A. Plug and smoking department.

X-Q. 86. Was he working with you?

A. Yes, sir.

X-Q. 87. Is he still with the Lorillard Company?

A. Yes, sir; he was transferred to Mr. Gay when this territory was split up the first of 1922.

X-Q. 88. Are the first three still with you in your district?

A. What is that?

X-Q. 89. The first three men we have already named,
2184 are they still with you in your district?

A. Yes, sir. Mr. Burgeson was transferred to Mr. Gay the first of 1922 and is still with him.

X-Q. 90. What are Mr. Bartel's initials?

A. N. Bartel. His first name was Nick.

X-Q. 91. Was he with the Lorillard Company before September, 1921?

A. Yes, sir.

X-Q. 92. About how long before?

A. Well, I would say about eight months.

X-Q. 93. In what department?

A. In the plug and smoking department.

X-Q. 94. Was he working with you? 2185

A. He was at the time.

X-Q. 95. Is he still with the Lorillard Company?

A. No, sir, he is not with us.

X-Q. 96. Do you know when he left?

A. Yes. I can't give you the dates on it.

X-Q. 97. About when?

A. Well, it was in January of 1922. I am quite sure that was the month, January, 1922.

X-Q. 98. Do you know what he is with now?

A. No, I do not; I could not say.

X-Q. 99. Is he in Chicago?

A. As far as I know, he is; yes. He lives on Nelson 2186
Street, Chicago he did at the time he was with me.

X-Q. 100. Do you know why he left the company?

A. Yes, sir; I discharged him for not—I went out and checked him up and I found he was not going according to my instructions; he was not putting up as much advertising as I thought he ought to, and I talked to him and told him that I expected him to put up more advertising, more sign posters and tackers; and I checked him up the second time and found that he had not gone according to my instructions, so I discharged him.

X-Q. 101. Did you have any complaints or unfavorable reports of his work during the Beech-Nut cam- 2187
paign?

A. No, I did not.

X-Q. 102. Did you check him up to any extent at that time to see whether he was following your instructions?

A. Yes, I checked him the same as I check the other boys. I check every man that is working under my supervision at times. I make it my way to work with some of these men every week.

X-Q. 103. Did you find anything to make you question at that time whether he was following your instructions?

2188 A. No, I did not.

X-Q. 104. What are Mr. Adams' initials?

A. L. J.

X-Q. 105. Was he with the P. Lorillard Company before the cigarette campaign?

A. Yes, sir.

X-Q. 106. About how long?

A. Well, I think I hired Adams,—I am not sure about that,—in May or June, 1921.

X-Q. 107. What department was he working in?

A. Plug and smoking department?

X-Q. 108. In your district?

2189 A. Oh, yes; yes.

X-Q. 109. Is he still with the Lorillard Company?

A. No.

X-Q. 110. When did he leave?

A. He left the latter part of January, 1922. He resigned.

X-Q. 111. Do you know what he is in now?

A. He is with some insurance company here in Chicago, either the Prudential or the Mutual, I could not say; he is with either one of those insurance companies, so I have heard.

X-Q. 112. In Chicago?

2190 A. Yes.

X-Q. 113. Was he under you at the time he resigned?

A. Yes, sir.

X-Q. 114. Did you ask him to resign?

A. No, he resigned of his own request.

X-Q. 115. Did you have any dissatisfaction with him?

A. No, not a bit. I would hire him again tomorrow if I had the opportunity and had an opening.

X-Q. 116. About what percentage of cases would you say that you accompanied your salesmen into the dealers, was it a large percentage or small percentage of all their calls?

A. Oh, it would be a very small percentage because 2191
I had a great deal of detail work and things to do and see after, but the average man makes about twenty-five calls a day. Now, occasionally I would spend a day with a man, we will say we called on twenty-five dealers. Maybe the next man I worked with I would spend two hours with him; go on and pick up another man; if I don't have time that day, the chances are I would see him the next day and spend a little time with each and every one of them.

X-Q. 117. Well, roughly, could you say about what percentage of their work you were able to observe yourself? 2192

A. Well, I couldn't give you anything very accurately on it. It would be a very hard proposition.

X-Q. 118. It would be a small percentage?

A. Yes. You take six men and say each man calls on tweny-five a day; that is a hundred and fifty dealers a day. Well, that week I only spend one day working with these salesmen and call on twenty-five, why, it would not be over ten per cent., I shouldn't think, Mr. Johnson. But in the meantime I call on dealers here and there systematically, wherever I happened to drop in and see how our brands are going here and there, and so forth, have posters with me and put up a poster in a 2193
man's store wherever I could. In other words, do everything I could do to promote the sale of Lorillard's brands that I am working.

X-Q. 119. But from your actual observation, Mr. Brown, you really could not say, except of this small percentage of cases, as to whether your men followed your instructions or not, could you, from your actual own observation?

A. What other would I have? Now, I check up these men, Mr. Johnson, go in these stores to see that our

2194 cigarettes are displayed on the counter where the consumer can see them, and see our advertising up, posters and tackers and tin signs and window displays. So, naturally, you check a man and find a nice showing of advertisements and your cigarettes displayed nicely on the counter, and no complaints by any dealers that you drop in to see, you would take it for granted that work was satisfactory, wouldn't you?

Mr. Johnson: Objection by Mr. Johnson to the latter part of this answer as not responsive.

The question was: From your own actual ob-
2195 servation, Mr. Brown.

A. Yes.

X-Q. 120. You could not say, except as to this small percentage of men, whether your men, from your own observation, did the things and said the things that you have described that they did and said when they went in to approach a dealer, can you, from your own observation?

A. That would be impossible to do that when I would not be with them.

X-Q. 121. Would these order slips which you have
2196 referred to on direct, which your salesman would make out for orders received on his rounds, have you seen slips, order slips of similar character used by jobbing firms, with the name of the jobber at the top, with the name of the jobber printed at the top?

A. Oh, yes, every jobber has these bills, but not of that particular type. They are larger bills.

X-Q. 122. But an order slip or a receipt for orders of a similar character, not just like that?

A. No. With their name and their address and 'phone number on it.

X-Q. 123. Yes. Did you hold meetings with your crew 2197
from time to time?

A. Yes, sir.

X-Q. 124. About how often?

A. Well, about twice a week.

X-Q. 125. And where?

A. In the warehouse, in our offices, 414 Rush Street.

X-Q. 126. What was the purpose of those meetings?

A. The purpose was to instill a little more pep into these men and to impress on their mind that we wanted this cigarette or tobacco, whichever we happened to be working, put over and become a big seller.

X-Q. 127. Was this during the time of the Beech-Nut 2198
cigarette campaign?

A. That we held these meetings?

X-Q. 128. Yes.

A. Yes, sir.

X-Q. 129. That is what you were referring to?

A. Yes, sir. Not only that, but during any time the head salesman with Lorillard has these little meetings with their retail men; it is quite a common occurrence to talk to their men.

X-Q. 130. Did you ever caution your men at these meetings about avoiding the appearance of presenting 2199
the Beech-Nut cigarettes as the product of the people who put out the Beech-Nut gum and Beech-Nut peanut butter, and so forth?

A. You mean at the time we introduced the cigarettes?

X-Q. 131. During these meetings, during the campaign.

A. No. Here is what I instructed my men, first, last and all the time: You are representing the P. Lorillard Tobacco Company, a firm that is well established all over the entire United States, and bring out the point and identify yourself with such brands as Beech-Nut chew-

2200 ing tobacco, Murad cigarettes, Helmar, Between the Acts little cigars, and along these lines, that you are representing the P. Lorillard Tobacco Company. But later on I heard,—I couldn't say where I heard this, but I remember there was some little friction on this name, so I had a meeting, which I was having, as I said, on an average of twice a week.

X-Q. 132. About when was that?

A. What is that?

X-Q. 133. About when was this that you called this last meeting that you have referred to?

A. Sometime—You mean after I had heard what lit-
2201 tle I have heard about this friction?

X-Q. 134. Yes.

A. Well, let's see. I couldn't say whether it was the last part of 1921 or the first of 1922; I could not say.

X-Q. 135. How long did this Beech-Nut cigarette campaign continue in your—

A. Department?

X-Q. 136. —district?

A. Well, it continued until the first of this year. That is now—

X-Q. 137. The first of what year?

A. 1923.

2202 X-Q. 138. You mean the special hard drive continued till the first of 1923?

A. Yes, sir. But now we didn't work last year, 1922, Beech-Nut exclusively. We worked in our tobaccos along with it. But I would say we devoted fifty per cent. of our time to Beech-Nut cigarettes during 1922.

X-Q. 139. What occurred at that special meeting that you spoke of calling after you had heard of the friction?

A. Nothing outside of the fact I told them I had heard there was a little friction, or, at least, the Beech-Nut Packing Company was trying to cause Lorillard some trouble on using that name, so I said, "Bring out

your point very thoroughly that this brand is made by 2203
the P. Lorillard Tobacco Company in every instance." I always had done that, as far as that is concerned, in introducing this to a consumer, to even a sample consumer, "We are representing the P. Lorillard Tobacco Company," and the same thing with the retailer. "We are representing the P. Lorillard Tobacco Company."

X-Q. 140. Who is the sales manager for P. Lorillard Company immediately above you, who was at that time?

A. During the latter part of 1921?

X-Q. 141. Yes.

A. Mr. Edward Meyer.

X-Q. 142. Did you receive any instructions from him 2204
or any suggestions that you talk to your own men especially on that point—

A. No, sir, I did not.

X-Q. 143. —to caution them not to let these cigarettes go out as the product of the Beech-Nut Company that made the gum?

A. No, sir; because we made very clear to the retailer that we were representing the P. Lorillard Tobacco Company.

X-Q. 144. Had you ever received any instructions from anyone above you to that effect, asking you to warn your men not to let the Beech-Nut cigarettes be offered 2205
to the dealers as a product of the gum company?

A. No, I did not, but the Lorillard Tobacco Company would naturally think, if they had a man in charge of a division, would know, rather, that the man would represent himself to be the representative of the P. Lorillard Tobacco Company wherever he went, and his retail men would be instructed accordingly.

Mr. Johnson: Objection to the latter part of this answer as opinion only.

2206 X-Q. 145. Did you ever receive any written instructions or any circular letters from the P. Lorillard Company warning you to instruct your salesmen to be careful in that regard?

A. No, I did not.

X-Q. 146. Did you ever give the salesmen under you any written instructions to that effect?

A. No, I did not, because all of my salesmen were working out of the same office I was in, 414 Rush Street, and I would see these salesmen every morning.

X-Q. 147. Then you have never issued to salesmen under you, after receiving from anyone above you in the
2207 P. Lorillard Company, any written instructions; is that right?

A. No, I have not.

X-Q. 148. What was this friction that you heard about that you have referred to?

A. Now, Mr. Johnson, I could not tell you, because it would be impossible for me to come out and tell you what it was, and I don't remember really where I got it, to tell you the truth about the matter, I thought so little about it, I was not interested.

X-Q. 149. But you did think enough of it at that time to call this special meeting that you speak of and especi-
2208 ally speak to your salesmen at that time; is that right?

A. But I did not tell them about these things. I just impressed on their mind more thoroughly to bring out the point of using the name, you are representing the P. Lorillard Tobacco Company and we are in the tobacco business and that makes these brands, Helmar, Murad, Mogul and Beech-Nut chewing tobacco.

X-Q. 150. In your instructions during the time of the Beech-Nut cigarette campaign to your salesmen, did you emphasize the quality of the Beech-Nut cigarette?

A. Yes, I emphasized it the same as I would talk quality on Beech-Nut chewing tobacco. I think brands

like Beech-Nut chewing tobacco stand for quality; brands 2209
that are tremendous sellers all over the country are bound to be quality.

X-Q. 151. Then in your instructions to your salesmen you told them to emphasize the quality of the Beech-Nut cigarettes in presenting them?

A. Absolutely.

X-Q. 152. Have you been disappointed in the quality of the Beech-Nut cigarette?

A. No, I can't say that I have.

X-Q. 153. Have you heard any complaints or remarks from users of the Beech-Nut cigarettes as to the quality?

A. Well, I have heard complaints that the brand was 2210
a little mild. Perhaps it didn't burn just like it should, but those complaints you will hear on any cigarettes, regardless of what they are.

X-Q. 154. How did the Beech-Nut cigarettes sell during the campaign?

A. Well, they sold very nicely. Now, that is the first brand of cigarettes I ever worked, previous to that being in the tobacco department, but they took hold and sold pretty good.

X-Q. 155. In your own experience in placing these cigarettes have you found that you got many repeat orders? 2211

A. On Beech-Nut?

X-Q. 156. Yes, Beech-Nut cigarettes?

A. Yes, sir; absolutely.

X-Q. 157. When did the sales of Beech-Nut cigarettes in your district reach their height, would you say?

A. Well, I would say they reached their height about April, 1922.

X-Q. 158. Were they growing up gradually to that height, were the sales growing gradually to that?

A. Yes, they grew up gradually.

X-Q. 159. How are they selling now?

A. Well, they are not selling as well as they did.

2212 X-Q. 160. Are they selling well at all at the present time?

A. Well, the brand is moving. I wouldn't call it a Camel or Lucky Strike in sales, but the brand is not dead by any means. I am taking repeat orders from the jobbers on the brand now.

X-Q. 161. How do the sales now compare with the sales in your district at the time they were at the peak that you have referred to?

A. I haven't got the figures on that, Mr. Johnson, I could not give you—

X-Q. 162. You can give a general opinion?

2213 A. Well, I would say Beech-Nut is selling twenty per cent as well as they were; twenty per cent as well as they were.

X-Q. 163. During this Beech-Nut cigarette campaign, Mr. Brown, did you move about a good deal among stores and about the streets?

A. Yes, sir, I did.

X-Q. 164. And how many inquiries, comments or remarks did you hear in regard to who made the Beech-Nut cigarettes and as to whether they were made by the same people that make the Beech-Nut gum?

A. Well, not over half a dozen retailers asked me

2214 that question, but here is what they asked: "Do you people make the gum?" Iwould say approximately six, half a dozen dealers.

X-Q. 165. Can you describe some of those instances where they occurred?

A. No, I cannot, Mr. Johnson; I could not.

X-Q. 166. Did you make any attempt to remember such inquiries, comments or remarks?

A. No; I just enlightened the man and told him we had nothing to do with the Beech-Nut gum; that it was the Lorillard Tobacco Company that made tobacco.

Mr. Johnson: Read the question, please. 2215
(The question was read.)

X-Q. 167. Did you make any attempt to remember such instances?

A. No, I did not.

X-Q. 168. Did anyone ask you to make a note or remember any such instances that might occur?

A. No, sir. In every instance where those approximately half a dozen occurred, I explained to them very thoroughly that Lorillard made Beech-Nut chewing tobacco, Murad, Helmar and those brands of tobacco; that we had nothing to do with the gum business; we were in 2216
the tobacco business, cigarette business, and not the gum business or food commodities or anything of that sort.

X-Q. 169. You were pretty busy during that time, were you not?

A. Well, I was, naturally, as I am busy now. I was busy; yes, sir, I was. I manage to keep busy all the time, Mr. Johnson.

X-Q. 170. When you say that you have heard a half a dozen of such inquiries or remarks, you mean you do not remember any more than that?

A. No, I cannot. I never heard any more than that. I say approximately six; in all, half a dozen. 2217

X-Q. 171. Can you give the names of any of those six parties who have asked?

A. Oh, no. As I have just told you, I did not pay much attention to it, and explained to the dealer we were in the tobacco business and did not make gum and explained to him thoroughly what we made. I didn't pay much attention to it.

2218 *Cross Examination.*

By Mr. Bulkley:

X-Q. 172. I would like to ask you something about this friction which you say you heard about. Was it a matter of common talk among the salesmen or those connected with the Lorillard Company as to the friction?

A. No.

X-Q. 173. Wait a minute. This friction between the Beech-Nut Packing Company and the Lorillard Company?

2219 A. No, sir, it was not, by any retail men.

X-Q. 174. I guess you don't get the question.

A. Perhaps not.

Mr. Bulkley: Will you please, Miss Examiner, read the question?

(The question was read.)

X-Q. 175. I was not asking you as to the talk among retail men.

A. Yes.

X-Q. 176. But as to whether there was any talk among the Lorillard people with reference to this friction.

2220 A. Yes.

X-Q. 177. And was it a matter of general talk, quite a little talk about it?

A. No, it was not. As I said a minute ago, I couldn't tell you where I really did get it, but not from any of my retail men. I am quite sure. There would be no object in my telling you I knew where it come from, because I do not know.

X-Q. 178. You say you do know it was not from any retail men?

A. I say I am quite sure it was not from any retail man, but I can't tell you from where.

X-Q. 179. Did it come from somebody connected with 2221
the Lorillard Company?

A. My friend, I don't know.

X-Q. 180. You have no recollection about it at all; is that right?

A. I do not remember where it came from, but I heard there was some kind of a friction or something of the kind, and I couldn't tell you where it came from.

X-Q. 181. And was it because of what you heard that you were so cautious in instructing your salesmen to represent themselves as Lorillard people in the sales of that Beech-Nut cigarette; is that right?

A. I impressed it on their mind a little more thor- 2222
oughly. As I said, we were having these meetings about twice a week and in every instance bringing out the point: You are representing the P. Lorillard Tobacco Company. And until this date, as long as I am with the Lorillard Company, in sampling even, in sampling a man, if I offer a man on the street a sample, I say, "I am representing the P. Lorillard Tobacco Company," regardless of what else I say, bring out the name.

X-Q. 182. If there was any occasion to tell him you represented the P. Lorillard Company, you would tell him that, wouldn't you?

A. Yes, sir; certainly. 2223

X-Q. 183. And you would have told him that regardless of questions—

A. I did tell him right along.

X-Q. 184. Will you wait until I complete my question?

A. Yes, sir.

Mr. Cavanagh: Don't break in on his answer.

Mr. Bulkley: Will you please read the question?

(The question was read.)

2224 X-Q. 185. What do you mean when you say you did tell them right along?

A. My instructions was to my retail men to introduce themselves as representing the P. Lorillard Tobacco Company. When you walk into a store or when you go to sample a man, introduce yourself as representing the P. Lorillard Tobacco Company. That is my first instruction to a man.

X-Q. 186. Did you tell that to these men at these triweekly meetings which you had?

A. I told that to my men ever since I have been a head salesman: When you sample a man, tell the man
2225 that you are representing the P. Lorillard Tobacco Company and we are interested in Beech-Nut cigarette or Beech-Nut tobacco or Climax, whatever brand we may be working, and to tell him that when you call on a retail man, when you go into the store, say: I am representing the P. Lorillard Tobacco Company.

X-Q. 187. You would have told them that, to represent themselves as representing the P. Lorillard Company, whether they were selling Beech-Nut cigarettes or not, wouldn't you?

A. I did tell them, I always did tell them that; yes, sir.

2226 X-Q. 188. Yes.

A. Yes, sir.

X-Q. 189. So that you would find no occasion particularly in connection with the sale of Beech-Nut cigarettes to tell them that they represented the P. Lorillard Company, would you?

A. Not only that I would take the next meeting to impress on their mind a little more thoroughly to bring out the name Lorillard.

X-Q. 190. Now, you did this on your own initiative, did you?

A. Yes, I did.

X-Q. 191. Nobody told you to do it at all? 2227

A. No, sir.

X-Q. 192. And you did it because you said you had heard of friction between the Beech-Nut Packing Company and the Lorillard Company?

Mr. Cavanagh: The question is objected to as indefinite and we want you to refer to what portion, whether you are speaking of his general instructions to them which he gave since he has been with the cigarette company or the particular instance when he had that meeting.

Mr. Bulkley: Go ahead. Read the question. 2228

(The question was read)

X-Q. 193. Is that right?

A. Well, I did that at my meeting. I brought out this point: That you are with the Lorillard Tobacco Company. But that was nothing unusual to what I had been doing previously.

X-Q. 194. Well, what did you instruct your salesmen by way of special emphasis, having in mind the friction which you had heard about?

A. Well, I didn't say anything to them about the friction. 2229

X-Q. 195. You have said, as I understood, that in your instructions you laid special emphasis upon something?

A. Yes?

X-Q. 196. To be said or done by him in view of this friction?

A. Yes, sir.

X-Q. 197. Which you had heard of. Now, what was that special emphasis that you resorted to in instructing your salesmen?

A. Well, I just simply told them, I says in my talk: Whenever you call on a man or sample a man, bring out

2230 that point, that you represent the P. Lorillard Tobacco Company. Now, that is what I told them.

X-Q. 198. And nobody told you to do that, did they?

A. No, sir, they did not.

X-Q. 199. Over how long a period did these tri-weekly conferences last?

A. Oh, they lasted—Still have my little conferences; I talk to my boys now.

X-Q. 200. At which conferences you laid emphasis on the instructions in connection with the sale of Beech-Nut, how long did they continue?

A. Well, they continued the greater part of last year,
2231 because we put fifty per cent of our efforts on Beech-Nut in 1922, I would say as a whole, roughly speaking, fifty per cent of our time was spent on Beech-Nut.

X-Q. 201. Did you have any talk with Meyer about this situation in connection with the trouble, at any time?

A. No.

X-Q. 202. Never said anything to him at all about it?

A. Mr. Meyer was transferred to Boston the first part of the year of 1922. I had no occasion to talk to him.

X-Q. 203. Ever talk to Mr. Gay about it?

A. Mr. Gay?

2232 X-Q. 204. Yes.

A. Well, since that time I perhaps have; yes, sir.

X-Q. 205. A good many times, haven't you?

A. I wouldn't say a good many times.

X-Q. 206. Did you ever talk to Mr. Gay about it at the time you had these conferences where you were instructing your salesmen with special emphasis?

A. Well, I couldn't say that I did.

X-Q. 207. Have you any recollection about it?

A. No, sir, I haven't.

X-Q. 208. Didn't you consider it a matter of some importance at that time?

A. Well, I didn't because Lorillard is so well known 2233
all over the country, the entire United States, and we have got such big brands, powerful brands, that we identify ourselves with these big brands, I couldn't see where we were connected in any shape, way or form where the friction could come, if there were any.

X-Q. 209. Now, Mr. Witness, I am trying to confine the cross-examination to the matter in hand here.

A. Yes, sir.

X-Q. 210. And I beg you to refrain from indulging in that which is not responsive to the question.

A. Yes, sir.

2234

Mr. Bulkley: The Examiner is requested to read the previous question to the witness.

(The record was read)

Mr. Cavanagh: This witness is instructed that he can answer his questions in any way he sees fit, irrespective of what Mr. Bulkley may or may not say. When Mr. Bulkley asks a question, you answer it to the best of your ability and as you see fit.

Do not be dictating to my witnesses how they shall answer the questions.

Mr. Bulkley: I am very glad to have that instruction on the record. 2235

Mr. Cavanagh: You are entitled to have it.

Mr. Bulkley: Read the question, please.

(The record was again read)

The Witness: I answered it, didn't I?

Mr. Cavanagh: Give him the fore part of it.

(The question was again read)

X-Q. 211. Didn't it seem to you rather an unusual thing at that time that there should be friction about the use of the word "Beech-Nut"?

A. Well, no. Beech-Nut is a nut, and I would think most anybody could use that name. I couldn't see how

2236 anyone could copyright and monopolize the name of a nut.

X-Q. 212. Well, now, what I am trying to get at with you is to ascertain whether this friction which you heard about didn't make some considerable impression on your mind at the time?

A. No, sir.

X-Q. 213 It being an unusual circumstance.

A. No, sir, it did not.

X-Q. 214. Well, it made such an impression on your mind as to cause you to give instructions to your salesmen by way of emphasis, didn't it?

2237 A. Well, yes; perhaps a little bit more so. At these meetings we had been bringing that out right along.

Mr. Bulkley: That is all.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

Whereupon a recess was taken until 2:00 o'clock p. m. of the same day.

2238

2239

Chicago, February 7, 1923
2:00 o'clock p. m.

Parties met pursuant to recess.
Present: Counsel as before.

JACOB GAY, JR., called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

2240

By Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation.

A. Jacob Gay, Jr.; salesman for P. Lorillard Company; age, thirty-seven; residence, 3501 Greenview Avenue, Chicago.

Q. 2. How long have you been with the P. Lorillard Company?

A. Well, since the dissolution. I was with the old American Tobacco Company and went with the Lorillard Company right after the disintegration of the so called trust.

2241

Q. 3. Will you state briefly at what places and in what connection you have been employed or associated with the Lorillard Company since you went with them in 1911 to the present time?

A. In 1911 I was in New Orleans until about the spring; I was a retail salesman. I was transferred to Houston, Texas, in that same capacity and worked in that vicinity about five months and was transferred to Dallas, Texas, in the same capacity the same year. I remained in Dallas until 1915, when I was promoted to head salesman and transferred to El Paso, Texas. I

2242 remained there until 1917. I was sent to St. Louis in 1918, where I remained until the second day of January, 1922. I was transferred to Chicago January 3, 1922.

Q. 4. As I understand you, you were in St. Louis from 1918 until 1922, up to the first of January, 1922?

A. Yes, sir.

Q. 5. And in what capacity?

A. In the capacity of head salesman.

Q. 6. In what department, or what kind of goods did you handle?

A. I was selling the Turkish brands, the Turkish department, the Anargyros.

2243 Q. 7. Did you have a campaign on introducing the Beech-Nut cigarettes in St. Louis?

A. Yes, sir.

Q. 8. When?

A. It began on September 26, 1922—1921, rather. I beg your pardon.

Q. 9. What, if any, active part did you take in that campaign?

A. Well, I had a crew of seven men and introduced the brand of Beech-Nut cigarettes in St. Louis and worked on it continuously until December the 16th of the same year, 1921.

2244 Q. 10. What territory did you work with that Beech-Nut cigarette on that campaign?

A. I worked St. Louis exclusively.

Q. 11. How many men did you say you had?

A. Seven.

Q. 12. Tell just what procedure or method you pursued in introducing the Beech-Nut cigarette during this campaign with this crew?

A. Well, on the morning that our campaign opened on Beech-Nut cigarettes, why, I naturally would call all my salesmen together.

Q. 13. Just what you did do. Not what you would do. What you did do.

A. I called all the men together and explained to 2245
them, brought out a carton of two hundred cigarettes, showed them the packing and got each man to smoke and enlightened them on the price, which was six dollars a thousand; and explained to each man that it was a blended cigarette and that we wanted a complete distribution of the entire city. Each man was given ten cartons of two hundred each and he was supposed to sell them for cash, and as he would do that he would get instructions to put them on the counter and place advertising matter on such dealers' places.

Q. 14. How often did you give such instructions?

A. Why, every day, as far as that goes; every day. 2246

Q. 15. What instructions, if any, did you give your crew as to the manner of approaching the customer in selling the cigarettes?

Mr. Johnson: Objection to that question as leading.

A. I instructed the men that the Lorillard Company was putting out the brand— You want sampling, too?

Mr. Bulkley: Go right ahead and answer in your own way.

2247

A. The Lorillard Company was putting out the brand and we were going to give it all the publicity that we possibly could.

Q. 16. Did you sell any of those cigarettes yourself during that drive or campaign?

A. Yes.

Q. 17. Now, tell me just what you would do and what you would say when you went into the store to sell a carton of those cigarettes?

A. Well, I naturally would tell the dealer—

Q. 18. What you did do.

2248 Mr. Bulkley: Wait a minute. Let the witness answer the question.

A. I am representing the Lorillard Tobacco Company and we have got a brand of cigarettes that we are putting out on your market here, twenty cigarettes in a package, retailing for fifteen cents.

Q. 19. If this customer purchased a carton of those cigarettes from you, what did you do, if anything?

A. I would put them on the counter and put a carton card in the open carton and place a poster on the window.

2249 Q. 20. I show you some slips which are in this case as defendant's exhibit No. 10. Do you recognize those, and, if so, please tell us what they are?

A. This is a slip that is torn out of our retail order book.

Q. 21. Did you ever use slips like those, and, if so. how?

A. Every day.

Q. 22. What did you do with them?

A. Write up the dealer's order and then turn them in to the jobber.

Q. 23. Supposing the retailer paid you cash, what did
2250 you do?

A. Make a receipt on this and give him one and keep the other myself.

Q. 24. Will you please tell us which one you kept and which one you gave to the dealer or retailer?

A. I gave him the white slip, which is the original copy.

Q. 25. What did you do with the other slips? Just tell us how you used them.

A. Left them in the book. Just remained in the retail order book.

Q. 26. If a man did not pay you cash, what did you 2251
do with his order?

A. Mailed it to the jobber.

Q. 27. What jobber?

A. This jobber that he specified he wanted his merchandise through.

Q. 28. Who were these men you had on the crew at that time, can you name them?

A. I think I have a list here. I can't give the initials of all of them.

Q. 29. Give us what information you can.

A. O'Brien is one.

2252

Mr. Johnson: If you can, give his initials.

Mr. Cavanagh: He said he could not give initials.

A. Not all of them. I can give you O'Brien's initials.

Mr. Johnson: Whatever ones you have. It will save some questions.

A. W. P. O'Brien. White; I can't give his initials. Carsten, Rumpf, Quince, Imhoff. And there was another; I can't recall his name, but I think it was Andrews. 2253
However, he did not remain very long.

Q. 30. Did you personally accompany any of these salesmen when they called upon the retail trade in introducing this cigarette?

A. You mean did I go with any of them?

Q. 31. Into the stores; yes.

A. Yes, sir.

Q. 32. Well, about how often?

A. Well, every once in a while I would work with the different men, say about every third day I would be with a different man.

2254 Q. 33. Did you ever hear of any comments or inquiries or remarks by consumers to the effect or which would lead you to believe that they thought that the Beech-Nut cigarette or Beech-Nut scrap tobacco was made by the same concern that makes the Beech-Nut gum, peanut butter or other food products?

A. No.

Mr Cavanagh: Direct examination closed.

STIPULATION.

2255 It is agreed that when the witness refers to a carton of cigarettes in his direct examination he is speaking of a carton of Beech-Nut cigarettes, of a pasteboard box of two hundred cigarettes and such as has been heretofore introduced in evidence in this case as Defendant's Cross Exhibit No. 4.

Cross Examination.

By Mr. Johnson:

X-Q. 34. In about what percentage of cases, Mr. Gay,
2256 did you accompany your salesmen when they went into the dealers' stores to offer the cigarettes for sale?

A. Well, that is a difficult matter. I cannot answer that directly, because I am with them occasionally and I never keep any record of that.

X-Q. 35. But was it half the time?

A. No.

X-Q. 36. A quarter of the time?

A. No. I couldn't say—You mean any particular one salesman or with—

X-Q. 37. No, with reference to any of the salesmen, your entire crew?

A. I will say three days in a week I was with salesmen; that would give half of the time. 2257

X-Q. 38. But of all of the number of times they went into stores to offer Beech-Nut cigarettes for sale, was it a very large proportion of the cases that you accompanied the salesmen and saw what he was doing and heard what he was saying?

A. No.

X-Q. 39. It was only a small number of the cases in which you were able to accompany him?

A. There was no set time because—

X-Q. 40. You could not be with your salesmen a great deal of the time, could you? 2258

A. Could not be with them any regular portion of the time; no.

X-Q. 41. Now, of the seven men on your crew that you have given the names of, was Mr. W. P. O'Brien with the Lorillard Company before this Beech-Nut cigarette campaign was started?

A. Yes.

X-Q. 42. About how long?

A. Over a year, I know.

X-Q. 43. In what department?

A. In the Turkish department, cigarette department.

X-Q. 44. Had he been working with you in your district? 2259

A. Yes.

X-Q. 45. Is he still with the Lorillard Company?

A. I think he is.

X-Q. 46. Do you know where he is?

A. At St. Louis, if he is still with the company.

X-Q. 47. Mr. White,—do you know his initials, have you thought of his initials?

A. No, I cannot recall.

2260 X-Q. 48. Was he with the P. Lorillard Company before this Beech-Nut cigarette campaign started?

A. Yes.

X-Q. 49. About how long?

A. About seven months.

X-Q. 50. In what department?

A. Cigarettes department?

X-Q. 51. Did he work with you in that district?

A. He worked under my supervision; yes.

X-Q. 52. Is he still with the Lorillard Company?

A. I do not think so.

X-Q. 53. Did both this Mr. Brown and Mr. White
2261 work with you on the Beech-Nut cigarette campaign, from start to finish on the campaign?

A. Yes.

X-Q. 54. Right through. Do you know where Mr. White is now?

A. No.

X-Q. 55. Do you know Mr. Carsten's initials?

A. No, I do not recall them.

X-Q. 56. Do you remember his first name?

A. No, I do not.

X-Q. 57. Was he with the P. Lorillard Company when the Beech-Nut cigarette campaign started?

2262 A. Yes.

X-Q. 58. About how long?

A. About two weeks.

X-Q. 59. Did you get him for the purposes of the campaign?

A. I hired him originally to work Helmars.

X-Q. 60. Did he work right through the campaign with you from start to finish?

A. Yes.

X-Q. 61. Is he still with the Lorillard Company?

A. I do not know.

X-Q. 62. You don't know where he is at all?

A. No, I do not.

X-Q. 63. Do you know Mr. Rumpf's initials or first name? 2263

A. No, I cannot recall his.

X-Q. 64. Was he with the P. Lorillard Company when this Beech-Nut cigarette campaign started?

A. Yes.

X-Q. 65. About how long had he been?

A. About two weeks before.

X-Q. 66. Did you hire him for the purposes of the campaign?

A. Put him on to work Helmars.

X-Q. 67. Did he work with you right through the Beech-Nut campaign from start to finish? 2264

A. Yes.

X-Q. 68. Is he still with the Lorillard Company?

A. That I do not know.

X-Q. 69. Do you know where he is?

A. No, I do not.

X-Q. 70. Do you know Mr. Quince's initials or first name?

A. I think it is Ed.

X-Q. 71. Was he with the P. Lorillard Company before this campaign started?

A. Yes.

X-Q. 72. About how long? 2265

A. That I do not know. He has been with the company—

X-Q. 73. Had he been with them a long time?

A. A long time; yes. In fact, he was transferred to me during the life of this Beech-Nut cigarette campaign.

X-Q. 74. What department was he transferred to you from?

A. From the plug and smoking department.

X-Q. 75. Did he start the campaign with you?

A. Yes.

X-Q. 76. Did he work right through to the finish of the campaign?

2266 A. Yes.

X-Q. 77. Is he still with the Lorillard Company?

A. I think he is.

X-Q. 78. Do you know where he is?

A. In St. Louis, I guess.

X-Q. 79. Do you know Mr. Imhoff's initials or first name?

A. No, I do not.

X-Q. 80. Was he with P. Lorillard Company before the Beech-Nut cigarette campaign started?

A. Yes.

X-Q. 81. About how long?

2267 A. Oh, I don't know. He too was transferred from the plug and smoking.

X-Q. 82. Was he an old employe?

A. Yes.

X-Q. 83. Did he start the campaign with you?

A. Yes.

X-Q. 84. And worked right through to the end with you?

A. Yes.

X-Q. 85. Is he still with the Lorillard Company?

A. That I do not know.

X-Q. 86. Do you know where he is at all?

2268 A. No, I do not.

X-Q. 87. What was the name of the seventh man?

A. I do not recall, but he was an old employe.

X-Q. 88. Did he start the campaign with you?

A. Yes.

X-Q. 89. Worked right through to the end with you?

A. No. Worked probably a week or more. He was taken sick and he resigned.

X-Q. 90. Do you know what was the matter with him?

A. No, I do not. He was transferred from the Beech-Nut scrap department.

X-Q. 91. Do you mean he resigned from this Beech-Nut cigarette campaign or from the Lorillard Company?

A. From the company. 2269

X-Q. 92. Did he join the company again, do you know?

A. Not that I know of; no.

X-Q. 93. Is he still living?

A. That I do not know.

X-Q. 94. You do not know where he is?

A. No, I do not.

X-Q. 95. Did you have any other men for this Beech-Nut cigarette campaign at all?

A. No. None other than the number I mentioned.

X-Q. 96. Did you have occasion to reprimand or find fault with the work of any of them during the Beech-Nut cigarette campaign? 2270

A. No, not generally.

X-Q. 97. Do you remember any instances where they did not follow your instructions and were reprimanded by you?

A. None other than not getting enough business, maybe on one or two occasions of them not getting enough business on the street.

X-Q. 98. During this Beech-Nut cigarette campaign did you see in your distrtict any circulars or circular letters from the P. Lorillard Company offering additional compensation to salesmen for increasing the sales of Beech-Nut cigarettes? 2271

A. I knew that the company offered twenty-five cents a thousand for the jobber salesmen to work the brand.

X-Q. 99. Was that all during the campaign or for a particular period?

A. A particular period, I think.

X-Q. 100. Did you see any circulars on that?

A. I do not recall of seeing one; no.

X-Q. 101. Did you ever receive any special instructions from any of your superiors in the P. Lorillard Company in regard to the Beech-Nut cigarette sales, in regard to the selling of the Beech-Nut cigarettes?

A. Any special instructions?

2272 X-Q. 102. Yes.

A. No, I can't say that I have; none different than in any other campaign.

X-Q. 103. Did you receive any written instructions or circulars covering the methods to be used during this Beech-Nut cigarette campaign?

A. No, I can't say that I have.

Mr. Johnson: That is all.

Mr. Cavanagh: No redirect.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the wit-
2273 ness to the foregoing deposition was waived.

Whereupon an adjournment was taken until Thursday, February 8, 1923, at 10:00 a. m.

Chicago, February 8, 1923

10:00 o'clock a. m.

Parties met pursuant to adjournment.

Present: Counsel as before.

FRANK C. DEGAN, called as a witness on behalf of the
2274 defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Cavanagh:

Q. 1. What is your name, age, residence and occupation?

A. Frank C. Degan, 1106 Wrightwood Avenue, Chicago; forty-five years old; salesman for the P. Lorillard Company.

Q. 2. How long have you been connected with the P. 2275
Lorillard Company?

A. Seven years; 1916 was the year that I came with them.

Q. 3. And in what departments and what capacities?

A. In the plug and smoking department continuously.

Q. 4. As a salesman?

A. As a salesman.

Q. 5. Where are your headquarters at present located?

A. 414 Rush Street, Chicago.

Q. 6. And under whose supervision do you work? 2276

A. Mr. W. H. Brown.

Q. 7. Now, Mr. Degan, do you recall or were you directly connected with the introductory campaign of the Beech-Nut cigarette in the territory where you were working?

A. As a salesman; yes, sir. Distributed it, if that is what you mean; yes, sir.

Q. 8. When did you first start to distribute this Beech-Nut cigarette in an introductory campaign?

A. On the morning of September 6th or 7th. It was the morning after Labor Day in the year 1921. Labor Day was on Monday, whether it was the 6th or 7th, it 2277
was the next morning; Lockport, Indiana. We left here on the evening of Labor Day. That was a holiday; it was for us.

Q. 9. Did you work under the supervision of anyone and, if so, whose supervision?

A. I would have to stop and think a minute.

Q. 10. Who was in charge of your crew?

A. I was just thinking. There was a change about that time. Mr. W. H. Brown; yes.

Q. 11. Did you take part in any such introductory campaign in Chicago?

2278 A. Yes, sir.

Q. 12. When did you start that campaign and when did it end, as far as the active campaign was concerned?

A On September 26th, approximately, and ended the end of that year; ended December 15th or 16th, somewhere around there, when we went on our vacations for the holidays; that was the active campaign.

Q. 13. As I understand, you were a member of Mr. Brown's crew in introducing this Beech-Nut cigarette to the trade?

A. Yes, sir.

2279 Q. 14. Did Mr. Brown give you any instructions as to how to proceed with the introduction of this cigarette to the trade, and if so, please tell us, in your own words, just what those instructions were.

A. Why, yes, we were instructed to explain to the dealer it was a combination of the various domestic tobaccos with a sprinkling of Turkish, and, of course, I explained to start with that we always explained to the dealer when we went in the place that we represented the Lorillard Tobacco Company and we manufactured brands such as Murad cigarette, Union Leader, Climax, Beech-Nut Scrap; that was for the purpose of
2280 identifying ourselves, as far as the dealer was concerned. Our instructions always had been to give them to understand we were from the Lorillard Company. The purpose of that was, I imagine, that the dealer would not forget us. We wanted him to remember our faces and we wanted him to know that we represented the Lorillard Tobacco Company as distinguished from a great many other companies.

Q. 15. How often did you receive such instructions from Mr. Brown, how often would they be given?

A. There were salesmen's meetings, we might call them, I should say several times a week, yes, at least that.

Q. 16. Where were you when these instructions would be given or these salesmen's meetings held? 2281

A. At the warehouse or depot, 414 Rush Street.

Q. 17. At what time of the day would these meetings usually be held?

A. Always before we left in the morning.

Q. 18. What do you mean by "left in the morning?"

A. Before we went out on our territory.

Q. 19. Now, when you went to call on the trade in introducing this Beech-Nut cigarette during this campaign, did you carry any materials with you and, if so, what?

A. Well, we carried stock, if that is what you want to know. I believe we started with ten cartons of the cigarette and sold them for cash. We had posters also. Was it the yellow—yellow posters; yes; and later on a tin sign that we were required to carry. 2282

Q. 20. And what did you do with these cartons of Beech-Nut cigarettes that you carried with you? Did you sell these to the customer or what?

A. We sold those for cash, the cartons that we carried with us.

Q. 21. What did you do with the advertising?

A. Pasted them on the window where we could, and where that was not possible got the best possible location for them on the dealer's store front, of course. 2283

Q. 22. Now, when you called on a customer, say a retailer, in introducing this Beech-Nut cigarette, what sales talk did you give him or what did you say to him?

A. As a rule—I will use this carton to illustrate—

Mr. Cavanagh: Witness refers to a carton of Beech-Nut cigarettes on the table before him.

A. A great many of the trade I was familiar with. I would tell them: "Harry, this is a Lorillard Beech-Nut cigarette. You have heard of it." They had

2284 heard of it because they were placed pretty generally throughout the territory before they came into Chicago and the better class dealers had heard of them. "It is a combination of Burley and some Virginia tobacco. It is a well wrapped piece of goods. Miid, somewhat milder than the average run of the fifteen-cent cigarettes. It will cost you $1.12 a carton net." I always quoted the net prices where it was a cash proceeding. Otherwise it resulted in an argument on discounts. Now, there was a little yellow slip we had in all of them, I used to make it a practice to put in the end of the carton, just as this is (indicating), and set it up on
2285 the dealer's case as a rule. Now, that was the substance of what I told them, as far as the selling end of it was concerned.

Q. 23. Was that all you told them?

A. Well, there would be other— Sometimes there would be a little selling argument, Mr. Cavanagh. They might say sometimes they had no outlet for a new brand and in that case I would explain to them as far as I could that our brands were all big sellers and call their attention again to our Climax or our Union Leader and our Beech-Nut Scrap tobacco, and explained to them that there was every reason to believe that this
2286 would be just as good a seller as our other brands. That was the substance of it, practically.

Q. 24. I show you some slips which are pinned together, which are in this case as defendant's exhibit No. 10. Can you identify those slips and, if so, tell me what they are?

A. I can identify those as being the Lorillard order blanks. It should have a tissue in here, or two of them. These are the original and duplicate of the Lorillard Tobacco Company order blank.

Q. 25. Did you ever use slips like these in your business?

A. Yes, sir. 228

Q. 26. What did you do with them?

A. We would use them wherever we got an order.

Q. 27. How did you use them? Just tell us.

A. If it was a cash order it was: Mark the date and "Cash" in here (indicating), the man's name, the street address and the merchandise and the character of it. Two hundred Beech-Nut cigarettes, $1.12; down across the face of it "Paid, Degan." The dealer was given the yellow slip. That is the purpose of it, either as a receipt or memorandum of his order, either one of the two. That is what they were used for. There should be a tissue of that; that stays in the book. 228

Q. 28. Did you ever sell or are you now selling the Beech-Nut scrap tobacco to the trade? If so, tell us just about what you have done in this line.

A. I am selling it at present; yes; I have been since the beginning of 1922. What was the other question?

Q. 29. Had you sold any of the Beech-Nut scrap before this?

A. Before 1922?

Q. 30. Yes.

A. To the best of my knowledge, no. I think we got that brand at the beginning of 1922.

Q. 31. What department were you working in before 1922? 228

A. Plug and smoking. I might explain, previous to that time the Beech-Nut scrap department was a separate department of the Lorillard Company.

Q. 32. So you personally began selling the Beech-Nut Scrap in 1922?

A. Yes, sir.

Q. 33. Now, have you ever heard of any comments or remarks or inquiries from customers or others to the effect or which would lead you to believe that they thought the Beech-Nut cigarette or the Beech-Nut

2290 Scrap tobacco was made by the same people that make the Beech-Nut gum or Beech-Nut peanut butter?

A. No, sir.

Q. 34. Are you still selling the Beech-Nut cigarette?

A. Yes, sir.

Q. 35. Are you still selling the Beech-Nut Scrap tobacco in your territory?

A. Yes, sir.

Mr. Cavanagh: Direct-Examination closed.

Cross-Examination

2291 By Mr. Johnson:

X-Q. 36. What was your district, Mr. Degan during this Beech-Nut cigarette campaign?

A. We had no particular section. We were assigned to different streets or territories from day to day.

X-Q. 37. What was the whole district that you were engaged in working in?

A. In Chicago, you mean?

X-Q. 38. Yes. Anything outside of Chicago?

A. Lockport, Indiana; Peru; Rochester; Monon; Rensselaer.

2292 X-Q. 39. Was your territory the whole district of Indiana or some portion of Indiana?

A. We were sent to Lockport and while we were there we received a slip from Mr. Brown—I had another man with me—which gave us towns we were to make, and they were the towns I have mentioned. There were several more, if you will let me finish.

X-Q. 40. If you can remember them.

A. I think so.

X-Q. 41. The others that you can remember.

A. North Judson, Shelby, Hammond, I think that is all, to the best of my recollection.

X-Q. 42. Was that in addition to the district of 2293
Chicago?

A. Yes, sir.

X-Q. 43. When you were working the district of Chicago, what portion of it was assigned to you?

A. Mostly the South and West Side.

X-Q. 44. South of any particular boundary street?

A. Madison and south.

X-Q. 45. Did you work that territory with other salesmen?

A. You mean in connection with other salesmen or in company with—

X-Q. 46. Were there other salesmen working that 2294
same territory during that Beech-Nut cigarette campaign?

A. Oh, yes.

X-Q. 47. Who were they, if you can remember?

A. No, I can't answer that question. There were so many of them and the most of them were strangers to me. They were men that had been put on at the time the campaign started.

X-Q. 48. Whose crew was that?

A. At that time they were under the general head of a Mr. Sherrock. I may be wrong about that, but that is the best of my recollection; and I worked under Mr. 2295
Brown. I think there were half a dozen others that were under Mr. Brown's direct jurisdiction in this work, and a Mr. Sherrock had charge of the Beech-Nut cigarette as a whole, but the plug and smoking department took the active part in it, in view of the fact that it was a Lorillard brand and they wanted to get as rapid and thorough a distribution as possible.

X-Q. 49. Was this Mr. Sherrock in charge of the Beech-Nut cigarette campaign for the City of Chicago?

A. I do not hesitate because I know—I can only explain that event this way: Presumably that after the

2296 campaign was over the Beech-Nut cigarettes were entirely under Mr. Sherrock's jurisdiction. We were then the plug and smoking department, but Mr. Sherrock was considered the head of the Beech-Nuts, as I understand.

X-Q. 50. Did he have a crew during this period of September 26th to the end of 1921 working on the South Side in the City of Chicago, at the same time you were working that part of the city?

The witness: Read that question.
(The question was read)

2297 X-Q. 51. That was during the Beech-Nut cigarette campaign in Chicago?

A. Yes, they were over the city in general. I can't say they were on the South-Side any more than the North Side, Mr. Johnson. We had no side, if I remember rightly, no side district. Now, his men may have had. Mr. Brown's did not, to the best of my knowledge. I may be wrong. This was a year and a half ago.

X-Q. 52. Mr. Sherrock had a crew of men out simply at the same time, did he?

A. Yes, sir.

2298 X-Q. 53. You say these men were not old Lorillard employes?

A. My recollection is that the majority of them were not old Lorillard employes.

X-Q. 54. Were they men hired just for the occasion?

A. That is to the best of my recollection.

X-Q. 55. Can you remember the names of any of that crew of men of Mr. Sherrock's?

A. Well, we have in the smoking and plug department two of them at present.

X-Q. 56. Who are they?

A. A. Winkelman.

X-Q. 57. How do you spell that? 2299

A. W-i-n-k-e-l-m-a-n.

That answer is wrong. I should have said one. We had another one, but he was transferred to Denver.

X-Q. 58. Do you know whether Mr. A. Winkelman was employed by the Lorillard Company for the first time for this Beech-Nut cigarette campaign?

A. To the best of my knowledge, that was the first time he worked for Lorillard.

X-Q. 59. What is the name of the man who went to Denver?

A. Arthur Mayburn. M-a-y-b-u-r-n, I think that is.

X-Q. 60. Do you know whether he was hired for the 2300
first time by the Lorillard Company to engage in this Beech-Nut cigarette campaign?

A. That is my recollection.

X-Q. 61. Have you ever heard any discussion at all, or any questions asked as to who made the Beech-Nut cigarette?

A. You mean the dealer?

X-Q. 62. Anybody.

A. That question is rather broad, Mr. Johnson. I wouldn't know just how to answer that. I would have to answer it in blanket no.

X-Q. 63. Anybody on your rounds as you have gone 2301
about the City of Chicago or your Indiana district?

A. Oh, I heard once or twice, not over that, I don't think, they would ask or make the comment: "This is not made by the people that make the gum, is it?" I have had that occur to me once or twice. They seemed to take it for granted that it was not.

X-Q. 64. Can you describe where or when such incidents as that occurred?

A. No, I cannot. I attached no importance to them at the time at all; none whatever. I had made a practice of giving the dealer to understand that I was from the Lorillard, the Climax and the Beech-Nut Scrap house.

2302 That was, as much as anything, because I wanted him t. remember me. I wanted him to remember me.

X-Q. 65. You have heard a few instances of that kind of questions and discussions, have you?

A. No discussion. It was just a casual remark: "This is not made by the gum house." I have heard that once or twice; I do not know where or when.

X-Q. 66. Did you make any effort to remember such incidents, if they occurred?

A. No, sir.

X-Q. 67. Did anyone ever ask you to make a note of them or remember them?

2303 A. No, sir.

X-Q. 68. When you say there were only one or two such remarks that you heard, you mean you do not remember any more than that, do you not?

A. Certainly. Certainly. It seems to me if there were more I might have had in mind where they occurred. That is why I say one or two.

X-Q. 69. Were you under Mr. Wade H. Brown during this Beech-Nut cigarette campaign?

A. Yes, sir.

X-Q. 70. Did you ever receive any written instructions from Mr. Brown covering your work in connection
2304 with this campaign,—any written instructions?

A. Not that I remember.

X-Q. 71. In offering these Beech-Nut cigarettes for sale, did you emphasize the quality of the cigarette?

A. Not more than I would any other one of our brands, I don't think. I made it a practice to speak quality in practically everything that Lorillard manufactured. I have, I think, good reason to believe that is a good selling argument with us and we use it. The fact that our brands are sellers as they are would indicate that quality has something to do with it.

X-Q. 72. Have you heard any complaints or remarks 2305
from people who have used the cigarette as to the quality of the Beech-Nut cigarette?

A. Yes, I have.

X-Q. 73. Of what nature?

A. They varied. Occasionally I would find a man that said they were too strong. Another man said they were too mild.

X-Q. 74. How did they sell at first?

A. You mean the outlet?

X-Q. 75. In your experience, how did they sell after the campaign opened?

A. Well, it was an intensive campaign and they sold, 2306
I think, as good as could be expected. I can't answer your question any further than that.

X-Q. 76. Did you make comparatively large sales?

A. No, I did not. I did not make any comparatively large sales personally.

X-Q. 77. Would you say they sold pretty well at the start?

A. For a new cigarette; yes.

X-Q. 78. Did the sales increase as the weeks and months went by?

A. I had no figures.

X-Q. 79. This is your own experience? 2307

A. They held about even, I should judge, I imagine they did, while we continued our advertising.

X-Q. 80. How are they selling to-day?

A. They are not selling as well, due to the lack of advertising, I think. We are doing no work in an advertising way.

Mr. Johnson: That is all.

2308 *Re-direct Examination.*

By Mr. Cavanagh:

R-D. Q. 81. If you had heard any appreciable or frequent number of remarks as to whether or not the Beech-Nut cigarette was made by the same people as the Beech-Nut gum, you would have remembered the fact?

A. Oh, yes.

R-D. Q. 82. As I understand it, when you started the Beech-Nut campaign, you started it about September 6, 1921, in Indiana, did you not?

2309 A. Yes, sir.

R-D. Q. 83. And then you subsequently came to Chicago about September 26, 1921?

A. Yes, sir.

R-D. Q. 84. And you were loaned from the plug and smoking department for this campaign, were you?

A. Yes, sir.

R-D. Q. 85. Now, you have stated in your direct examination that you received word from Mr. Brown as to what cities to cover in Indiana. Were those written instructions, do you recall?

A. Mr. Brown came to the hotel in Lockport and we
2310 wrote down, he and I—who don't know, which of us,—the names of those cities that Mr. Brown wanted me and the other salesmen there to make.

Mr. Cavanagh: That is all.

Mr. Johnson: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

2311

PHILIP LUDWIG BURGESON, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Cavanagh:

Q. 1. Please state your name, age, residence and occupation?

A. Philip Ludwig Burgeson; I am twenty-nine; 3802 North Paulina Street, Chicago; salesman for the P .Lorillard Company.

2312

Q. 2. How long have you been connected with the P. Lorillard Company?

A. It will be three years April 17, 1923; that is, since April, 1920.

Q. 3. What department of the Lorillard Company did you start with and where?

A. I started in the plug and smoking, with Mr. Edward Meyer.

Q. 4. Where?

A. At Kinzie Street; the office was at that time on Kinzie Street, Chicago.

2313

Q. 5. Did you take part in any introductory campaign of the Beech-Nut cigarette in the Chicago territory?

A. Yes; both in Chicago and Indiana.

Q. 6. When?

A. We started in October—or September 6th.

Q. 7. What year?

A. That is 1921. We started in Indiana. I started it in South Bend, Indiana.

Q. 8. How long did you work in India on that campaign?

2314 A. About four weeks in Indiana, three or four weeks.

Q. 9. And when and how long did you work it in Chicago?

A. Oh, we worked it in Chicago from the 26th of the same month, we worked it until Christmas time of the same year, for introductory work is what I mean.

Q. 10. Under whose supervision did you work?

A. Under W. H. Brown.

Q. 11. Now, in connection with this campaign I understand you worked as a member of Mr. Brown's crew?

2315 A. Yes, sir.

Q. 12. Did you receive any instructions from Mr. Brown as to how to do your work in this campaign or present the Beech-Nut cigarettes to the trade?

A. Yes, sir, we did receive instructions about two or three times a week how to sell and advertise the brand.

Q. 13. Where were these instructions given to you?

A. Given right at the office, 414 Rush Street.

Q. 14. What time during the day?

A. Well, from eight o'clock until—between eight and nine in the morning, just before we went out on our
2316 territories.

Q. 15. What instructions did you so receive from Mr. Brown? State in your own words.

A. Well, we received instructions—we received our advertising and our cigarettes and then also how to sell and advertise the brand.

Q. 16. What did he tell you in respect to selling and advertising the brand?

A. Well, for instance: "We are with the Lorillard Company," as Mr. Brown always would state to us the Lorillard Company. "We are putting on a new cigarette called Beech-Nut. Perhaps a lot of dealers have

heard of it, of course." Then, of course, if we did not 2317
sell the dealer we would put up our advertising and also mention our other brands such as Murads, Helmars, Deities; also Climax. Then we would never forget to mention our famous brand, Beech-Nut chewing tobacco.

Q. 17. You refer to the Beech-Nut Scrap?

A. Yes, Beech-Nut chewing. We do not call it scrap any more, Mr. Cavanagh; we call it chewing.

Q. 18. Now, when you called on the dealer to introduce the cigarette, after receiving these instructions, what selling talk did you give the dealer, what did you say to him and what did you do? 2318

A. Well, I would come in and say I represented the Lorillard Tobacco Company; that we were putting on a new brand of cigarettes and he perhaps had heard of them; that they were called the Beech-Nut cigarettes. Then we would talk about some of our other brands I would say, "I suppose you know we also manufacture the Beech-Nut Scrap tobacco and the Climax, and so forth." Ask him how our other brands were going; also state that they were also made by the P. Lorillard Company, all these brands.

Q. 19. What did you do with the advertising that you took into the store? 2319

A. The advertising, we would try to get some inside and some outside, wherever there was a space for it, we would ask the dealer's permission in order to put it up. Always that is our biggest point, advertising; we have got to get advertising.

Q. 20. When you went into this dealer's place you took some of the cartons of cigarettes with you, as I understand?

A. Yes, sir, I sold off a car so I always carried a big supply on the car with me; I always did.

Q. 21. If the dealer made a purchase, what did you do, what procedure would you follow?

2320 A. We would have an order blank just like that (indicating).

Mr. Cavanagh: Witness refers to Defendant's Exhibit No. 10, order receipt.

A. We would make out the order to the amount sold and then we would give him the yellow sheet and keep the white one ourselves, and if it was sent through the jobber,—sometimes the dealer did not want it direct,—we would give him the same one, the yellow one, and send the white one to the jobber and keep our own
2321 record on the tissue sheet.

Q. 22. Have you ever personally sold the Beech-Nut Scrap tobacco for P. Lorillard Company to the trade?

A. I have in the last year, from the first—the year before 1922—from the first of the year, when the Beech-Nut was tranferred over to the plug and smoking. Before that time it was a separate department.

Q. 23. Now, have you ever heard of any questions or comments or remarks from customers or any other person or persons to the effect or which would lead you to believe that they thought the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco were made by the same people
2322 that make the Beech-Nut gum or Beech-Nut peanut butter or food products?

A. Well, I have perhaps as high as two or three times. A dealer would say, "Do you also make the Beech-Nut gum?" Of course, it would not be our big dealer that would say that; it would be some of the peanut stands, as we would say, that would say that. Two or three times at the highest.

Q. 24. What was your answer on those occasions?

A. "We only make smoking articles." Always say Beech-Nut gum is a food product and we do not make food products. We make eighty-five of the Turkish

brands that are on the market. We do not manufacture any food products whatsoever. 2323

Cross Examination.

By Mr. Johnson:

X-Q. 25. You did, then, Mr. Burgeson, hear some questions and discussion as to whether the Beech-Nut cigarettes were made by the gum people?

A. Yes, naturally I would, on account of being the same name, but not as much as we did expect.

X-Q. 26. Can you describe any of those incidents? 2324

A. No, I can't; I can't remember.

X-Q. 27. Can you say where they took place?

A. No, I cannot remember that. That is impossible. We paid no attention to it. I do not remember.

X-Q. 28. You did not try to remember such incidents as they happened, you did not try to remember them?

A. No, I did not.

X-Q. 29. Did anyone ever ask you to remember them or make a note of them?

A. No; not to make a note of them.

X-Q. 30. You had no reason then to try to remember them? 2325

A. No, I did not.

XQ. 31. When you say there were only two or three such instances then, do you mean that there were only two or three that you remember?

A. Well, I wouldn't say that no. It may not be that many, but I remember of hearing some. I couldn't exactly say whether it was two or three, one or two.

X-Q. 32. During the Beech-Nut cigarette campaign, did you go around any of the time with another salesman?

A. At the time I took part of Indiana and another man took the other part of Indiana, a few counties. I

2326 had one man with me, but never with me on the same car. He was never with me. I told him where to go. I had South Bend and a few other towns.

X-Q. 33. That is what I mean, you did not go into the same stores?

A. No. That is just what I am trying to explain.

X-Q. 34. Then when you said on your direct testimony, "We would do this and we would do that," you mean you, yourself?

A. Me, myself, of course. I did not mean—When we talk about our company we say "we," of course. We do not say "I."

2327 X-Q. 35. But you cannot say, can you, what the other salesmen said and did when they went into the stores?

A. No, I cannot. Everyone uses a different line of sales talk, of course. We are all instructed the same, but finally drift into our own.

X-Q. 36. Can you give the names of the Indiana towns that you worked during the Beech-Nut cigarette campaign?

A. Give the names of what?

X-Q. 37. Of the towns?

A. No, I can't. I remember I worked South Bend
2328 and Benton Harbor, but there was a lot of small towns, maybe only two or three dealers in. I have got the records of it, if you want it, but I can't remember.

X-Q. 38. Can you remember any more than that?

A. It is hard to remember those little burgs, you know, as we call them. We put it all on record when I have seen the dealer and I have forgotten all about them towns and everything. I am through with them.

X-Q. 39. When you were working the Chicago district, what part of Chicago did you yourself work in?

A. Both the North Side—

X-Q. 40. I am speaking of the Beech-Nut cigarette campaign.

A. Both the North Side and the South Side. We worked streets, of course, take street after street, and we are assigned to a different street every morning. 2329

X-Q. 41. Did you work mostly the South Side or mostly the North Side?

A. That I could not say; just about the same, I think.

X-Q. 42. Were there any other crews out besides this crew of yours under Mr. Brown?

A. Why, that was only at the time we were out in Indiana that we were split up in small crews. Otherwise we would work directly under Mr. Brown.

X-Q. 43. But I mean besides Mr. Brown's crew, do you know of any other crews who worked the City of Chicago during this Beech-Nut cigarette campaign? 2330

A. No, only Mr. Brown's crew worked here at that time.

X-Q. 44. In offering these Beech-Nut cigarettes to the trade, did you emphasize the quality of the cigarettes?

A. Yes. Told them it was a very mild cigarette and it was cheaper than the other cigarettes and giving them just as good quality as the others we sold at higher prices.

X-Q. 45. Did you hear any complaints as to the quality of the Beech-Nut cigarettes?

A. Yes, we did. We always heard it was too mild, didn't suit the people; too mild. That is the complaint we heard all the way around; that is why we never made a success of Beech-Nut cigarettes. 2331

X-Q. 46. Did they sell pretty well at first, in your experience?

A. Yes, at first they sold fairly well.

X-Q. 47. About how long did they continue to be a good seller?

A. Well, that is hard to say; perhaps about two or three months they were good sellers.

2332 X-Q. 48. How are they selling now?
A. Not very good.

Mr. Johnson: That is all.

Re-direct Examination.

By Mr. Cavanagh:

R-D. Q. 49. If you had heard any appreciable number or frequent inquiries as to whether the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum, would you have remembered such in-
2333 stances?

A. I would not have remembered where it was, Mr. Cavanagh.

R-D. Q. 50. Would you remember the fact?

A. Yes, I would.

R-D. Q. 51. You said on your cross examination that Mr. Brown had the one crew here in Chicago; is that right?

A. That is at the time when we put on the cigarettes, but later on Mr. Gay was transferred over here. That was in 1922.

R-D. Q. 52. Was there a Mr. Sherrock here?
2334
A. I did not work under Mr. Sherrock.

Pardon me. I made a slip there. Mr. Sherrock was here too.

R-D. Q. 53. For information, what is Mr. Sherrock's position here, what is he?

A. He is not here any more.

R-D. Q. 54. What was he at that time?

A. He was head salesman for the Beech-Nut cigarettes. Of course, we were in the plug and smoking and also assigned to work Beech-Nut cigarettes at the time when Beech-Nut cigarettes were put out and everybody

was put on them in the plug and smoking, out of the plug and smoking, were put on this Beech-Nut crew. 2335

Re-cross Examination.

By Mr. Johnson:

R-X. Q. 55. Then do I understand you now to say t during the Beech-Nut cigarette campaign in Chic there was another crew or other crews working the C of Chicago?

A. Yes, there was a Beech-Nut crew that had nc ing to do but with Beech-Nut cigarettes.

2336

R-X. Q. 56. Do you know how many of such other crews there were?

A. There was only one crew here that was charged under Mr. Sherrock.

R-X Q. 57. Did you know the men on that crew?

A. No; none of those men are left.

R-X. Q. 58. Could you name any of them?

A. Well, there was— No, I couldn't. I was never in contact with them, because we had our department and did not pay any attention to them at all.

R-X. Q. 59. Were they old Lorillard employes, do you know?

2337

A. No, they were not. They were hired just for the present time, I guess, for the campaign.

Mr. Johnson: That is all.

Mr. Cavanagh: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

WHEREUPON a recess was taken until 2:00 o'clock p. m. of the same day.

Vol. III

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 240

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 3, 1926.

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)

(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORRILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

VOLUME III

INDEX.

	Page
Testimony of William G. Sues	1657
J. S. Weiner	1671
David Kossack	1680
William Getzelman	1688
B. Ganek	1706
John A. Weber	1712
Nathan Adelman	1721
Jacob Shanfield	1733
William Steidinger	1744
Carl A. Paulsen (stipulated)	1756
Frank Goldstein (stipulated)	1758
L. S. Jones (stipulated)	1760
Charlie Friedman (stipulated)	1762
D. H. Kropp (stipulated)	1764
D. A. Rogoff (stipulated)	1766
M. S. Winerlack (stipulated)	1763

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

F15968

	Page
Testimony of O. H. Olsen (stipulated)	1770
A. Thompson (stipulated)	1772
A. Christianson (stipulated)	1774
C. Biasetti (stipulated)	1776
J. W. Corey (stipulated)	1778
A. Henderickx (stipulated)	1780
Morris Gold (stipulated)	1782
M. W. Masor (stipulated)	1783
A. W. Schreiber (stipulated)	1785
C. H. Kappmeyer (stipulated)	1787
Wm. T. Vanbactor (stipulated)	1790
Harry Bernard (stipulated)	1792
Jake Kurland (stipulated)	1793
C. P. Burdick (stipulated)	1795
R. A. Carter (stipulated)	1797
J. M. McGowan (stipulated)	1799
Norman A. Lynch (stipulated)	1801
James A. Henderson (stipulated)	1802
T. A. Walker (stipulated)	1804
H. C. Chandler (stipulated)	1805
John Gross (stipulated)	1808
D. W. Holbrook (stipulated)	1809
Dean S. House (stipulated)	1811
C. W. Kirby (stipulated)	1813
H. L. Grant (stipulated)	1815
I. H. Rider (stipulated)	1817
Allison James (stipulated)	1818
F. A. Smithdeal (stipulated)	1820
E. W. Hanron (stipulated)	1822
E. I. Fater (stipulated)	1824
E. S. Gulyear (stipulated)	1826
M. E. Parthemas (stipulated)	1828
John H. Monteath (stipulated)	1830
L. J. Wilson (stipulated)	1832
Fred Hester (stipulated)	1835
J. R. Shedd (stipulated)	1837
Sam Carnaggio (stipulated)	1839
M. L. Moore (stipulated)	1841
S. A. Sabbagha (stipulated)	1842
R. L. Burnett (stipulated)	1844
A. B. Tomlinson (stipulated)	1846
J. F. Drake (stipulated)	1847
J. J. Bates (stipulated)	1849
R. L. Waldrop (stipulated)	1852
C. W. Ridgway (stipulated)	1854
P. R. Jameson (stipulated)	1856
John D. Ashmore (stipulated)	1858
J. O. Sloman (stipulated)	1860
T. J. Sayle (stipulated)	1862
F. C. Calder (stipulated)	1864
Roy McDonald (stipulated)	1867

Page

Testimony of W. E. Douglas (stipulated) 1869
A. R. Smith (stipulated) 1871
F. W. Geiss (stipulated) 1874
J. Blaufield (stipulated) 1876
C. F. Crawford (stipulated) 1878
George H. Bell (stipulated) 1880
Stipulation re testimony of certain witnesses 1881
Testimony of L. M. Lavin (stipulated) 1884
Emmet Howard (stipulated) 1886
J. E. Craven (stipulated) 1888
L. R. Bramblett (stipulated) 1890
Louis Evers (stipulated) 1892
F. Odell (stipulated) 1894
H. A. Taylor (stipulated) 1896
Charlie Bradshaw (stipulated) 1898
E. R. Turner (stipulated) 1900
Wm. H. J. Meyer (stipulated) 1902
W. P. Schaefer (stipulated) 1904
J. G. Block (stipulated) 1906
H. G. Saam (stipulated) 1908
J. E. Cobb (stipulated) 1910
H. R. Petty (stipulated) 1912
A. De King (stipulated) 1915
W. B. Zulwood (stipulated) 1917
Bertha Rosenfield (stipulated) 1920
J. L. Shinfessel (stipulated) 1921
Stipulation re testimony of certain witnesses 1923
Testimony of P. J. Rosswog (stipulated) 1925
M. Borenstein (stipulated) 1928
A. J. Fleischauer (stipulated) 1931
A. Gorenstein (stipulated) 1933
Henry Rivlin (stipulated) 1936
Chas. F. Smith (stipulated) 1938
J. E. Detwiler (stipulated) 1940
Louis Huck (stipulated) 1942
A. Petty (stipulated) 1944
A. Kidner (stipulated) 1946
Jos. H. Rosswog (stipulated) 1948
M. J. Farrell (stipulated) 1950
Wm. C. Dickel (stipulated) 1952
S. Samuels (stipulated) 1954
Max Seltzman (stipulated) 1956
A. W. Meyers (stipulated) 1958
M. J. Murray (stipulated) 1960
Stipulation re testimony of certain witnesses 1962
Testimony of Aleck Bolton (stipulated) 1964
J. Elmer Freese (stipulated) 1966
Thomas P. Hayes (stipulated) 1968
J. F. Reinacker (stipulated) 1970
E. B. Potts (stipulated) 1972

	Page
Testimony of W. J. Kaiser (stipulated)	1974
E. Sayer (stipulated)	1975
P. P. Naufel (stipulated)	1978
L. M. Dorsey (stipulated)	1980
William J. Dolan	1985
William H. Norton	1993
John Racow	2012
Phllip Gerardi	2023
Benjamin Saletan	2030
Joseph A. Tevlin	2036
B. T. Miller (stipulated)	2043
Max Seltzer (stipulated)	2045
Arthur Lennox (stipulated)	2047
Morris Stein (stipulated)	2049
H. Clymer (stipulated)	2051
B. H. Pierce (stipulated)	2053
I. Kaufman (stipulated)	2055
C. R. Densmore (stipulated)	2057
H. Liebowitz (stipulated)	2057
Stipulation re testimony of certain witnesses	2059
Testimony of Maxwell C. Durham	2061
Barnett Dickstein	2070
Paul Schwartz	2080
Stipulation re Plaintiff's Exhibit No. 2	2088
Testimony of William J. Coughlan	2090
R. F. Stahl (stipulated)	2096
Agnes R. McKay (stipulated)	2098
A. Wolinsky (stipulated)	2100
Sam Sukloff, Jr. (stipulated)	2102
C. C. Gillespie (stipulated)	2105
Isadore Tagum (stipulated)	2107
Harry Silverman (stipulated)	2109
Mrs. N. Frantz (stipulated)	2111
Meyer Levine (stipulated)	2113
John K. Stevenson (stipulated)	2115
William Silver (stipulated)	2117
Trace Caldwell (stipulated)	2117
L. Wolfson (stipulated)	2119
Josephine Garbarino (stipulated)	2121
—— Restivo (stipulated)	2123
William Doll (stipulated)	2125
W. J. Costello (stipulated)	2127
A. B. Welsh (stipulated)	2129
Stipulation re testimony of certain witnesses	2131
Testimony of A. H. Gotch (stipulated)	2134
Mrs. H. Fineson (stipulated)	2137
James P. Sheehan (stipulated)	2139
A. M. Seligson (stipulated)	2140
W. A. Clark (stipulated)	2142
C. F. Tarlov (stipulated)	2144

IN THE
DISTRICT COURT OF THE UNITED STATES,

FOR THE DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorrillard Company,
Defendant.

In Equity
No. 3056

VOLUME II.

DEFENDANT'S RECORD.

ILLINOIS WITNESSES CONTINUED.

838

Chicago, February 8, 1923,
2:00 o'clock p. m.

Parties met pursuant to recess.

PRESENT: Counsel as before.

WILLIAM G. SUES, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

839 *Direct Examination.*

By Mr. Cavanagh:

Q. 1. Will you please state your name, age, residence and occupation?

A. William G. Sues; age, fifty-nine years; residence, 3123 Broadway; occupation, cigar clerk.

Q. 2. For what concern and where are you employed?

A. Albert Breitung, 134 South La Salle Street.

Q. 3. Is that in the Corn Exchange Bank Building?

A. It is in the Corn Exchange Bank Building; yes,

840 sir.

Q. 4. How large is that store there, is it a small store?

A. Just an inside stand.

Q. 5. How long have you been employed at this stand in the Corn Exchange Bank Building?

A. About five years.

Q. 6. Regularly all that time?

A. Yes, sir.

Q. 7. Are there any other clerks employed at that stand?

A. There is a relief clerk. I am the only regular clerk, but a clerk relieves me at the lunch hour. 234

Q. 8. As I understand it, this other clerk is only there during the lunch hour?

A. Yes, sir.

Q. 9. And how long has that same relief clerk been working there, do you know?

A. Oh, he has been working there about six weeks.

Q. 10. Did you have any relief clerk before that?

A. Yes, sir; they keep changing them all the time.

Q. 11. But you are there steadily, all day?

A. Yes, sir.

Q. 12. You are the regular clerk? 234

A. Yes, sir.

Q. 13. At this stand did you ever handle the Beech-Nut cigarette?

A. Yes, sir.

Q. 14. And Beech-Nut Scrap tobacco?

A. No; just the cigarettes. We do not carry much tobacco. It is a small stand.

Q. 15. Did you ever handle the Beech-Nut gum at that stand?

A. Beech-Nut gum; yes, sir.

Q. 16. And the Beech-Nut mints?

A. Beech-Nut mints; yes, sir. 234

Q. 17. Do you know who makes the Beech-Nut cigarette, what concern?

A. I do not know the concern's name, just called the Beech-Nut Company, I think. I do not know the people behind it.

Q. 18. I am talking about the Beech-Nut cigarette.

A. Oh, cigarettes! The Lorillard Company.

Q. 19. Do you know what concern makes the gum?

A. I do not know who the persons or the people are in the gum business.

Q. 20. How long have you known of the P. Lorillard Company?

2344 A. Oh, forty or fifty years.

Q. 21 Do you know what line of business they are in?

A. Tobacco manufacturers; cigarettes; tobaccos.

Q. 22. How long did you know the Lorillard Company to make the Beech-Nut cigarette, or to be the manufacturers of the cigarette?

A. The cigarettes? Just a couple of years.

Q. 23. While you have been at that counter did you ever have any relief clerks there for any extended period of time, such as three or four years, only for the relief work there, that length of time?

A. No, sir; they change them about every two
2345 months.

Q. 24. Your hair is gray, is it not, Mr. Sues?

A. Yes, sir.

Q. 25. Now, it has been testified in this case by Mr. Darrell S. Boyd, on behalf of the plaintiff, that he made certain purchases of Beech-Nut cigarettes at the stand at the Breitung tobacco stand in this Corn Exchange Bank Building, and he testified, in substance, that he asked the clerk back of the counter, whom he had seen there for three or four years and who was a gray haired man about fifty years old, "if the cigarettes were made by the same company who marketed the Beech-Nut bacon
2346 and other well known Beech-Nut products", and that the clerk said it was; that they were products of the same company that got out Beech-Nut bacon and Beech-Nut candy and Beech-Nut gum and various other Beech-Nut products; and that he then called the attention of the clerk to the name "P. Lorillard Company" on the package of cigarettes and asked, "What does P. Lorillard on the label mean," and that this clerk said, "Oh, they are all made by the same company"; and that he said. "The P. Lorillard Company is not the company that gets out Beech-Nut bacon", and the clerk said, "No but they are all made by the same concern; the Beech-

Nut Packing Company owns and controls the P. Lorillard Company. It is all the same crowd." Do you ever recall having made such a statement? 2347

Mr. Johnson: Objection by Mr. Johnson to this question as grossly leading. Counsel for Beech-Nut Packing Company objects to the manner in which Mr. Cavanagh approaches this question in presenting this inquiry.

Mr. Cavanagh: This question is in the nature of rebuttal of certain testimony produced by plaintiff, and it is not seen how the question can be leading as, according to the rules of evidence, one is entitled to direct the attention of a rebuttal witness to the state of facts which he is called to rebut. 2348

A. No, sir, I never had such a conversation.

Mr. Johnson: I want to add to that objection our objection as to the manner in which Mr. Cavanagh approaches this question.

Q. 26. Has there ever been any reason for you to make such a statement?

A. No, sir. It would be ridiculous for me to make any such statement because Lorillards were the biggest tobacco concern in the country and Beech-Nut Candy Company wouldn't have any interest in that, to run that factory for P. Lorillards. 2349

Q. 27. And when you were handling the cigarette, the Beech-Nut cigarette, you knew what concern manufactured it?

A. Yes, sir; P. Lorillards; see right on the carton.

Q. 28. While you were selling the Beech-Nut cigarette at this stand, did you ever hear of any remarks or questions from customers to the effect or which would lead

2350 you to believe that they thought this Beech-Nut cigarette was made by the same people that make the Beech-Nut gum?

A. No, sir.

Cross Examination.

By Mr. Bulkley:

X-Q. 29. Did you ever have any conversation, Mr. Sues, with a customer in connection with Beech-Nut cigarettes sold by you?

A. No, sir.

2351 X-Q. 30. I understand you never had any talk with anybody concerning Beech-Nut cigarettes at any time?

A. Just when we want to sell them, I would speak up for the cigarettes because they were something new.

X-Q. 31. What would you say, as you now recollect it, when you talked to the customers about Beech-Nut cigarettes?

A. I would say, "Here is some new cigarettes, P. Lorillard's got out; ought to try them; they seem to be taking well."

X-Q. 32. And that is the only conversation or the only kind of a conversation you had about Beech-Nut 2352 cigarettes with any customer?

A. With any customer; yes, sir.

X-Q. 33. During the whole of the time—

A. Yes, sir.

X-Q. 34. —that you were selling Beech-Nut cigarettes?

A. During the whole of the time; yes, sir.

X-Q. 35. Did you tell the customers whenever you presented them with the new Beech-Nut cigarettes that they were manufactured by P. Lorillard?

A. They could see it right on the stand, that was

right on the show case, set out just like that (illustrating); they could see the name on there. 2353

X-Q. 35. That is not what I asked you.

A. Yes, sir.

X-Q. 37. What I did ask you was whether you ever told the customer that these new Beech-Nut cigarettes were made by the P. Lorillard Company?

A. I told them they was made by P. Lorillard Company; yes, sir.

X-Q. 38. And in every case that you told them that you wanted them to try a new cigarette, you told them that it was manufactured by the P. Lorillard Company?

A. Yes, sir. 2354

X-Q. 39. In every instance?

A. Every case; yes, sir.

X-Q. 40. Do you remember what any of the customers said to you when you thus presented them with this new cigarette and advised them to purchase it?

A. They said they would try them.

X-Q. 41. Did they ever say they would not try them or didn't want to try them?

A. Said they would be used to some other cigarette; they would not want to change.

X-Q. 42. Why did you invariably, as you say, tell them that the cigarette was manufactured by P. Lorillard Company? 2355

A. I do in all cases with a new cigarette tell them who is the manufacturer of it; it takes better.

X-Q. 43. Don't you know that customers generally buy cigarettes without knowing who the manufacturers of them are?

A. Oh, no, they want to know who makes the cigarette. Any new cigarette comes out, they want to know who is the manufacturer of those cigarettes.

X-Q. 44. Have you found it to be most invariably the

2356 case if you do not tell them who manufactured the cigarettes they would not take them?

A. Yes, sir.

X-Q. 45. Don't you think that those who purchase cigarettes are largely guided by the brand on the cigarette package in determining whether they want it?

A. They are guided by the manufacturer who makes the cigarette.

X-Q. 46. They are not influenced by the brand?

A. No, sir, not at all.

X-Q. 47. Don't you know the Lorillard Company puts out a good many cigarettes that do not have their name
2357 on them?

Mr. Cavanagh: I object to your constant effort to bulldoze this witness. This is not a police court.

Mr. Bulkley: You say this on the record?

Mr. Cavanagh: I call the attention of the court to the fact that Mr. Bulkley is leaning over this witness, a rather elderly gentleman, and shouting his questions at him in an unseemly manner, and this is not a police court. Counsel for Lorillard Company objects to that kind of examination. I want you to stop trying to bulldoze that man. Let him an-
2358 swer things and treat him right.

Mr. Bulkley: Read the question.

(The question was read.)

A. They do not have to have their name because they have been in the market so long everyone knows the P. Lorillard Company is the manufacturer.

X-Q. 48. Do you think you could tell, if I gave you the names of cigarettes whether they were manufactured by the P. Lorillard Company?

A. Yes, sir.

X-Q. 49. In every instance?

A. Pretty near all cases; yes, sir. 2359

X-Q. 50. I asked you whether in every instance you know?

A. Yes, sir, in all cases.

X-Q. 51. Now, who manufactures the Camel cigarettes?

A. Camel cigarettes?

X-Q. 52. Yes.

A. I can't call just the name now.

X-Q. 53. Sell a good many Camel cigarettes, do you not?

A. Yes, sir.

X-Q. 54. About how many a week? 2360

A. Oh, it varies; different.

X-Q. 55. About how many a week, I asked.

A. Oh, about ten thousand.

X-Q. 56. Who manufactures the Mogul cigarettes?

A. P. Lorillards.

X-Q. 57. Do you know the names of any other brands of cigarettes manufactured by P. Lorillard?

A. Yes, sir.

X-Q. 58. Will you state them?

A. Murad, Helmar, Deities.

X-Q. 59. Is that all?

A. All I just think of now. 2361

X-Q. 60. Do you know whether the name P. Lorillard Company is upon the package of Deities cigarettes?

A. I can't remember just now.

X-Q. 61. Do you know whether it is on the Beech-Nut Murad cigarettes?

A. I can't answer that.

X-Q. 62. Do you know whether the name P. Lorillard Company is on the package of Helmar cigarettes?

A. I can't tell you now.

X-Q. 63. Do you know who manufacturers a cigarette called the London Life?

2362 A. No, sir.

X-Q. 64. Did you ever sell any such cigarettes?

A. Yes, sir.

X-Q. 65. About how many do you suppose you have sold of those cigarettes?

A. Oh, quite a lot of them.

X-Q. 66. Do you still continue to sell them?

A. Yes, sir.

X-Q. 67. Who manufactures the cigarette known as the Lucky Strike?

A. I couldn't tell you.

X-Q. 68. Do you know whether the Lorillard Com-
2363 pany manufactures them or not?

A. I couldn't tell you.

X-Q. 69. Do you know who manufactures the Fatima cigarette?

A. Couldn't tell you.

X-Q. 70. Do you know whether the Lorillard Company manufactures them or not?

A. I couldn't tell you.

X-Q. 71. Do you know who manufactures the Chesterfield cigarette?

A. I couldn't tell you.

X-Q. 72. You don't know whether the Lorillard Com-
2364 pany manufactures them or not?

A. I couldn't tell you.

X-Q. 73. Do you know who manufactures the Philip Morris cigarette?

A. I couldn't tell you.

X-Q. 74. And you don't know whether the Lorillard Company manufactures it or not?

A. I couldn't tell you.

X-Q. 75. And the Pall Mall cigarette?

A. I couldn't tell you.

X-Q. 76. Don't know who manufactures it?

A. No, sir.

X-Q. 77. Or whether the Lorillard Company manu- 2365
factures it or not?

A. No, sir.

Cross Examination.

By Mr. Johnson:

X-Q. 78. How long have you been in the tobacco trade, Mr. Sues?

A. Oh, about forty years.

X-Q. 79. Do you know Mr. Darrell S. Boyd?

A. No, sir, I do not. 2366

X-Q. 80. Whose office is in the Corn Exchange Bank Building?

A. No, sir, I do not.

X-Q. 81. Are you kept pretty busy at your stand?

A. Yes, sir, going all the time.

X-Q. 82. About how many customers a day would you say you had?

A. About nine hundred.

X-Q. 83. Do you have much time to talk with them?

A. Very few—very little.

X-Q. 84. Is any part of the day more dull time than others? 2367

A. No, it keeps going from the time I open up until I close.

X-Q. 85. Has anyone ever asked you who makes the Beech-Nut cigarettes?

A. Beech-Nut cigarettes?

X-Q. 86. Yes.

A. No, sir.

X-Q. 87. No one has ever asked you?

A. No, sir.

X-Q. 88. Have you made any effort to remember instances where people might have asked you who made

2368 the Beech-Nut cigarettes or whether they were made by the same people as the Beech-Nut gum?

A. No, sir.

X-Q. 89. Have you had reason to try to remember such incidents?

A. No, sir, never had any conversation on that at all.

X-Q. 90. Have you made any attempt to remember such a question?

A. Yes, sir, I have got a good memory. I can remember away back.

X-Q. 91. But you are kept pretty busy at that stand?

A. Yes, sir.

2369 X-Q. 92. Very busy, in fact?

A. Oh, going all the time.

X-Q. 93. When did you first see a package of Beech-Nut cigarettes?

A. That is about two or three years ago.

X-Q. 94. Can you tell a little closer than that?

A. No, I couldn't get any closer than that.

X-Q. 95. You can remember exactly, or even within a year of when you first saw them?

A. No, sir.

X-Q. 96. Do you know when the Beech-Nut cigarettes were first put on the market in Chicago?

2370 A. I couldn't tell you.

X-Q. 97. Were you selling cigarettes at that time?

A. Yes, sir, we carry a certain amount, because this is a small stand we can't carry everything; get out anything new they send it over and we give it a try-out to see how it goes; put it on our show case so customers can see what we got, something new.

X-Q. 98. But you can't remember when the Beech-Nut cigarette first came on the market?

A. No, sir, I couldn't tell you.

X-Q. 99. When did you first hear of the Beech-Nut cigarette?

A. When they sent some over to my stand to see 2371
what I could do with them, to see how they would take with the customers.

X-Q. 100. When was that?

A. Oh, it might have been about two to three years ago; I can't remember just the time.

X-Q. 101. Have you ever discussed with anyone who makes the Beech-Nut cigarettes?

A. No, sir, I did not.

X-Q. 102. Not even one person?

A. No, sir.

X-Q. 103. How have the Beech-Nut cigarettes sold at your stand? 2372

A. At that time they were sold for fifteen cents.

X-Q. 104. I mean have you sold many or few?

A. It did take at first, but after while they didn't take so well, so we didn't keep them any more.

X-Q. 105. Did many people buy them the second time?

A. Quite a few bought the second time, but if a cigarette don't take well you take them off the stand. If you don't get rid of them, they get stale and dry up.

X-Q. 106. Have you heard any complaints as to the Beech-Nut cigarette?

A. No, they said it was a good cigarette, but they 2373
rather have what they are used to. Pretty hard to change people on cigarettes.

X-Q. 107. How are they selling now?

A. I don't know what the price is on them now.

X-Q. 108. Are you selling any of them now?

A. No. The other stands are selling them. I haven't got any at my stand.

X-Q. 109. What do you mean by "the other stands"?

A. Breitung has twelve stands in all in the Loop. What takes in one stand won't take in another place. Lot of stands only have cigarettes and cigars and don't

2374 have to attend to any candies or anything like that; give more attention to it.

X-Q. 110. Do you sell many Beech-Nut mints?

A. Yes, have quite a trade on them.

X-Q. 111. Sell much Beech-Nut gum?

A. Yes, sir.

X-Q. 112. Did you ever have anyone come to your stand and ask just for Beech-Nut?

A. No, sir. Always say they want the gum. When they seen the cigarettes on the show case, then they would call for gum, Beech-Nut gum.

X-Q. 113. Ever have anyone ask you just for Beech-
2375 Nut?

A. No, sir.

Mr. Johnson: That is all.

Re-direct Examination

By Mr. Cavanagh:

R-D Q. 114. Now, you have stated when they saw the Beech-Nut cigarettes on the show case they would call for Beech-Nut gum?

A. Yes, sir.

2376 R-D Q. 115. What do you mean by that?

A. So as not to make a mistake, hand them out cigarettes in place of gum, you see. Cigarettes right alongside the candy, right close to it, and the gum was right there, and they would say gum or cigarettes.

R-D Q. 116. So they would distinguish them?

A. Distinguish both kinds.

R-D Q. 117. Now, in your cross-examination you were asked by Mr. Bulkley as to what concerns made certain brands of cigarettes?

A. Yes, sir.

R-D Q. 118. What companies, and you said you did not know. While you were under that examination did you really make any attempt to try to remember who made those? 2377

A. No, I did not.

R-D Q. 119. You were upset by the manner of your cross-examination, were you?

A. Yes, sir.

R-D Q. 120. You are rather an elderly man?

A. Yes, sir.

Mr. Cavanagh: That is all.

Re-cross Examination. 2378

By Mr. Bulkley:

R-X Q. 121. Will you now try to cast your memory about and see if you can tell us who are the manufacturers of those cigarettes to which I directed your attention on cross-examination?

Mr. Cavanagh: The question is objected to as indefinite. Let him mention the cigarette brand he wants to know about.

Mr. Bulkley: Will you read the question? 2379

(The question was read)

A. I could not answer that now.

R-X Q. 122. Can you tell us who manufactures the Fatima cigarette? And you may take all the time you see fit in order to give me the name of the manufacturer, if you can.

A. I cannot recall just now.

R-X Q. 123. Have you taken, do you think, adequate time in an effort to recollect the name?

A. I can't remember just now.

380 R-X Q. 124. How much time do you want to take in order to recollect sufficiently?

A. Well, I couldn't tell you now.

R-X Q. 125. How much time do you want to take in order to recollect sufficiently?

A. I couldn't tell you now.

R-X Q. 126. If I will give you more time to think about it, do you think you could recollect the name of the manufacturer of that cigarette?

A. No, not this afternoon.

R-X Q. 127. Well, now, take the Chesterfield cigarette and take what you deem to be adequate time in an
381 effort to remember who the manufacturer was.

A. No, sir.

R-X Q. 128. You can't tell?

A. No, sir.

R-X Q. 129. Well, as to the Helmar cigarette, taking sufficient time—

A. P. Lorillard.

R-X Q. 130. How does it happen that you can recollect who the manufacturer of those brands is, such as the Mogul and Murad, Helmar and Egyptian Deities, that they are manufactured by the Lorillard Company, and you don't seem to recollect who are the manufac-
382 turers of these other conspicuous cigarettes? How do you account for that?

A. I never paid much attention to the others.

Mr. Bulkley: That is all.

Re-direct Examination

By Mr. Cavanagh:

R-D Q. 131. The P. Lorillard Company are large Turkish cigarette manufacturers, are they not?

A. Yes, sir.

R-D Q. 132. And those are Turkish brands you have mentioned? 2383

A. Turkish brands; yes, sir.

Mr. Cavanagh: That is all.

Mr. Bulkley: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

J. S. WEINER, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows: 2384

Direct Examination

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?

A. J. S. Weiner; age, thirty-two; residence, 2702 North Sacramento Avenue, Chicago; occupation, manager of the cigarette department of Rothschild & Company, Chicago, Illinois.

Q. 2. Mr. Weiner, will you state whether or not Rothschild's Department Store Company is one of the largest department stores in the City of Chicago? 2385

A. Well, it is one of the largest. While it is not the largest, it is one of the largest stores on State Street here.

Q. 3. How long have you been manager of the same department of Rothschilds?

A. Since June, 1918.

Q. 4. In the tobacco department do you handle Beech-Nut Scrap tobacco?

A. Yes, we do.

2386 Q. 5. Do you know what company makes Beech-Nut Scrap tobacco?

A. As far as I know of my own knowledge, P. Lorillard Company always have made it. I believe their name appears on the tobacco.

Q. 6. Mr. Weiner, do you handle Beech-Nut cigarettes?

A. We do.

Q. 7. Do you know what company makes Beech-Nut cigarettes?

A. Same company as Beech-Nut tobacco, P. Lorillard Company.

2387 Q. 8. How long have you known of the Lorillard Company, Mr. Weiner?

A. How long have I known the company?

Q. 9. Known of the Lorillard Company?

A. I have known it to be one of the largest tobacco companies since I have been in the business, ever since I am in the tobacco business; that is since 1910; always done business with P. Lorillard Company.

Q. 10. Would you name some of the Lorillard brands of cigarettes you handle?

A. Murad, Egyptian Deities, Beech-Nut tobacco, Union Leader, Sensation, Climax, Spear Head, and several others too numerous to mention.

2388 Q. 11. Are they well known brands of tobacco and cigarettes?

A. Yes, sir. Most of them are well known and they sell very good.

Q. 12. Mr. Weiner, do you know of the Beech-Nut Packing Company?

A. I have heard of them, the Beech-Nut Products Company.

Q. 13. Do you know of Beech-Nut chewing gum?

A. Yes, sir; chew a lot of it myself.

Q. 14. Beech-Nut mints?

A. Yes, sir.

Q. 15. Did you ever hear any remarks, inquiries or comments among your customers or others to the effect or which led you to believe they thought the Beech-Nut Scrap tobacco or the Beech-Nut cigarette could be made by the Beech-Nut Packing Company? 2389

A. To my knowledge, I never heard any such comments.

Q. 16. Did you ever know of a tobacco manufacturer that manufactured food products?

A. Never heard of any; not as yet.

Q. 17. Do you regard chewing gum and confections and food products as in the same or in a different class of products from tobacco and cigarettes? 2390

A. Common sense would tell you it is two different individual products. Even in our store here we handle them in two different departments; we separate them.

Q. 18. Are any confections or chewing gum sold in the tobacco department here in this store?

A. No, sir; we confine ourselves simply to products made of tobacco.

Q. 19. Where are confections sold?

A. They are sold in department 16, the next aisle here, (indicating) the south end of the store.

Q. 20. Are Beech-Nut mints and Beech-Nut chewing gum on sale there? 2391

A. I believe we handle them; yes, sir.

Q. 21. Is that department located near the tobacco department?

A. It is a distance of about seven or eight aisles between the two departments.

Q. 22. Are they in the same room?

A. No, sir, the cigarette department is in the north room and the candy department in the south room.

Mr. Preston: I think that is all.

2392 *Cross Examination*

By Mr. Johnson:

X-Q. 23. How long have you been with Rothschild's, Mr. Weiner?

A. Since June, 1918.

X-Q. 24. Have you been in charge of their tobacco department ever since you entered their employ?

A. Yes, sir.

X-Q. 25. How long have you been in the tobacco trade all together?

A. Since 1910.

2393 X-Q. 26. With whom were you before you went to Rothschild?

A. Siegel-Cooper & Company.

X-Q. 27. Is that a department store?

A. Formerly Siegel-Cooper & Company; Leiter's Building now.

X-Q. 28. This one across the street?

A. Yes, right across the street from here.

X-Q. 29. How long were you with Siegel-Cooper's?

A. Well, since 1910 till 1918, till the time I came here. Do you want the exact dates?

X-Q. 30. No. Have you sold Lorillard tobaccos and
2394 cigarettes during all of that time?

A. Well, we always handled some of their brands, most of their leading brands anyhow.

X-Q. 31. Have you found in your experience in the tobacco trade that customers ask you for a brand of cigarettes or tobacco, or do they ask you for the cigarettes by the name of the maker?

A. They ask for the cigarette by the name of the brand of the cigarettes.

X-Q. 32. Cigarettes sell by the brand?

A. By the brand; by the name.

X-Q. 33. Did you ever have any customer in your experience ask you for Lorillard Murad cigarettes? 239

A. I do not recollect.

X-Q. 34. Or American Tobacco Company's Lucky Strike cigarettes?

A. Well, they occasionally specify the company.

X-Q. 35. Do you ever remember anyone asking you for American Tobacco Company's Lucky Strikes?

A. No, I do not remember.

X-Q. 36. Do you ever remember a customer asking you for Reynolds' Camel cigarettes?

A. No, sir, not directly.

X-Q. 37. Where is your tobacco department located in Rothschild's department store? 239

A. It is aisle 5, State Street side, right across there (indicating).

X-Q. 38. Is that on the main floor?

A. Main floor; yes, sir.

X-Q. 39. Is that somewhere near the center of the State Street side of the store?

A. Just a little off of the center, north.

X-Q. 40. Just a little north of the center?

A. Just north of the center. You see, there is a center door over there. Our department begins right there, just a little distance in between. 239

X-Q. 41. What floor space, approximately, do you occupy?

A. I do not know; I never measured it.

X-Q. 42. Just roughly?

A. Roughly speaking, we will say—

X-Q. 43. How long is it?

A. Oh, about fifty-four feet.

X-Q. 44. And about what depth have you?

A. About three or three and a half; something like that, I am very poor on measuring distance.

X-Q. 45. Do you have a pretty big trade there?

2398 A. Yes, we do a pretty nice business.

X-Q. 46. How long have you sold Beech-Nut cigarettes?

A. Approximately two years or so.

X-Q. 47. Do you remember when you first put them in stock?

A. I can't remember. I can look it up for you. I imagine it was sometime in the fall of 1921.

X-Q. 48. When did you first handle Beech-Nut Scrap tobacco?

A. We always handled it here, since 1918.

X-Q. 49. When you first saw a package of Beech-Nut
2399 cigarettes, whose product did you think they were?

A. Well, the name was right on the package, P. Lorillard Company.

X-Q. 50. When you first saw a package, whose product did you think they were?

A. The name was right on the package, P. Lorillard Company. That is the reason I thought it was P. Lorillard's. I don't believe I knew of the Beech-Nut Product Company at that time.

X-Q. 51. You have always known of the P. Lorillard Company and you have always known the Beech-Nut cigarettes were one of their products, have you?

2400 A. Always was in close touch with their products, naturally, doing business with them, I would.

X-Q. 52. Have you heard of any inquiries, comments, remarks or any discussion as to who made the Beech-Nut cigarettes, or as to whether the same company made the Beech-Nut cigarettes as makes the chewing gum?

A. As far back as I can remember, I never heard any such comments.

X-Q. 53. You are pretty busy in your department, are you not?

A. Yes, sir.

X-Q. 54. Wait on a great many people? 2401

A. Yes, I do; most of the time.

X-Q. 55. Can you estimate how many a day?

A. About six hundred, on an average.

X-Q. 56. How many are there, how many clerks in your department?

A. Six.

X-Q. 57. How many are on duty at one time?

A. Outside of lunch hours, they are all on the job.

X-Q. 58. Do you wait on the counter yourself?

A. Yes, sir.

X-Q. 59. Do you have much time to talk to customers?

A. No, we don't waste much time talking to them un- 2402
less they ask us any questions about the article they want to buy.

X-Q. 60. Do customers frequently ask you who makes a certain cigarette or tobacco?

A. No, very seldom. They are most interested about the price.

X-Q. 61. Have you made any effort to remember any inquiries, remarks or comments as to who makes the Beech-Nut cigarettes, or as to whether they are made by the same company that makes the Beech-Nut gum?

A. No, sir.

X-Q. 62. Have you made any particular effort to re- 2403
member any such incidents?

A. I never have.

X-Q. 63. Did you have any reason to?

A. No, I don't believe I ever heard any comments.

X-Q. 64. Did anyone ever ask you to remember or make note of such inquiries or comments?

A. No, sir.

X-Q. 65. You never tried to remember them, did you?

A. Had no occasion to. I never did.

X-Q. 66. When you say that you never heard any

2404 such inquiries, remarks or comments, what you mean is you don't remember any?

A. I do not remember any because it would not be an ordinary question for a customer to ask anyone behind the counter.

X-Q. 67. Do you do the buying in your department, Mr. Weiner?

A. Yes, sir.

X-Q. 68. You buy through jobbers?

A. We do some; yes, sir.

X-Q. 69. Where do you buy your stock as a rule?

A. We try to buy most of our merchandise direct
2405 where we possibly can. Some of the staple merchandise we pick up from the jobbers, such as P. Lorillard's goods, we buy those through the jobbers.

X-Q. 70. When you buy from jobbers, does the jobber usually give you an order slip or receipt?

A. Well, not the jobbers. We usually order through the telephone, but occasionally a company representative comes in here, we call that missionary work. If we buy an order through them direct, they give us a copy of the order and then they ship the goods through the jobbers.

X-Q. 71. Does such order sheet have the name of the
2406 jobber at the top?

A. Has the name of the company and then the name of the jobber. The name of the jobber will be on top and the name of the company on the bottom as a rule.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 72. Mr. Weiner, will you state whether or not, if you had heard any considerable number of remarks, inquiries or comments which indicated to you

that your customers or others thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes could be put out by the Beech-Nut Packing Company, you would have remembered them? 2407

A. I believe I would; yes sir.

R-D Q. 73. Do you remember, Mr. Weiner, from whom you first bought Beech-Nut cigarettes, what salesman, that is?

A. Sure. Mr. Brown. He is the P. Lorillard representative for the City of Chicago and usually calls on us.

R-D. Q. 74. Do you remember whether or not he gave you a duplicate copy of your order?

A. He always does. Undoubtedly he did, but we don't 2408
keep them away back in 1921.

R-D Q. 75. Do you happen to remember whether P. Lorillard's name is written on the top of those duplicate order blanks that are left with you?

A. I really couldn't say for sure. I know their name appears on the blank there.

R-D Q. 76. You know it appears on the blank somewhere?

A. Yes, sir; I just don't happen to remember what part of it.

Re-cross Examination 2409

By Mr. Johnson:

R-X Q. 75. How have the Beech-Nut cigarettes sold in your department?

A. They are a fair seller; nothing to brag about, though.

R-X Q. 76. At what period in the last two years did you sell the most of them?

A. Well, we sold most when they first came out, naturally, being a new brand, people were anxious to try them and see what they were.

2410 R-X Q. 77. Did you find many of your customers would smoke them the second time?

A. Yes, quite a few would come back for more.

R-X Q. 78. But you didn't sell many after you stopped pushing them; is that right?

A. We don't feature an item for a very long time; just give it a start and let it take its natural course.

R-X Q. 79. Do you sell many of them now?

A. Sell a few; yes; not as much as when they first came out.

R-X Q. 80. About how many a week do you sell now?

A. I should say about a thousand a week, approxi-
2411 mately.

R-X Q. 81. About how many did you sell a week when they were selling best?

A. Be nothing for us to sell five thousand.

Mr. Johnson: That is all.

Mr. Preston: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

DAVID KOSSACK, called as a witness on behalf of the defendant, P. Lorillard Company, having been
2412 first duly sworn, testified as follows:

Direct Examination

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?

A. My name is David Kossack; age, thirty-two; residence, 3255 West Polk Street, Chicago, Illinois; occupation, cigar dealer.

Q. 2. Mr. Kossack, do you know of the P. Lorillard 2413
Company?

A. I surely do. I handle their merchandise.

Q. 3. What sort of products does the Lorillard Company make?

A. Well, they make Beech-Nut—

Q. 4. I mean what sort of products.

A. Tobaccos.

Q. 5. Will you name some of the Lorillard products that you handle?

A. Handle Beech-Nut tobaccos, Union Leader, Climax, Beech-Nut Scrap, and handle some of their cigars, of course, Royal Bengal, and so on. 2414

Q. 6. Do you handle Murad cigarettes?

A. Yes, sir.

Q. 7. Do you handle any other Turkish cigarettes made by Lorillard Company?

A. I really can't place all their brands. You can't remember all their brands, you see. Murads, London Life, that is their brands.

Q. 8. How long have you handled Beech-Nut Scrap tobacco, Mr. Kossack?

A. Since they have been on the market. I don't really remember how long it is.

Q. 9. Approximately. Could you give the approxi- 2415
mate time?

A. Been handling it now for the last seven years that I remember.

Q. 10. Have you always known what company makes Beech-Nut tobacco?

A. Yes, sir.

Q. 11. What company does make it?

A. Lorillard.

Q. 12. Is it a good seller?

A. Yes, it is.

Q. 13. Have you any better selling scrap tobacco?

A. No, sir.

2416 Q. 14. Do you handle Beech-Nut cigarettes?

A. Yes, sir, I do.

Q. 15. Do you know what company makes the Beech-Nut cigarette?

A. Lorillard makes them.

Q. 16. How long have you handled them?

A. About two years since they come out, isn't it?

Q. 17. Do you handle Beech-Nut chewing gum?

A. Yes, sir.

Q. 18. Do you know what company makes Beech-Nut chewing gum?

A. No, I do not, but it is the Chicle Company, but I really don't know the name of it now.

2417 Q. 19. Were you ever under the impression that Beech-Nut Scrap tobacco and Beech-Nut cigarettes were made by the same company that makes Beech-Nut chewing gum?

A. No, sir.

Q. 20. Did you ever hear any remarks, inquiries or comments by customers or others which indicated to you that they thought Beech-Nut Scrap tobacco and Beech-Nut cigarettes were made by the same company that makes the Beech-Nut chewing gum?

A. No, siree. I think anyone will understand that this is a tobacco company and not the candy.

2418 Q. 21. Do you regard chewing gum or confections as in the same or a different class of products from tobacco or cigarettes?

A. Well, it is a different class of products. Anything applying to eatables cannot compare to chewing tobaccos.

Q. 22. Did you ever know of a tobacco company that manufactured food products or confections?

A. No, I did not.

Mr. Preston: That is all.

Cross Examination 241

By Mr. Johnson:

X-Q. 23. How long have you been in the tobacco business?

A. Sixteen years on the 17th.

X-Q. 24. All together?

A. All together.

X-Q. 25. Are you the proprietor of this store?

A. Yes, sir. Got two more.

X-Q. 26. I am referring to the store at 436 South Clark Street? 242

A. Yes, sir.

X-Q. 27. How long have you had this store?

A. Two years in May.

X-Q. 28. How long have you been in business for yourself?

A. Sixteen years.

X-Q. 29. Been your own boss all that time?

A. Yes, sir. Not continually. You know, during that time I sold out a store and went to work for three or four months, probably a year or six months, then went back into business. I wouldn't say I was my own boss.

X-Q. 30. About what size is this store at 436 South Clark Street? 243

A. You mean what size, the size of the length or what?

X-Q. 31. Yes, just roughly.

A. I should judge about ten feet front and about forty or forty-five feet deep. Maybe twelve in front.

X-Q. 32. Have you a counter down along the length of the south side, with cases containing tobaccos and smokers' articles back of the counter?

A. Sure. All counters are on the south side. There is nothing on the north side of the store.

2422 X-Q. 33. About how many customers a day do you have coming in here?

A. Really, this is a personal question, but if I must answer it I will answer it. This is not in the line of questions at all.

X-Q. 34. We are not trying to get any secrets.

A. I understand, but in business it is a personal question. We have between four and five hundred people.

X-Q. 35. Have you any other clerks here besides yourself?

A. Yes, sir.

2423 X-Q. 36. How many?

A. One; sometimes two.

X-Q. 37. How many do you have in here at one time as a rule?

A. As I said before, one, and sometimes two. This man that just walked out is an extra man. He is not here regularly, but once in a while he is.

X-Q. 38. Do you wait on the counter yourself?

A. Yes, sir.

X-Q. 39. Do you have much time, as a rule, to talk to customers?

A. Well, yes; to a certain extent.

2424 X-Q. 40. Do many of them ask who makes a cigarette or whatever it is they are buying?

A. No, sir, they do not.

X-Q. 41. Have you in your experience, since Beech-Nut Scrap tobacco came out and you have been handling it, heard any customers ask who made it?

A. No, sir. I wouldn't swear I never heard a man ask who, but very seldom.

X-Q. 42. And the same with regard to Beech-Nut cigarettes, have you heard—

A. No, sir.

X-Q. 43. —any customers ask who made them?

A. No, sir; they don't care who makes it.

X-Q. 44. Or have you heard any remarks, comments or discussion along that line as to who makes the Beech-Nut cigarettes or as to whether they are made by the same people that make the Beech-Nut gum? 2425

A. No, siree.

X-Q. 45. Have you made any effort to remember such incidents if they had happened, have you tried to remember them?

A. I did not make any effort, but a person would remember a question of that kind.

X-Q. 46. But you yourself have always known both the scrap tobacco and the Beech-Nut cigarettes were made by the Lorillard Company? 2426

A. Yes, sir.

X-Q. 47. Have you found in all these years' experience in the tobacco trade that people ask for cigarettes or tobacco by the name of the brand?

A. Only.

X-Q. 48. That is, they ask for Camel cigarettes?

A. Camels or Beech-Nut, or whatever cigarette brand, they ask for it by name.

X-Q. 49. Did you ever hear a customer ask for Lorillard's Beech-Nut cigarettes?

A. No, sir.

X-Q. 50. Or for Reynolds' Camels? 2427

A. No, sir, they never asked me that.

X-Q. 51. Or for the American Tobacco Company's Lucky Strikes?

A. No, siree.

X-Q. 52. You never heard anyone buying cigarettes or tobacco ask for it by the name of the maker, have you?

A. No, sir.

X-Q. 53. Have you handled Camel cigarettes?

A. Yes, sir.

2428 X-Q. 54. Have you handled many of them?

A. Many.

X-Q. 55. About how many thousands a week?

A. We sell about twelve or fifteen thousand a week.

X-Q. 56. Have you handled the packages in your own hands?

A. Some of them. Of course, when I am not here—

X-Q. 57. A good many of them?

A. A good many of them; yes, sir.

X-Q. 58. Can you tell me what is on the front side of the Camel cigarette package underneath the picture of the Camel?

2429 A. Just says "Cigarettes" underneath; that is all. Says "Camels" on top.

X-Q. 59. Have you handled Lucky Strike cigarettes?

A. Yes, sir.

X-Q. 60. Many of them?

A. Yes, sir; quite a few.

X-Q. 61. In your own hands?

A. Some of them, as I said before, handled a good many of them.

X-Q. 62. Can you tell me what is on the front side of the Lucky Strike cigarette package underneath the red panel?

2430 A. It is written in gold lettering "Cigarettes;" that is all I remember of.

X-Q. 63. Have you found the Beech-Nut cigarettes to be good sellers?

A. No, not much; it has not sold with me, anyway.

X-Q. 64. How did they sell when they first put them into your store?

A. Never sell much; couldn't class them as a good seller, by any means.

X-Q. 65. About how many a week did you sell when they were selling best?

A. Well, really, to be truthful, I can't remember. I didn't sell many; that is one thing. 2431

X-Q. 66. Are you selling them now?

A. Yes, sir.

X-Q. 67. About how many a week?

A. Oh, we sell probably a thousand a month.

Mr. Johnson: That is all.

Re-direct Examination:

By Mr. Preston:

R-D. Q. 68. Mr. Kossack, will you state whether or not, if you had heard any considerable number of remarks or inquiries in regard to who made the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, you would have remembered it? 2432

A. Sure. As I said before, I would have remembered such remarks. Now, to explain how, plainly the customer personally does not care who makes it or what it is. They go by name only.

R-D. Q. 69. In your store here, Mr. Kossack, do you handle any dry goods?

A. Well, I call it gents' furnishings, if that is what you are referring to. 2433

R-D. Q. 70. Gents' furnishings?

A. Gloves, socks; that is all the gents' furnishings I have.

R-D. Q. 71. Do you handle playing cards?

A. Yes, sir.

R-D. Q. 72. Do you sell knives?

A. Yes, sir.

R-D. Q. 73. Do you sell pencils?

A. Yes, sir.

R-D. Q. 74. Are you the owner of any stores besides this one here?

1687

2434 A. Yes, sir; two of them.

R-D. Q. 75. Are they situated in the down town section of Chicago?

A. One of them.

R-D. Q. 76. And where is the other one?

A. 601 South Dearborn.

Mr. Preston: That is all.

Mr. Johnson: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

2435 WHEREUPON an adjournment was taken until Friday, February 9, 1923, at 9:30 a. m.

Chicago, February 9, 1923,
9:30 o'clock a. m.

Parties met pursuant to adjournment.

PRESENT: Counsel as before.

WILLIAM H. GETZELMAN, called as a witness on behalf of the defendant, P. Lorillard Company, having
2436 been first duly sworn, testified as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?

A. William H. Getzelman; age, thirty-five; residence, 6204 Langley Avenue, Chicago; general manager for Albert Breitung.

Q. 2. What business is Albert Breitung in?

A. Retail cigar business. 2437

Q. 3. How many stores does he control?

A. We have eleven at present.

Q. 4. What part of the City of Chicago are they located in?

A. In the Loop.

Q. 5. And how long have you been manager of this chain of stores?

A. Four and a half years.

Q. 6. Mr Getzelman, could you give approximately the average of the number of customers you have in one of your stores a day?

A. In one store? 2438

Q. 7. How many customers do you have in all eleven of your stores, do you know that, approximately?

A. No, I do not. I could get that for you in a minute.

Q. 8. Could you make anywhere near an accurate estimate?

A. Well, you see, some of the stands run seven or eight hundred customers, and some of the stores run about twelve hundred. Of course, I could get the figures from the office.

Q. 9. I do not think that is necessary. Mr. Getzelman, do you handle Beech-Nut Scrap tobacco in your stores? 2439

A. Well, we handle it in—like where there is transient trade, that is, the corner stores, like you take the stands, they generally carry it. There is no demand for it.

Q. 10. In the stores where you keep Beech-Nut Scrap tobacco, is it a very good seller?

A. Very good seller.

Q. 11. Do you know of the Lorillard Company?

A. Oh, sure.

Q. 12. What business are they in?

2440 A. Manufacturers of cigarettes, scrap tobacco and plug tobacco, cigars.

Q. 13. Did you ever know the Lorillard Company to put out anything except tobacco products?

A. No.

Q. 14. Do you handle a good many Lorillard brands?

A. Why, we handle them all.

Q. 15. Would you name some of the more prominent Lorillard brands you handle?

A. Well, Murad cigarettes, Egyptian Deities, that is, you know, cigarettes, we sell a great number of them; we sell a lot of Climax tobacco, and Muriel cigars.

2441 Q. 16. Do you know what company manufactures Beech-Nut Scrap tobacco?

A. Oh, Lorillard.

Q. 17. Have you known that ever since you have been handling it?

A. Yes.

Q. 18. Do you handle Beech-Nut cigarettes?

A. Yes.

Q. 19. About how many have you handled of them?

A. Well, we were the first people in Chicago to put Beech-Nut cigarettes on the market. Now, I think that is a couple of years; I wouldn't say for sure.

2442 Q. 20. When Beech-Nut cigarettes were first put on sale on this market, were they prominently displayed in our stores?

Mr. Johnson: Objection by Mr. Johnson to the leading questions.

A. Yes.

Q. 21. Will you state, in your own words, your method of display, how you displayed those cigarettes when you first put them on the market?

A. Well, we made exclusive windows. By that I

mean it was a solid window of Beech-Nut cigarettes. 2443
The reason for that was I figured they would sell better, I mean the sale would be larger than if we only had one or two cartons in the window.

Q. 22. Do you know what company makes Beech-Nut cigarettes?

A. Lorillard.

Q. 23. You have always known that?

A. Yes.

Q. 24. Do you handle Beech-Nut chewing gum?

A. Yes.

Q. 25. Do you know what company manufactures Beech-Nut chewing gum? 2444

A. Yes.

Q. 26. What company manufactures it?

A. I guess it is the Beech-Nut Packing Company, I believe the Cudahy Beech-Nut Packing Company. I know we carry Beech-Nut chewing gum; I guess it is the Beech-Nut Packing Company.

Q. 27. Mr. Getzelman, have you ever heard any remarks, inquiries or comments among your customers or others to the effect or which led you to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes to be a product of the company that manufactured Beech-Nut gum? 2445

A. No.

Q. 28. Did you ever know of a food products or candy company that manufactured any tobacco products?

A. No.

Q. 29. Do you regard gum and tobacco products as in the same or in separate classes?

A. Separate.

Q. 30. Do you think that Beech-Nut Scrap tobacco packages or the Beech-Nut cigarette package look like the Beech-Nut gum package?

A. No.

2446 Q. 31. Do you think it would be possible to mistake either the cigarette package or the scrap tobacco package for a gum package?

A. No.

Mr. Preston: That is all.

Cross Examination

By Mr. Johnson:

X-Q. 32. Mr. Getzelman, how long have you been in the tobacco business all together?

2447 A. I have been with Mr. Breitung sixteen years.

X-Q. 33. Was that when you first went to work?

A. Sixteen years ago; yes, sir.

X-Q. 34. What positions have you held with him during that time?

A. Why, I started working in the shipping room, and then I was a clerk behind the counter here for a while, in the Monadnock here.

X-Q. 35. About how long?

A. Well, you would call it a clerk or manager of a store for about twelve years. Some take the title of manager of the store and is nothing but a clerk. I had

2448 charge of the Sherman House store for eight years and I had three and four men working with me at the Sherman House store. That is a prominent corner and supposed to be one of our best stores, and my position was in breaking in the men for the other stores, you see. If they would hire a new man, they would send him down to me and I would handle him for a while. If he proved all right, they would take him away and use him in another store, if he was needed.

X-Q. 36. What store do you make your headquarters now?

A. Right here.

X-Q. 37. What is that address? 2449

A. 300 South Dearborn.

X-Q. 38. Is that in the Monadnock Building?

A. Yes, sir.

X-Q. 39. How long have you been in this store?

A. Well, I have been general manager for about four and a half years.

X-Q. 40. And during the time when you were clerk or store manager how long were you in this store?

A. Well, let me see. I was at the Sherman House about eight years and about four here.

X-Q. 41. Before you became general manager?

A. No. I have been with Breitung sixteen years. I 2450
started in this building. This is the headquarters, you see. I started at the other end of the building and I worked when this store was down a little further; we did not have the corner, you see. I worked in this building about four years and then went to the Sherman House. I was at the Sherman House about eight years and they made me general manager and I came back here. This is the headquarters. I was made general manager.

X-Q. 42. Is this on a corner?

A. Yes, sir.

X-Q. 43. What corner? 2451

A. Jackson and Dearborn; on the southwest corner.

X-Q. 44. Are the other Albert Breitung stores in the principal office buildings of Chicago?

A. Yes, sir.

X-Q. 45. The down town office buildings?

A. Yes, sir.

X-Q. 46. About how many customers do you have in this store a day?

A. In this store?

X-Q. 47. Yes.

A. This store will run about eight hundred. You see, the hours here are very—well, you know how an

152 office building is, they come in at nine and they are out of the building at five. That is why this store don't run more. A store like this should be open evenings, holidays and Sundays. Take a store like the Sherman, that is open until twelve o'clock at night. That store runs a good many more customers.

X-Q. 48. Have you been general manager of Breitung's all during the time since the Beech-Nut cigarettes first came out?

A. Well, I believe Beech-Nut cigarettes come out about two years ago, and I have been general manager four and a half years.

153 X-Q. 49. Have you waited on the counter much during that time?

A. I do not wait on the counter much; I do once in a while, not very much.

X-Q. 50. To relieve—

A. No. Once in a while I do it to see what the customers have to say. Mr. Breitung and I do not agree on that. He says that is no place for me, but I do it sometimes to see what is really going on.

X-Q. 51. But you have not been able to do it very much during the last two years?

A. No, I do not do it much.

154 X-Q. 52. So you do not hear very much of what customers are saying?

A. You don't think so? You want to travel around with me to the eleven stores. That is why I am manager. I have no assistants. I make all the stores.

X-Q. 53. Do you have much occasion to hear what the customers are saying behind your back?

A. That is what I try to do. I try to see if they are pleased. I try to make everything as agreeable as I can for the customer.

X-Q. 54. When did you first start to handle Beech-Nut cigarettes?

A. I believe about two years ago; I wouldn't say 2455
for sure.

X-Q. 55. You think you were the first one in Chicago?

A. I know we were the first one. Whenever there is anything new on the market, see, I like to be the first one to handle it, if I think much of it, because I feel it is a good ad. See?

X-Q. 56. Can you tell me when that was that you first put them in?

A. I say about two years ago.

X-Q. 57. Can you locate it any more accurately than that? 2456

A. I can have the office look it up.

X-Q. 58. I mean, can you say what month or what year it was?

A. I could not say for sure.

X-Q. 59. You cannot remember any closer than that it was about two years ago?

A. I know this much, that it was not in November or December or January. I know that because I would not give them an exclusive window on Beech-Nut cigarettes in those months, because our windows are too valuable. See? So probably—this is just guess work—I started in March or April or June; I couldn't say. 2457
See? But I know it was not November or December or January. I know it was not in those months.

X-Q. 60. Have you heard any inquiries, remarks or comments as to who makes the Beech-Nut cigarettes or as to whether the same people make them that make the Beech-Nut gum?

A. No.

X-Q. 61. You have not heard any at all?

A. No.

X-Q. 62. Have you made any effort to remember any such inquiries or remarks, if any?

2458 A. Well, what we try to do,—See? We do not believe in misrepresenting an article. See?

X-Q. 63. Just answer that question.

Mr. Johnson: Read the question, please.
(The question was read)

X-Q. 64. Have you made any effort to remember such things?

A. I have not made any effort.

X-Q. 65. Did anyone ask you to make a note of them?

A. No.

2459 X-Q. 66. Or try to remember them?

A. No.

X-Q. 67. Do you handle Beech-Nut chewing gum?

A. Yes, sir, and we sell a lot of it.

X-Q. 68. Do you handle any Beech-Nut mints?

A. Yes, sir.

X-Q. 69. Or hard candies?

A. Yes, we buy everything direct in the way of mints, chewing gum, their caramels, and they are displayed on the counter.

X-Q. 70. Have you ever made an exclusive window display of Beech-Nut gums and hard candies?

2460 A. No, we do not display candies. They are in the show case. They are not in the show windows.

X-Q. 71. Whereabouts in your store are the Beech-Nut gum and hard candies displayed?

A. This store don't carry candies, the lease won't allow us, but we have a gum case here on the counter. See? At the entrance counter.

X-Q. 72. Where is that with reference to the cigarettes?

A. Well, we have cigarettes—Beech-Nut cigarettes are not in the show cases; Beech-Nut cigarettes are in the drawer on top of the counter. We display the higher priced cigarettes, but we do not display, you know, the

cheap cigarettes like Camels, Lucky Strikes, and so forth; we do not display those in the show cases. 2461

X-Q. 73. You mean like the Beech-Nut cigarettes in the last classification?

A. I would. The cheap cigarettes, Camels, Lucky Strikes, Beech-Nut; that is what I call the cheap cigarettes.

X-Q. 74. Where is the Beech-Nut chewing gum displayed in your store with reference to your cigarettes?

A. Oh, that is separate. We do not have the cigarettes and the chewing gum together, you know.

X-Q. 75. About how near are they? 2462

A. Well, the Beech-Nut cigarettes are in a drawer. We may have a Beech-Nut carton on the top of the counter, see, but it would not be right in with the gum.

X-Q. 76. Where is the gum?

A. The gum is displayed in a show case.

X-Q. 77. At the back of the counters?

A. Yes. You take some of our stands, why, the Beech-Nut mints, you take like the Harris Trust Building, for instance, see? I mention the Harris Trust because we sell probably seventy or eighty dollars' worth of candy and gum a day. We have one end of the counter for the gum and the candy, the Beech-Nut mints, Hershey bars, and so forth; big sellers; that is not in the case, because people come in and help themselves. We wouldn't have Beech-Nut cigarettes or Lucky Strikes or some other cigarettes mixed up with the candy and gum. That is off on the other end of the counter. 2463

X-Q. 78. Did you, in making these Beech-Nut window displays, ever place in with the Beech-Nut cigarettes any of the Beech-Nut gum or mint packages or advertising matter?

A. No gum went in with the Beech-Nut cigarettes.

X-Q. 79. In these window displays I am speaking of.

A. No; no, sir.

2464 X-Q. 80. Have you handled Lorillard tobacco products for a good many years?

A. Yes, sir.

X-Q. 81. Ever since you began in the business?

A. Well, I guess, as far as I know, since I been in the business, why, we have sold Lorillard. See?

X-Q. 82. Are you big buyers of the Lorillard Company?

A. Well, I don't know whether you would call it big buyers. We are on the direct list with all the tobacco houses. See? And for eleven or twelve Stores, I guess we are big buyers. I don't know whether you would
2465 call us big buyers, but we must be pretty large to be on the direct list. They don't put a man on with one store, or two stores, you know.

X-Q. 83. So you have been familiar with the Lorillard products for a long time, haven't you?

A. Yes.

X-Q. 84. You have been in direct relationship with the Lorillard Company for quite a long while, from what you say?

A. What do you mean?

X-Q. 85. Is that correct. On this direct list you are buying—

2466 A. We are direct buyers, the same as we are with Beech-Nut chewing gum. We buy direct everything we have; everything direct, you see.

X-Q. 86. When did you first start to handle Beech-Nut Scrap tobacco?

A. Well, that is hard to say. I suppose we have handled it as long as it has been on the market; I do not know for sure. I knew we have had Beech-Nut Scrap for a long time.

X-Q. 87. Did you know whose product it was when you first saw the package?

A. Yes, sir, because those salesmen, you know, make 2467
it a point to say who makes an article.

X-Q. 88. Whose product did you think the Beech-Nut cigarettes were when you first saw the package?

A. Whom did I think?

X-Q. 89. Whose product did you think the Beech-Nut cigarettes were?

A. I naturally would think it was the Lorillard Company when the Lorillard man came in to see me.

X-Q. 90. Do you know the Lorillard men personally that come in?

A. I know some of them. They get around here
just the same way as the other salesmen, you know, 2468
that we buy from.

X-Q. 91. You are buying from them constantly and the same men are here frequently?

A. You see, we make up our order about twice a month and it is mailed in. We do not wait for the salesman to come in; it is mailed direct. You see? Because the only time they come around here is when they have something new, you know. They want to show it, and that is the only time the salesmen come here to see me; if there is something new they want to put on the market, they come to see me. Now, the
order is made up about twice a month and is mailed 2469
direct. We do not wait for the salesman to come in to give him our order. He don't come in to take the order.

X-Q. 92. Do you know Mr. Wade H. Brown, the district Lorillard man in Chicago, Mr. Getzelman?

A. Yes. This gentleman that was here this morning, you mean?

X-Q. 93. Yes.

A. Yes, I know him.

X-Q. 94. How long have you known him?

A. Well, probably—this is just guess work—about two years; maybe it is three; I couldn't say.

2470 X-Q. 95. How have the Beech-Nut cigarettes sold since they first came out?

A. Well, when we first put them on they went over very good; very, very good, but of late they are not selling.

X-Q. 96. About how many of them did you sell when they were going good?

A. I guess we started out selling about fifty thousand a month. For a new cigarette I call that very good.

X-Q. 97. About how many are you selling now?

A. Well, probably, maybe a thousand.

X-Q. 98. Is that in all your eleven stores you are re-
2471 ferring to?

A. Yes.

X-Q. 99. Have you heard any remarks or complaints as to the quality of the Beech-Nut cigarettes?

A. Well, yes, I have; like some say they do not like them, you know; that is about what I have heard, you know. I have heard them say, "I don't like that Beech-Nut cigarette."

X-Q. 100. Have you found that the same customer, as a rule, would come back and buy them the second time?

A. Oh, when they first come out, yes. I say when
2472 they were first put on the market, you know, why, we had regular customers. Must have had, you know, to sell fifty thousand.

X-Q. 101. In your experience in the tobacco business, Mr. Getzelman, have you found that customers ask for cigarettes and tobaccos by the name of the brand? Do they ask for Camels and Lucky Strikes and Union Leader, Climax, the names of the brands, such as that?

A. Yes. Yes, they come in and say, Camel, Lucky Strike. That is generally the way they ask for them.

X-Q. 102. Would you say they sell by brands?

A. Well, I guess that is what you would say, they

sell by brands. If a man wants a package of Camels, 2473
he won't say Reynolds' Camels; he would say Camels.

X-Q. 103. That is what I mean. Did you ever, in your experience, extending through sixteen years, hear a man, a customer, ask for Reynolds' Camels?

A. No.

X-Q. 104. Or American Tobacco Company's Lucky Strikes?

A. No. But now, here is a case, here is the La Venda cigar—I don't know whether this is to be taken down.

X-Q. 105. Just answer the question.

2474

Mr. Preston: Go ahead and finish your answer, Mr. Getzelman.

A. I was going to say, you see, there is the La Venda and the La Venga. We have a little trouble on that. The La Venda is our cigar and the La Venga is somebody else's.

X-Q. 106. Those are cigars, are they?

A. Yes.

X-Q. 107. Did you ever in your experience hear a customer ask for Lorillard's Moguls?

A. No

2475

X-Q. 108. Or Lorillard's Murads?

A. No.

X-Q. 109. Or Lorillard's Beech-Nut cigarettes?

A. I have heard them ask for Beech-Nut cigarettes, but I won't say Lorillard Beech-Nut cigarettes. But I will say this much that in introducing a new cigarette you have got, the people are so that they want to know who manufactures it. See? Because you can't come out with a cigarette that is made over here on Twelfth Street and make a success of it, because the public won't fall for it. There has to be a big company behind it to put a cigarette over nowadays.

2476 X-Q. 110. Have you changed your mind as to the answer to the question as to whether you have heard inquiries as to who makes the Beech-Nut cigarettes?

A. Let me get that.

X-Q. 111. As I understood you before, you said you had never heard any one ask who makes the Beech-Nut cigarettes?

A. I have never heard anybody ask.

X-Q. 112. Yes. And especially as to whether they are made by the same people as the Beech-Nut gum?

A. Well, sure, I have heard people say, "Who makes the Beech-Nut cigarettes?"

2477 X-Q. 113. Did you hear any discussion of it at any time?

A. Of course, I wouldn't have very many inquiries as to who makes it unless we are trying to sell a package. Naturally, the name is right there on the package, Lorillard's Beech-Nut, you know.

Mr. Johnson: That is all.

Re-direct Examination.

By Mr. Preston:

2478 R-D Q. 114. Mr. Getzelman, did you ever hear any of your customers say that, in their opinion, the tobacco in Beech-Nut cigarettes was not good tobacco?

A. Is not what?

R-D Q. 115. Did you ever hear any of your customers say that the tobacco in Beech-Nut cigarettes was not good tobacco?

A. No. They generally say they don't like the cigarettes. That is what they say; they don't say the tobacco is not good.

R-D Q. 116. You regard it merely as a matter of per-

sonal taste as to whether a man likes a cigarette or not? 2479

A. Yes.

R-D Q. 117. Can you state whether or not, during the time that you have worked for Mr. Breitung, you have been engaged in training new salesmen?

A. Yes, sir.

R-D Q. 118. What was the nature of the instructions which you tried to impress upon your salesmen when you were breaking them in?

A. Well, that is a long story. I always want to impress the salesman not to lie to the customers; always tell the truth; not to misrepresent an article. 2480

R-D Q. 119. I understood you to say on your cross-examination that you always made an attempt to be the first to put a new article on the market if you thought it was going to be a good seller?

A. Yes.

R-D Q. 120. Will you state why it was that you made an attempt and did put Beech-Nut cigarettes on this market before any of the other stores had them?

A. Well, I suppose, if I remember correct, the Beech-Nut cigarette come out at fifteen cents, and at that time most cigarettes of that style were selling for twenty cents, and I thought there was a good opportunity 2481 to have a big business on a fifteen-cent cigarette.

R-D Q. 121. At that time were you handling Beech-Nut chewing gum?

A. Yes, sir.

R-D Q. 122. Was it a good seller with you at that time?

A. Yes, sir.

R-D Q. 123. Did that fact induce you to make an attempt to get Beech-Nut cigarettes before the stores in this neighborhood had them? Do you understand the question?

2482 A. No.

R-D Q. 124. Did the fact—

Mr. Johnson: Objection by Mr. Johnson to this question as grossly leading.

Mr. Preston: Will you read the question?

(The record was read)

A. No.

Mr. Johnson: Add to my objection, please. Counsel for Beech-Nut Packing Company objects to
2483 counsel for P. Lorillard Company telling the witness in his question just exactly what he wants in the answer.

R-D Q. 125. Mr. Getzelman, will you state whether or not, if you had heard a considerable number of remarks or inquiries or comments among your customers which indicated that they thought Beech-Nut cigarettes were made by the same company that makes Beech-Nut gum, you would have remembered them?

A. Well, I would have remembered them. Our class of trade is people that we come in contact with, you know, every day. It is not so much transient trade, and
2484 it would get to me if there was a lot of complaining. Of course, you take like the Sherman House store and Stock Exchange and Borland, they have a lot of transient trade, but the other places, you see, it is a regular trade every day, and when they come they say, "How do you do, Mr. Johnson, How do you do, Mr. Brown." We know them. But the transient stores, why, I would get to it. See?

Mr. Preston: That is all.

Re-cross Examination 2485

By Mr. Johnson:

R-X Q. 126. Mr. Getzelman, can you tell me what office buildings your tobacco stands are in?

A. For instance, the Monadnock, we have a store and a stand; is that what you want?

R-X Q. 127. I just want the names of the buildings, really.

A. Monadnock Building, a corner store and an inside stand. Old Colony Building, store. Marshall Field Building, men's building, stand. Hotel Sherman, store. Stock Exchange Building, store. Borland Building 2486
store. Harris Trust Bank Building, store. Standard Trust Building, store. Corn Exchange Bank Building, stand. The Rookery, I don't know if you call that a stand or a store. It is a prominent building and we sell loads of cigarettes in there on account of so many brokers; it is a big stand.

R-X Q. 128. Are these among the busiest tobacco stores and stands in the City of Chicago?

A. Yes, sir.

R-X Q. 129. Do you handle Lorillard products in all of them? 2487

A. Yes, sir.

R-X Q. 130. And have you handled Lorillard products in all of them for some years?

A. Yes, sir.

Mr. Johnson: That is all.

Mr. Preston: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

2488

B. GANEK, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?

A. B. Ganek; age, twenty-nine; residence, 3821 West Congress Street, Chicago; occupation, retail cigar mer-

2489 chant.

Q. 2. Mr. Ganek, are you the manager of a number of stores in Chicago?

A. Yes.

Q. 3. How many are you the manager of?

A. At the present time, six.

Q. 4. What part of Chicago are they located in?

A. Two of them in the Loop and four on the South Side.

Q. 5. How long have you been manager of these six stores, Mr. Ganek?

A. Four years.

2490 Q. 6. Do you spend much of your time in the stores yourself?

A. Oh, yes.

Q. 7. Do you handle Beech-Nut Scrap tobacco?

A. Yes, sir.

Q. 8. How long have you handled that tobacco?

A. Well, since the last four years, for this concern.

Q. 9. Do you know what company makes Beech-Nut tobacco?

A. Yes, sir.

Q. 10. What company is it?

A. P. Lorillard.

Q. 11. Do you handle any other products made by 2491
the Lorillard Company?

A. Yes, sir.

Q. 12. Will you name a few of the Lorillard products that you handle?

A. Union Leader, Climax, Sensation, Open Book.

Q. 13. Do you handle any Turkish cigarettes made by the Lorillard Company?

A. Yes, sir. Murad, Helmar, Egyptian Deities, Luxuries.

Q. 14. Do you handle Beech-Nut cigarettes, Mr. Ganek?

A. Yes, sir, Beech-Nut cigarettes. 2492

Q. 15. How long have you handled them?

A. Since they came out, the last two years, I guess.

Q. 16. Do you know what company makes them?

A. Yes, sir.

Q. 17. What company makes them?

A. P. Lorillard.

Q. 18. Do you handle Beech-Nut chewing gum?

A. Yes, sir.

Q. 19. Do you handle any Beech-Nut mints or candies?

A. We do.

Q. 20. Do you know what company manufactures 2493
Beech-Nut chewing gum and mints?

A. Yes, sir.

Q. 21. What company?

A. Beech-Nut Packing Company.

Q. 22. Did you ever hear any remarks, inquiries or comments among your customers or others to the effect or which would lead you to believe they thought Beech-Nut Scrap tobacco or the Beech-Nut cigarettes to be the product of the Beech-Nut Packing Company?

A. No, sir.

Q. 23. Did you ever know of a food products company

2494 or a candy company or a gum company that manufactured any tobacco products?

A. No, not that I know of.

Q. 24. Do you regard gum and candies as in the same or a different class from tobacco or cigarettes?

A. It is a different class.

Q. 25. Did you ever see a package put up by the Beech-Nut Packing Company that looked either like Lorillard's Beech-Nut Scrap tobacco or Beech-Nut cigarettes?

A. No, sir, I never did.

2495 *Cross Examination*

By Mr. Johnson:

X-Q. 26. How long have you been in the tobacco business, Mr. Ganek?

A. For the last fifteen years.

X-Q. 27. What were you doing before you came into your present position?

A. I had a place of business on the South Side, corner of Twenty-second and Wentworth Avenue, 2201 Wentworth.

X-Q. 28. What did you do there?

2496 A. Same line of business, cigars and tobacco.

X-Q. 29. What store do you make your headquarters right now?

A. Right here.

X-Q. 30. What is the address?

A. 600 South State Street.

X-Q. 31. Do you wait on the counter here?

A. Yes, I do.

X-Q. 32. How long have you been at this address, 600 South State Street?

A. About two and a half years.

X-Q. 33. Ever since the Beech-Nut cigarettes came 2497
out?

A. Well, I don't remember when they came out, but we had them when they first came out.

X-Q. 34. Can you say about what month and year it was when you first began to handle Beech-Nut cigarettes?

A. I couldn't exactly tell you; probably about a year ago or so.

X-Q. 35. About how many customers do you have in this store, 66 South State Street, a day?

A. Between ten and twelve hundred.

X-Q. 36. It is a very busy store, is it? 2498

A. It is a pretty busy store; yes, sir.

X-Q. 37. How many clerks do you have?

A. Four clerks.

X-Q. 38. Besides yourself?

A. No; three besides myself.

X-Q. 39. You have four here most of the time?

A. They are not here all the time, but I have different shifts.

X-Q. 40. How many at a time?

A. One or two at a time.

X-Q. 41. Is this a corner store?

A. Yes, sir. 2499

X-Q. 42. On what corner?

A. State and Harrison.

X-Q. 43. Do you have much time to talk to customers?

A. Oh, yes, quite a bit of time.

X-Q. 44. Do many of them ask you who makes these cigarettes or the article they are buying.

A. No; very seldom anybody asks that.

X-Q. 45. Did you make any effort to remember whether you heard any inquiries, comments or remarks as to who makes the Beech-Nut cigarettes?

A. No; never did.

2500 X-Q. 46. You never tried to remember?

A. That is, I never had any inquiries.

X-Q. 47. My question was: Did you ever try to remember any such inquiries, if you had them?

A. Well, I never had any, so I can't remember.

X-Q. 48. Did anybody ever ask you to remember or make a note of any such inquiries?

A. No, they never did.

X-Q. 49. Then you had no reason, did you, to try to remember any such?

A. No.

X-Q. 50. Did you ever hear any discussion as to who
2501 makes the Beech-Nut cigarettes?

A. No, I never did.

X-Q. 51. Never at any time?

A. No.

X-Q. 52. When you first saw the package, who did you think put out the Beech-Nut cigarettes?

A. P. Lorillard.

X-Q. 53. Have you handled Lorillard products for a long time?

A. Oh, yes.

X-Q. 54. Handle many in quantity of them?

A. Quite a few.

2502 X-Q. 55. Do you know Mr. Brown, the district man for the P. Lorillard Company in Chicago?

A. Yes, sir.

X-Q. 56. How long have you known him?

A. I have known him for the last six or eight years.

X-Q. 57. How have the Beech-Nut cigarettes sold since you have been here?

A. Sir?

X-Q. 58. How have the Beech-Nut cigarettes sold since you put them in here?

A. Very bad.

X-Q. 59. Ever since the start?

A. Ever since the start; they did not take.

X-Q. 60. About how many a week did you sell when they were selling best?

A. Well, I couldn't tell you that; probably use about a thousand a week in all the stores.

X-Q. 61. In all six stores?

A. In all six stores.

X-Q. 62. About how many a week do you sell now?

A. I couldn't tell you; I don't know— About two hundred a week in all six stores.

X-Q. 63. Did you ever hear any complaints as to the quality of the Beech-Nut cigarettes?

A. No; never did.

X-Q. 64. Did you hear any remarks on the Beech-Nut cigarettes by those who had used them?

A. No; never did.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 65. Mr. Ganek, you sell playing cards in your store here?

A. Yes, sir.

R-D. Q. 66. Do you sell pencils?

A. Yes, sir.

R-D. Q. 67. Do you sell razor blades?

A Yes, sir.

R-D. Q. 68. Will you state whether or not, if you had heard any considerable number of remarks or inquiries among your customers or others which led you to believe that Beech-Nut cigarettes or Beech-Nut Scrap tobacco was made by the same concern that makes Beech-Nut chewing gum, you would have remembered them?

A. Oh, yes, I would.

2506 Mr. Preston: That is all.

Mr. Johnson: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

WHEREUPON a recess was taken until 2:00 o'clock p. m. of the same day.

Chicago, February 9, 1923.
2:00 o'clock p. m.

2507 Parties met pursuant to recess.

PRESENT: Counsel as before.

JOHN A. WEBER, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Mr. Weber, will you please state your name,
2508 age, residence and occupation?

A. My name is John A. Weber; age, thirty-seven years; residence, 5110 North Bernard Street, Chicago; occupation, cigar merchant.

Q. 2. Mr. Weber, do you manage more than one cigar store?

A. Yes.

Q. 3. How many stores?

A. Seven.

Q. 4. In what part of Chicago are those stores located?

A. Well, there is five on the North Side and one on 2509
the West Side and one on the Northwest Side.

Q. 5. And what is the address of this store where you are now?

A. 754 North Clark Street.

Q. 6. Mr. Weber, do you spend most of your time in one or the other of these stores?

A. Most of the time is here. Of course, I work in all of them off and on. I am in there every day, but do not stay there continuously.

Q. 7. Do you wait on customers yourself?

A. Oh, yes.

Q. 8. Mr. Weber, do you handle Beech-Nut Scrap to- 2510
bacco?

A. Yes, sir.

Q. 9. For how long a time have you handled that?

A. Well, I guess ever since it is on the market.

Q. 10. Is it a good seller?

A. It is my best seller in scrap.

Q. 11. Do you sell half as much of any other scrap tobacco as you do Beech-Nut?

A. Yes, we sell over half as much, but not as much as Beech-Nut, but I guess more than half as much.

Q. 12. Do you know what company makes the Beech-Nut Scrap tobacco? 2511

A. P. Lorillard.

Q. 13. Do you handle many Lorillard products?

A. Handle all their brands salable in this district.

Q. 14. Would you name some of the leading Lorillard brands that you handle?

A. Beech-Nut cigarettes; Beech-Nut tobaccos; Union Leader; Climax; Havana Blossom.

Q. 15. Do you handle any other Turkish cigarettes manufactured by the Lorillard Company?

A. Yes.

2512 Q. 16. Name some of them, please.

A. Murads, Moguls, Helmars.

Q. 17. How long have you handled Beech-Nut cigarettes, Mr. Weber?

A. Ever since they were put on the market. How long ago that is, I cannot remember.

Q. 18. Can you remember about how long you have handled them?

A. It is rather hard to tell just how long, because I did not pay any attention to it, whether it is two years or three years; I guess it is all of three years. I am not positive of that, I won't swear to that just definite.

2513 Q. 19. Have you always known Beech-Nut cigarettes were manufactured by the Lorillard Company?

A. Yes, sir.

Q. 20. Can you remember who the salesman was who first sold you those cigarettes?

A. No, I cannot; I am not positive.

Q. 21. Do you remember whether, at the time the cigarettes first came on this market, you had them displayed in your store and had any advertising matter advertising the cigarette?

A. Yes, I gave them window displays, featured them in the windows, when they first came out.

2514 Q. 22. Do you sell Beech-Nut chewing gum?

A. Yes.

Q. 23. Beech-Nut mints?

A. No.

Q. 24. Do you know what company manufactures Beech-Nut chewing gum?

A. Beech-Nut Products Company, I guess that is it, Beech-Nut Packing Company.

Q. 25. Mr. Weber, have you ever heard any remarks, inquiries or comments among your customers or others to the effect or which would lead you to believe they thought Beech-Nut Scrap tobacco or Beech-Nut ciga-

rettes to be the product of the same company that manufactures Beech-Nut chewing gum? 2515

A. There was one, about once or twice that question was asked, wanted to know whether it was made all by one company or not.

Q. 26. About how many times do you think that was?

A. Once or twice, and I happened to be on watch at that time.

Q. 27. Was that when the cigarettes first came out?

Mr. Johnson: Objection by Mr. Johnson to this question as leading.

2516

A. Yes, that was shortly after the cigarettes were put out.

Q. 28. What did you tell those people who asked you whether it was made by the same company?

A. Well, being acquainted with both companies, I just told them one was made by the packing company that makes bacons and hams, and the other was made by P. Lorillard Company, the tobacco company; there was no confliction between the two at all.

Q. 29. Did you ever know of a tobacco company which manufactured food products or confections?

A. Did I ever know of any? 2517

Q. 30. Yes, sir.

A. Not that I know of.

Q. 31. Do you regard gum and tobacco or cigarettes as in the same or different classes?

A. Different classes.

Q. 32. Did you ever see a package put out by the Beech-Nut Packing Company which looked like Lorillard's Beech-Nut Scrap tobacco or cigarette packages?

A. No, I can't say that I did.

Q. 33. Do you think that anyone could possibly mis

2518 take the gum package for either the scrap tobacco package or the cigarette package?

A. No, I do not think they can.

Q. 34. Mr. Weber, do you sell fountain pens in your store?

A. Yes.

Q. 35. Razor blades?

A. Yes.

Q. 36. Pencils?

A. Yes.

Q. 37. Toys?

A. Toys?

2519 Q. 38. Yes, sir.

A. No. No, not as a rule; a few little toys.

Q. 39. Playing cards?

A. Playing cards; yes.

Q. 40. Pictures?

A. No. Those are tablets.

Q. 41. Stationery?

A. Yes.

By Mr. Preston: That is all.

Cross Examination.

2520

By Mr Johnson:

X-Q. 42. Mr. Weber, how long have you been in the tobacco business all together?

A. Twenty-three years.

X-Q. 43. And are you the proprietor of this store at the present time?

A. Well, I am one of the partners; yes.

X-Q. 44. What is the name of the concern?

A. Neubauer & Weber. We have not been partners all those twenty-three years. Of course, I have been in the business twenty-three years.

X-Q. 45. Is Neubauer & Weber the name of the concern? 2521

A. That is the name of this concern.

X-Q. 46. That owns these seven stores you have referred to?

A. Yes.

X-Q. 47. What do you call your chain of stores?

A. N & W Cigar Stores.

X-Q. 48. Which one is your headquarters?

A. 754 North Clark.

X-Q. 49. Which one are you in most of the time?

A. 754 North Clark.

X-Q. 50. You do a wholesale or jobbing business, as well as retail? 2522

A. No; all retail.

X-Q. 51. Do you wait on the counter yourself?

A. Oh, yes.

X-Q. 52. In 754 North Clark Street?

A. Yes, always work, in case somebody is sick step in to help out.

X-Q. 53. How many clerks do you keep in this store as a rule?

A. Two.

X-Q. 54. At one time?

A. No, one man at one time; two men here besides the bosses. 2523

X-Q. 55. About how many customers a day do you have in this store?

A. About five hundred a day.

X-Q. 56. With one man, as a rule, waiting on them?

A. Yes.

X-Q. 57. About what size, approximately, is this store, the front?

A. About eleven by twenty-eight.

X-Q. 58. During all these twenty-three years have you been in the retail tobacco trade?

2524 A. Well, we used to be in wholesale and retail a part of the time; it is all retail now.

X-Q. 59. When you first saw the Beech-Nut Scrap tobacco, whose product did you think it was?

A. P. Lorillard's.

X-Q. 60. When you first saw Beech-Nut cigarettes, whose product did you think they were?

A. Beech-Nut cigarettes? P. Lorillard.

X-Q. 61. Did you know they were made by the P. Lorillard Company before you ever saw a package of them?

A. Yes, sir.

2525 X-Q. 62. You are kept pretty busy waiting on your customers when you are behind the counter?

A. At times. There are times of the day I am not so busy.

X-Q. 63. Do you have many purchasers come in and ask you who makes the article that they are buying?

A. No. Very seldom.

X-Q. 64. As a rule, do you have much conversation with your customers?

A. Well, at times. People you are well acquainted with you get in conversation with; customers sometimes start in to talk and get ideas of merchandise,

2526 want to know things about them.

X-Q. 65. And have you heard some discussion as to whether the Beech-Nut cigarettes are made by the same people that make the Beech-Nut chewing gum?

A. Never. No, I can't say that I ever heard that.

X-Q. 66. Did you ever hear any questions asked as to who makes the Beech-Nut cigarettes?

A. Only once or twice, as I stated before.

X-Q. 67. Can you describe those incidents that you have just mentioned? Remember what the people said at the time?

A. All I can say is, one party says, "Are they all made by the same people?" I says, "No." 2527

X-Q. 68. What did they mean, were they all made by the same people, what were they referring to?

A. Well, Beech-Nut gum and Beech-Nut cigarettes.

X-Q. 69. And how many times have you been asked questions like that?

A. Twice, to my knowledge; that is all.

X-Q. 70. Do you remember the parties?

A. No, I do not.

X-Q. 71. Do you remember about when it was?

A. No, I can't say that either.

X-Q. 72. When did you first put in the Beech-Nut cigarettes? 2528

A. When P. Lorillard first introduced them in the City of Chicago; how long ago, I do not know.

X-Q. 73. Can you remember about when it was?

A. I can't exactly tell you that, whether it was two years or three years.

X-Q. 74. Did you make any effort to remember any such instances as you have just mentioned, of people asking whether the Beech-Nut cigarettes and chewing gum were made by the same people, did you make any particular effort to remember such things?

A. No, I have not. 2529

X-Q. 75. You might have heard some more then that you do not remember, might you not?

A. The reason of me remembering those two is because the names were all so much alike. That is the reason I remember that, you see, and made by different corporations. Otherwise I am positive I never heard anything said about it.

X-Q. 76. When people have come into your stores, within your long experience in the tobacco business, do they usually ask for cigarettes or tobacco by the name of the brand?

A. Oh, yes; yes.

2530 X-Q. 77. Would you say that cigarettes and tobacco sell by the brand?

A. By the brand; yes.

X-Q. 78. Did you ever have a purchaser come in and ask for Reynolds' Camels?

A. No.

X-Q. 79. Or American Tobacco Company's Lucky Strikes?

A. No. Never.

X-Q. 80. Or Lorillard's Beech-Nut cigarettes?

A. No.

X-Q. 81. Do they always ask for the cigarettes or to-
2531 bacco by the name of the brand?

A. They do.

X-Q. 82. Have you handled Lorillard Company's products for many years?

A. Ever since I am in this business, some brands; some one of their brands at all times.

X-Q. 83. Have you handled a great many of their goods?

A. Yes, carry a big line of stuff that is sold in this market.

X-Q. 84. Have you been acquainted with their salesmen in this district?

2532 A. Oh, yes.

X-Q. 85. Do you know Mr. Brown, the district sales manager in Chicago now?

A. I do.

X-Q. 86. About how long have you been acquainted with him?

A. Well, I should judge about two years; maybe longer; I can't say for sure.

X-Q. 87. Are you the buyer for your seven stores?

A. Yes, sir.

X-Q. 88. Do you know the Lorillard salesmen pretty well?

A. I know their entire force here, that is, all their district managers in this territory. 2533

Mr. Johnson: That is all.

Re-direct Examination

By Mr. Preston:

R-D Q. 89. Mr. Weber, did you ever know a Lorillard salesman to misrepresent one of the products he was handling?

A. No.

2534

Mr. Preston: That is all.

Mr. Johnson: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

NATHAN ADELMAN, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination

2535

By Mr. Preston:

Q. 1. Mr. Adelman, will you state your name, age, residence and occupation?

A. My name is Nathan Adelman; residence, 3901 South Halsted Street, Chicago; age, about thirty-two, am going on my thirty-third year; and occupation, cigar business; cigars, candy and tobacco.

Q. 2. And where is your store located?

A. 3901 South Halsted.

2536 Q. 3. Mr. Adelman, how long have you been in this business?

A. How long I been entirely in business, you mean, or in this place?

Q. 4. In the tobacco business.

A. In the tobacco business, around eight years.

Q. 5. How long have you been in this store?

A. You see, I was next door. I was over a year next door and then I moved in here; about three months since I moved from the next door over.

Q. 6. Mr. Adelman, do you carry various other products besides tobacco?

2537 A. I do. Gloves—

Q. 7. Could you name some of the other things you carry besides tobacco?

A. Gum, candy. Chewing gum and smoking articles like pipes, and a little hosiery; not much.

Q. 8. Do you sell flashlights?

A. Yes.

Q. 9. Do you sell stationery?

A. Very little. Most of my business is on the tobacco business; that is most of my business.

Q. 10. Do you carry playing cards?

A. Yes.

2538 Q. 11. Stationery?

A. Stationery? Just a very little in stationery.

Q. 12. Pencils?

A. Yes, pencils.

Q. 13. Mr. Adelman, do you know of the Lorillard Company?

A. Yes, I know them; I have been dealing with them since I am in business.

Q. 14. What business are they in?

A. They are in the tobacco business.

Q. 15. Will you name some of the Lorillard brands you handle?

A. What do you want on the tobacco, scrap tobacco 2539
or little cigars, plug tobaccoes, or what?

Q. 16. A few of each, please.

A. I handle Climax. I handle Red Cross and I handle—Climax, that means all sizes, you know. And I handle tobaccos, Union Leader, Havana Blossom, Beech-Nut Scrap, Tiger Fine-cut, Comic, Open Book; little cigars, Royal Bengals, Flexo, Giants and then Between-the-Acts, Sub Rosa. And on cigarettes, as far as I know, what I am handling of their stock is Beech-Nut cigarettes, Murad, Helmar. That is three that I know.

Q. 17. How long have you been handling Beech-Nut 2540
Scrap tobacco?

A. Since I am ever in business.

Q. 18. Mr. Adelman, do you know what company manufactures Beech-Nut Scrap tobacco?

A. What company?

Q. 19. Yes, sir.

A. As far as I know, it is P. Lorillard.

Q. 20. Have you known ever since you have handled Beech-Nut Scrap tobacco it was a product of the Lorillard Company?

A. Yes.

Q. 21. Is Beech-Nut Scrap tobacco a good seller? 2541

A. Absolutely a good seller. It is the best seller in scrap tobacco with me. As far as I know, it is the best seller I have in scrap tobacco.

Q. 22. Is your store located near the Chicago Union Stock Yards?

A. Yes.

Q. 23. How much Beech-Nut scrap tobacco do you suppose you sell in a week?

A. Two gross.

Q. 24. How many packages in a gross?

A. A hundred and forty-four packages in a gross

2542 and two hundred and eighty-eight packages a week is what I sell.

Q. 25. About how long have you handled Beech-Nut cigarettes?

A. Since they ever came out.

Q. 26. And can you remember about how long ago that was?

A. Oh, that must have been a little over a year since; must have been about August; a little over a year. That is as far as I know; must have been around August or something like that.

Q. 27. Do you know what company manufactures
2543 Beech-Nut cigarettes?

A. Yes. P. Lorillard Company.

Q. 28. Do you remember what salesman first sold you Beech-Nut cigarettes?

A. What salesman sold me the first Beech-Nut cigarettes? I think, if I don't mistake—It is kind of hard to remember, but if I don't mistake, it was a blonde fellow. I don't know exactly his name. He always used to wear a derby.

Q. 29. Can you remember whether or not, when he sold you these cigarettes, he told you he was a representative of the Lorillard Company?

2544 A. Yes; absolutely.

Mr. Johnson: Objection by Mr. Johnson to leading questions.

A. Yes; absolutely he told me.

Q. 30. Did you finish your answer to that question?

A. On that, yes.

Q. 31. Do you remember whether or not he had advertising matter with him at that time?

A. Yes, he did have posters.

Q. 32. Did he put any posters up in your store?

A. Yes, he did. He told me that would help sell the Beech-Nut cigarettes from Lorillard. 2545

Q. 33. Do you handle Beech-Nut chewing gum?

A. Yes. Here they are (indicating).

Q. 34. Do you sell any Beech-Nut mints or candies?

A. No, that is the only thing I handle; that is the only thing. Always a good seller is Beech-Nut gum.

Q. 35. Do you know what company manufactures Beech-Nut chewing gum?

A. As far as I know, it is the Beech-Nut packers, what they call them.

Q. 36. Have you heard any remarks, inquiries or comments among your customers or anybody else to the effect or which would lead you to believe that they thought Beech-Nut cigarettes or Beech-Nut Scrap tobacco were made by the same company that manufactured Beech-Nut chewing gum? 2546

A. No. The only thing when the Beech-Nut cigarettes were out, the same company, P. Lorillard, what manufactures Beech-Nut Scrap. In case they ain't any good, the Lorillard Company is supposed to be back of them.

Q. 37. You never heard anything which indicated that people thought the Beech-Nut Packing Company made Beech-Nut cigarettes; is that right? 2547

A. No, not as I know.

Q. 38. Did you ever know of a tobacco company that manufactured any confections or chewing gum?

A. Chewing gum, any manufacturer?

Q. 39. Did you ever know of a tobacco company that manufatcured any chewing gum?

A. No, not as I know.

Q. 40. Do you regard gum and tobacco or cigarettes as in the same or separate classes?

A. What? The gum with the tobacco?

Q. 41. Yes.

A. Separate; absolutely separate.

2548 *Cross Examination.*

By Mr. Johnson:

X-Q. 42. Are you engaged in the retail tobacco trade?

A. Retail tobacco, candy and gum.

X-Q. 43. And how long have you been in the tobacco business all together?

A. About eight years.

X-Q. 44. Been in the retail trade all that time?

A. Been in the retail trade all that time.

X-Q. 45. Are you the proprietor of this store?

2549 A. Yes, sir.

X-Q. 46. Is this a corner store?

A. Yes, sir.

X-Q. 47. On what corner?

A. It is on the southeast corner.

X-Q. 48. Of what streets?

A. Halsted and Pershing Road. Used to be Thirty-ninth.

X-Q. 49. Is this a busy corner?

A. Yes, sir; absolutely busy corner.

X-Q. 50. About what size is this store?

A. About twenty-eight front by twenty-five feet

2550 depth.

X-Q. 51. About how many customers a day do you have in here?

A. Average between four and five hundred.

X-Q. 52. How many clerks do you have?

A. Me and my wife.

X-Q. 53. Just you and your wife?

A. Yes. Summer time we get a clerk, but not in the winter time.

X-Q. 54. You try to keep just one in here at a time, just one clerk?

A. One; yes.

X-Q. 55. Then you are pretty busy waiting on customers, are you not? 2551

A. Too busy in the mornings. In the day time we can take care of it, but in the morning it is too busy.

X-Q. 56. Do you have much time to talk to customers?

A. Of the day certain hours I can and certain hours I don't.

X-Q. 57. Does a customer often come in to buy cigarettes or tobacco and ask you, while he is buying it, who makes it?

A. Yes, many times. When the Beech-Nut cigarettes came out there are many times they asked me.

X-Q. 58. Did they ask you the same thing about the 2552 Beech-Nut Scrap tobacco when it came out?

A. Well, it was too early for me then; when they first came out I was too young; I was maybe not born yet.

X-Q. 59. You mean you do not remember?

A. No.

X-Q. 60. Have you heard many people ask whether the Beech-Nut cigarettes and Beech-Nut gum were made by the same people?

A. Beech-Nut gum and Beech-Nut cigarettes, they are made by the same people? No. Once in a while a fellow asks and sometimes says, "There are so many 2553 Beech-Nut." I says, "Beech-Nut cigarettes is Lorillard's and Beech-Nut gum is Beech-Nut Packing Company's."

Q-X. 61. Have a good many people asked you that?

A. No, just one since I am in this place; just one or two.

X-Q. 62. How long have you been in this place?

A. Both of them together I acquired, you see.

X-Q. 63. Yes.

A. Just about a year and a half.

2554 X-Q. 64. You didn't try to remember such people asking such things, did you?

A. I do when I talked to them. I remember they never asked me, just but two. I guess I am right.

X-Q. 65. Do they ever come into your store and just ask for Beech-Nut?

A. They come in here and ask for Beech-Nut gum if they want gum, and if they want chewing tobacco that is what they ask for. When they come in they ask for Beech-Nut Scrap or they ask for a package of Beech-Nut gum if they want gum.

X-Q. 66. Do you ever have people come in and just
2555 ask for Beech-Nut, without saying whether it is gum or cigarettes?

.A Once in a while; yes.

X-Q. 67. What do you do in a case like that?

A. I ask him what he wants, if he says "Beech-Nut," "What kind of a Beech-Nut you want?" If it is gum they say "Beech-Nut gum," or if it is Beech-Nut cigarettes, they say "Beech-Nut cigarettes."

X-Q. Have you a front window along the Halsted Street sidewalk across nearly the entire front of your store?

A. Yes.

2556 X-Q. 69. What advertising have you in that window now?

A. Now I have got little cigars, all that stuff.

X-Q. 70. Name some of it, some of the brands that you are advertising in your window today.

A. You mean right now?

X-Q. 71. Yes.

A. They just trimmed a little while ago. You mean the entire window?

X-Q. 72. Name some of the brands advertised in the window.

A. Flexo Giants, Royal Bengals, Sub Rosa, Beech-Nut cigarettes and Camel cigarettes and Lucky Strikes; Chesterfields. 2557

X-Q. 73. Are those in the window now?

A. Yes.

X-Q. 74. Are you sure?

A. Yes; absolutely.

X-Q. 75. Are Murad cigarettes advertised in your window?

A. Yes.

X-Q. 76. Today?

A. Yes.

X-Q. 77. Are Helmar cigarettes? 2558

A. Yes.

X-Q. 78. Are Beech-Nut cigarettes?

A. In the window; yes; in a carton, and the display.

X-Q. 79. Beech-Nut Scrap tobacco advertised in your window today?

A. Yes.

X-Q. 80. Is Climax advertised in your store today?

A. Yes.

X-Q. 81. Is there a permanent large red sign appended at the top of your window, about three feet high, advertising Murad cigarettes, all the way across the front? 2559

A. No, not all the way across; just half of the window.

X-Q. 82. Half ways?

A. Half ways Murad and half ways Helmar. I got two Helmar and one Murad with big letters, is what I mean.

X-Q. 83. People approaching your store from the front today might think this was a Lorillard store, might they not?

A. I don't know what they think. I know it ain't.

X-Q. 84. Have you been keeping Lorillard products many years?

2560 A. Oh, yes; since I am in business I always got Lorillard goods.

X-Q. 85. Have you sold a great many of them?

A. Yes. Wherever I got a good store always sell lots of stuff?

X-Q. 86. Do you know the Lorillard salesmen in this district?

A. Yes.

X-Q. 87. Do you know Mr. Brown, the head salesman for Lorillard's in this district?

A. Yes; know Mr. Brown, Mr. Degan, and I know Berkley and I know Meyers; that is the advertising man.

2561 X-Q. 88. How long have you known Mr. Brown?

A. Oh, I know Mr. Brown since I am in business.

X-Q. 89. How have the Beech-Nut cigarettes sold in your store since they first came out?

A. Pretty good.

X-Q. 90. About how many did you sell when they were selling best?

A. Selling best, I was selling about two thousand a week.

X-Q. 91. About when was that, that they were selling two thousand a week?

A. They were selling around September, October,

2562 November of last year.

X-Q. 92. What year?

A. 1922.

X-Q. 93. Are you selling many of them now?

A. I did sell more when they first came out than I do now. I am selling about a thousand a week; five cartons, two hundred to a carton, that is a thousand cigarettes.

X-Q. 94. Have you heard any complaints as to the quality of the Beech-Nut cigarettes?

A. No. But they always come out with twelve cigarettes for so much, all different prices on different

quality, so people nowadays they like what is cheaper, 2563
you know.

X-Q. 95. In your experience in the tobacco business, Mr. Adelman, do customers usually ask for a cigar, cigarette or tobacco by the name of the brand?

A. Absolutely; absolutely.

X-Q. 96. Do many customers ask you for the name of the brand, together with the name of the maker, like Reynolds' Camel cigarettes?

A. No.

X-Q. 97. Did anybody ever ask you for cigarettes that way?

A. No. No, they come in and ask for Beech-Nut 2564
Scrap tobacco, Beech-Nut cigarettes, and if they want Beech-Nut cigarettes they say Beech-Nut cigarettes.

X-Q. 98. They do not say Lorillard cigarettes?

A. No, they say Beech-Nut cigarettes.

Re-direct Examination.

By Mr. Preston:

R-D Q. 99. Mr. Adelman, do you advertise Lorillard brands very extensively at your store?

A. Same as I do all the rest of them. 2565

Mr. Preston: That is all.

Re-cross Examination.

By Mr. Johnson:

R-X Q. 100. But your show window in front today, Mr. Adelman, contains almost exclusively Lorillard products, does it not?

A. Yes.

2566 R-X Q. 101. About how long do you keep the same display in the window?

A. About every four weeks, probably a couple of days before or a couple of days after; every month we change the displays.

Mr. Johnson: That is all.

Re-direct Examination.

By Mr. Preston:

R-D Q. 102. Mr. Adelman, do you carry many prod-
2567 ucts manufactured by the Reynolds Tobacco Company?

A. Yes.

R-D Q. 103. Do you sell a great many of the Reynolds Tobacco Company's products?

A. Camels and Prince Alberts.

R-D Q. 104. Do you carry a great many products manufactured by the American Tobacco Company?

A. Yes.

R-D Q. 105. Do you sell a great many of the American Tobacco Company's products?

A. Yes. Want me to mention the names?

R-D Q. 106. No, that is not necessary. Do you carry
2568 a great many products manufactured by the Liggett & Meyers Tobacco Company?

A. Yes.

R-D Q. 107. What brand of cigarettes do you sell most of?

A. Camels.

R-D Q. 108. What company is that manufactured by?

A. That is Reynolds', R. J. Reynolds. Then comes next Lucky Strikes; that is the American Tobacco Company's; Chesterfield is Liggett & Meyers'.

R-D Q. 109. What is your best selling scrap tobacco?

A. Beech-Nut Scrap.

R-D Q. 110. What company manufactures that? 2569
A. P. Lorillard.

Re-cross Examination.

By Mr. Johnson:

R-X Q. 111. Do you buy large quantities of Lorillard's products?
A. Yes.

Re-direct Examination.

By Mr. Preston: 2570

R-D Q. 112. Do you buy large quantities of Reynold's products?
A. Reynolds? Yes, one brand; Camel.

Mr. Preston: That is all.
Mr. Johnson: That is all.
By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

2571

JACOB SHANFIELD, called as a witness on behalf of the defendant, P. Lorillard, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Will you please state your name, age, residence and occupation?
A. My name is Jacob Shanfield; age, forty-five; residence, 742 West Forty-third Street, Chicago, Illinois; occupation, merchant, I always call it.

2572 Q. 2. Will you name some of the kinds of things that you sell in your store?

A. Cigars, cigarettes, tobacco, candies, notions, stationery, gum.

Q. 3. Do you sell sporting goods?

A. Yes, sir.

Q. 4. Do you sell toys?

A. Toys; yes, sir.

Q. 5. Do you sell stationery?

A. Yes, sir; I mentioned that.

Q. 6. About how large is your store, Mr. Shanfield? About what are the dimensions of it?

2573 A. Width twenty; length about forty.

Q. 7. Mr. Shanfield, do you know of the Lorillard Company?

A. Yes, sir.

Q. 8. What line of business are they engaged in?

A. Tobacco.

Q. 9. Do you handle many Lorillard brands?

A. I do, sir.

Q. 10. Would you name a few of the leading Lorillard brands that you handle?

A. Climax chewing tobacco, Union Leader smoking, Beech-Nut Scrap tobacco, Beech-Nut cigarettes.

2574 Q. 11. Do you handle any Turkish cigarettes manufactured by Lorillard?

A. Yes, sir.

Q. 12. How long have you handled Beech-Nut Scrap tobacco, Mr. Shanfield, about how long?

A. A few years; I don't know exactly; since the Beech-Nut is out.

Q. 13. Could you say about how many years that has been?

A. Five or six years.

Q. 14. Do you know what company makes that?

A. The Lorillard.

Q. 15. Have you known the Lorillard Company made Beech-Nut tobacco since you have been handling it? 2575

A. Ever since I have been handling it?

Q. 16. Yes, sir.

A. Yes, sir.

Q. 17. Do you handle Beech-Nut cigarettes?

A. Yes, sir.

Q. 18. How long have you handled them?

A. Two or three years, I think, ever since they came out.

Q. 19. Do you know what company makes them?

A. P. Lorillard.

Q. 20. Is the Beech-Nut Scrap tobacco a good seller? 2576

A. Yes, sir.

Q. 21. Is it your best selling scrap?

A. Yes, sir.

Q. 22. How do the Beech-Nut cigarettes sell with you, sir?

A. Not so good.

Q. 23. Do you handle Beech-Nut chewing gum?

A. Yes, sir.

Q. 24. Do you know what company manufactures that?

A. No, sir.

Q. 25. Did you ever think that the Lorillard Company made Beech-Nut chewing gum? 2577

A. No, sir.

Q. 26. Have you ever heard any remarks, inquiries or comments among your customers or others to the effect or that led you to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were manufactured by the same company that makes Beech-Nut gum?

A. No, sir.

Q. 27. Do you handle any Beech-Nut mints or candies?

A. No.

2578 Q. 28. Did you ever know of a tobacco company that manufactured candies or chewing gum?

A. No, sir.

Q. 29. Do you regard tobacco and cigarettes as in the same or a different class from chewing gum?

A. Certainly I do.

Q. 30. The same or different?

A. Different.

Q. 31. Do you think that either the Beech-Nut Scrap tobacco package or the Beech-Nut cigarette package looks like a chewing gum package?

A. No, sir.

2579 Q. 32. What would you think of any man who would accept scrap tobacco or cigarettes in the place of chewing gum?

A. In the place of chewing gum, no, sir; he would not accept it. He would laugh at me.

Q. 33. Can you remember who the salesman was who first sold you Beech-Nut cigarettes?

A. No, sir.

Q. 34. Do you remember whether, when you first put Beech-Nut cigarettes on sale there was any advertising matter put up in your store by the salesman, advertising the Beech-Nut cigarettes?

2580 A. I don't know whether they made a demonstration here or not at that time.

Q. 35. Can you remember whether any posters or such advertising matter as that was put on display in your store?

A. In the store, no, sir; outside in the store, in the window might be, but not in the store.

Q. 36. About how many customers a day do you have here?

A. About five hundred.

Mr. Preston: That is all.

Cross Examination. 2581

By Mr. Johnson:

X-Q. 37. Are you the proprietor of this store, Mr. Shanfield?

A. Yes, sir.

X-Q. 38. Is your store at 742 West 43rd Street, Chicago?

A. Yes, sir.

X-Q. 39. How long have you been in the tobacco business all together?

A. Thirteen years.

2582

X-Q. 40. Have you been in the retail tobacco business all that time?

A. Yes, sir.

X-Q. 41. How long have you had a store of your own?

A. All that time.

X-Q. 42. Thirteen years?

A. Yes, sir.

X-Q. 43. How long have you been at this address?

A. Same time.

X-Q. 44. At the same store all that time?

A. Yes, sir; same store all that time.

2583

X-Q. 45. How many clerks do you have in this store?

A. None.

X-Q. 46. How many wait on the counter at one time?

A. Helps me, my wife and child, two at one time.

X-Q. 47. You try to keep two here the most of the time?

A. Most of the time; yes, sir.

X-Q. 48. Are you kept pretty busy waiting on customers?

A. Well, not all day; mornings and evenings mostly.

2584 X-Q. 49. Do many customers who come in to buy cigarettes or tobacco ask you who makes the cigarettes or tobacco that they buy?

A. No, sir.

X-Q. 50. They are not very often interested in who makes them?

A. No, sir.

X-Q. 51. Have you had any people ask you who made the Beech-Nut cigarettes?

A. No, sir.

X-Q. 52. Have you heard any people discussing whether the same people make the Beech-Nut cigarettes
2585 that make the Beech-Nut chewing gum?

A. No, sir.

X-Q. 53. Did you ever hear anybody talking about that or asking about it?

A. No, sir.

X-Q. 54. Did you try to remember any such things if it had happened?

A. I think I would remember if it had happened?

X-Q. 55. Did you have any reason to try to remember such questions or remarks, if you heard them?

A. No, not particularly.

X-Q. 56. Who makes the Camel cigarettes?

2586 A. J. R. Reynolds & Company.

X-Q. 57. Who makes the Fatimas?

A. Liggett & Meyers.

X-Q. 58. Who makes the London Life cigarettes?

A. P. Lorillard.

X-Q. 59. Do people ever come in your store and just ask for Beech-Nut, without saying cigarettes or gum?

A. Yes, sir, sometimes they do and I ask them, "Gum?" Then they laugh at me. The majority of my customers are tobacco chewers and if I ask them "Gum?" they laugh at me and say, "What do you think I am, a gum chewer?", or something like that.

X-Q. 60. Does that happen a good many times? 2587

A. Yes, sir, it happens sometimes. A lady sometimes comes in and asks me for Beech-Nut and I say, "You want a cigar or tobacco?" and she laughs the other way and says, "No, I want gum." That happens almost every day.

X-Q. 61. Do you find through your experience of thirteen years that your customers ask for a cigarette or tobacco by the name of the brand?

A. By the name of the brand; yes, sir.

X-Q. 62. Do they ask you for a brand made by the American Tobacco Company or—

A. No, sir. 2588

X-Q. 63. Or naming the maker?

A. No, sir. Sometimes they come and ask me and give me the P. A., or there was a tobacco by the name J. R. There was one tobacco, J. R. Reynolds, and that was on the package, big J and big R. J. R.

X-Q. 64. Was that generally asked for in any way except by the name of the brand?

A. Brand.

X-Q. 65. Would you say cigarettes and tobacco sell by the brand?

A. By the brand.

X-Q. 66. Have you a front display window facing 2589 the side walk on the front side of your store?

A. Yes, sir.

X-Q. 67. Whose brands are you displaying in one half of your front window at the present time?

A. Mostly P. Lorillard Company.

X-Q. 68. What name is on the painted sign hanging out over your door with the street number "742 West 43rd Street" on it?

A. One side is Helmar and one side is London Life, I believe. Don't say what company.

X-Q. 69. Have you large posters up at the top of

2590 your show cases all around your room conspicuously advertising London Life, Murad, Helmar, Between-the-Acts, Murads,—have you?

A. Yes, sir.

X-Q. 70. Have you handled Lorillard products for many years?

A. Yes, sir.

X-Q. 71. Do you order large quantities of them, comparatively?

A. Well, comparatively; yes, sir.

X-Q. 72. Do you know the Lorillard salesman in the Chicago district?

2591 A. I know the most of them.

X-Q. 73. What ones do you know?

A. Well,— The names?

X-Q. 74. Yes.

A. Salesman by the name of Degan; Horder; Mr. Brown.

X-Q. 75. Do you know Mr. Brown, the head salesman in the Chicago district?

A. Yes, sir.

X-Q. 76. How long have you known him?

A. Five or six years.

X-Q. 77. Did you know that the Beech-Nut Scrap 2592 tobacco was made by the Lorillard Company before you ever saw a package?

A. Well, I didn't know there was such a thing out, but when they got it here to sell, I knew it was made by P. Lorillard.

X-Q. 78. Did you know Beech-Nut cigarettes were made by the P. Lorillard Company before you ever saw a package of them?

A. No, sir.

X-Q. 79. Whom did you buy them from first?

A. From a salesman.

X-Q. 80. A Lorillard Company salesman?

A. Yes, sir.

X-Q. 81. One of the ones that you [illegible]? 2593

A. I couldn't say whether it wa[illegible]he ones I knew or whether it was a new sales[illegible]

X-Q. 82. When you ordered it from them did you know it was a Lorillard cigarette?

A. Yes, sir.

Mr. Johnson: That is all.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 82. Mr. Shanfield, what is your best selling 2594 cigarette brand?

A. Camel.

R-D Q. 83. And what company is that made by?

A. J. R. Reynolds.

R-D Q. 84. What is your next best selling cigarette?

A. Lucky Strike.

R-D. Q. 85. What company is that made by?

A. American Tobacco Company.

R-D. Q. 86. How do your sales of Beech-Nut Scrap tobacco compare with the sales of other scrap tobaccos?

A. Well, fifty per cent. more than the others.

R-D. Q. 87. What do you mean "fifty per cent. more 2595 than the others?" You mean all the others put together? What do you mean by "others?"

A. Than all the others put together, sales fifty per cent. better than all the others put together.

R-D. Q. 88. On cross examination, Mr. Shanfield, you have referred to a line of posters advertising various tobacco brands which you have around the top of the shelves in your store. Have you a poster there advertising Omar cigarettes?

A. If I have? Yes, sir.

2572 R-D. Q. 89. Is the Omar cigarette a Lorillard brand?
A. No, sir.
R-D. Q. 90. Have you a poster there advertising Mecca?
A Yes, sir.
R-D. Q. 91. Is that a Lorillard brand?
A. No, sir.
R-D. Q. 92. Have you a poster there advertising Tokio?
A. Yes, sir.
R-D Q. 93. Is that a Lorillard brand?
A. No, sir.
2573 R-D Q. 94. Have you a poster there advertising Richmond Straight-cut cigarettes?
A. Yes, sir.
R-D. Q. 95. Is that a Lorillard brand?
A. No, sir.
R-D. Q. 96. Mr. Shanfield, will you state whether or not if you had heard any considerable number of remarks among your customers or others which indicated they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were made by the company that makes Beech-Nut chewing gum, you think you would have remembered it?
A. Yes, sir, I would have remembered it.
2574 R-D. Q. 97. Mr. Shanfield, do you sell Star tobacco?
A. Yes, sir, Star.
R-D. Q. 98. Do you sell Star razor blades?
A. Yes, sir.
R-D. Q. 99. Are they made by the same company?
A. No, sir.
R-D. Q. 100. Do you sell Velvet tobacco?
A. Yes, sir.
R-D. Q. 101. Do you sell Velvet pencils?
A. Yes, sir, I did sell them once.
R-D. Q. 102. Are they made by the same company?
A. No, sir

Re-cross Examination. 2575

By Mr. Johnson:

R-X. Q. 103. Has the Beech-Nut cigarette been a good seller with you?

A. Not very good; no.

R-X. Q. 104. How many did you sell a week when it was selling the best?

A. Well, about five hundred.

R-X. Q. 105. About when was that, about when was it selling the best?

A. Maybe a couple of years ago; I think it was about two years ago. 2576

R-X. Q. 106. Near the start?

A. Right after the start; yes, sir.

R-X. Q. 107. About how many of them are you selling a week now, of Beech-Nut cigarettes?

A. Oh, about a hundred and fifty or two hundred.

R-X. Q. 108. They are not selling very well now then?

A. No.

Mr. Johnson: That is all.

Mr. Preston: That is all.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived. 2577

2602 WILLIAM STEIDINGER, called as a witness on behalf of the defendant, P. Lorillard Company, having been first duly sworn, testified as follows:

Direct Examination.

By Mr. Preston:

Q. 1. Will you state your name, age, residence and occupation?

A. William Steidinger; my age is almost thirty; my residence is 716 West 19th Street. This is my store.
2603 I am a storekeeper.

Q. 2. Where is your store located?

A. 1157 West Forty-seventh Street.

Q. 3. Is that near an entrance to the Chicago Union Stock Yards?

A. Yes, sir.

Q. 4. In your store do you sell groceries, Mr. Steidinger?

A. Yes, sir.

Q. 5. Do you sell tobacco?

A. Yes, sir.

2604 Q. 6. Do you sell candy?

A. Yes, sir.

Q. 7. Do you sell dry goods?

A. Well, notions; I wouldn't call it dry goods; I call it notions.

Q. 8. Do you sell socks?

A. Yes, sir.

Q. 9. Shoe strings?

A. Shoe strings; yes, sir.

Q. 10. Hair nets?

A. Yes, sir.

Q. 11. Gloves?

A. Yes, sir.

Q. 12. About how many customers a day do you have Mr. Steidinger, in this store? 2605

A. Well, sir, let's see.

Q. 13. I mean just approximately; just give a general idea.

A. Well, between three hundred and fifty to four hundred customers.

Q. 14. And how long have you been located here, Mr. Steidinger?

A. About six months.

Q. 15. And what business were you engaged in before you came here?

A. Oh, well, the last position I had was bill clerk. 2606

Q. 16. You have been only a retail merchant for the past six months; is that correct?

A. Six months; yes, sir.

Q. 17. Do you handle Beech-Nut Scrap tobacco?

A. Yes, sir.

Q. 18. Do you know what company makes Beech-Nut Scrap tobacco?

A. The Beech-Nut is—I don't even know; I can't even tell you right now.

Q. 19. Mr. Steidinger, do you know of the Lorillard Tobacco Company?

A. Sure, I know of the Lorillard. 2607

Q. 20. Do you handle any of the Lorillard Tobacco Company's products?

A. Sure, I got Lorillard.

Q. 21. Could you name a few Lorillard products that you handle?

A. Well, sir, that is, the Climax is Lorillard's, isn't it? Yes.

Q. 22. Do you handle Beech-Nut cigarettes?

A. Beech-Nut cigarettes? Yes, sir.

Q. 23. Do you know what company makes Beech-Nut cigarettes?

2608 A. I do not know; no. I never paid any attention to that. You see, I buy from the jobbers; I don't even know half of the companies, who makes them.

Q. 24. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Will you tell me whose name appears on the front of that package beneath the oval?

A. The P. Lorillard—The manufacturer?

Q. 25. Yes.

A. Yes. P. Lorillard Company.

Q. 26. Have you ever seen that before?

A. Oh, sure.

2609 Q. 27. Do you sell Beech-Nut chewing gum?

A. Yes, sir.

Q. 28. Do you know what company makes Beech-Nut gum?

A. Oh, now, let's see. They are in Canajoharie.

Q. 29. Do you know the name of the concern?

A. I think it is the Beech-Nut Manufacturing Company.

Q. 30. Were you ever under the impression that Beech-Nut Scrap tobacco and Beech-Nut cigarettes were made by the same company that makes Beech-Nut chewing gum?

2610 A. No, sir.

Q. 31. Mr. Steidinger, will you state whether or not it ever occurred to you to confuse Beech-Nut scrap tobacco and Beech-Nut cigarettes with Beech-Nut chewing gum?

A. It never did.

Q. 32. Did it ever enter your head that they were made by the same company?

A. No, sir.

Q. 33. Will you state, if you can, why it was that you never thought they were made by the same company?

A. Well, for one reason, two different names, two

different manufacturers, located at different places. 2611
The trade-marks are not the same.

Q. 34. Did you ever hear of a tobacco company that manufactured any chewing gum?

A. Of a tobacco company that manufactured chewing gum? I did not.

Q. 35. Do you regard gum and tobacco or cigarettes as in any way related to one another?

A. No, sir.

Q. 36. Did I understand you to say, when I asked you a moment ago whether you knew what company made Beech-Nut Scrap tobacco, that you did not know what company made it? 2612

A. I didn't know it unless I took time. I didn't pay any attention to the manufacturers at that time. I know it was not a gum manufacturer; it was a tobacco.

Q. 37. Have you ever heard any remarks, inquiries or comments among your customers or others to the effect or which led you to believe that the Beech-Nut Scrap tobacco or the Beech-Nut cigarettes were made by the same company that makes the Beech-Nut gum?

A. No.

Q. 38. Mr. Steidinger, do you sell Beech-Nut cigarettes?

A. Yes, sir. 2613

Q. 39. Do you sell Tip-Top tobacco?

A. Yes, sir.

Q. 40. Do you sell Tip-Top bread?

A. Yes, sir.

Q. 41. Are they manufactured by the same company?

A. No, sir.

Q. 42. Do you sell Star tobacco?

A. Yes, sir.

Q. 43. Do you sell Star Bug Killer?

A. Yes, sir.

Q. 44. Are they manufactured by the same company?

A. No.

2614 Mr. Johnson: Objection by Mr. Johnson to this line of evidence as being immaterial and irrelevant.

It is stipulated that this objection shall apply, without repetition, to all questions and answers along this same line.

Q. 45. Do you sell Sunshine cigarettes?

A. Yes, sir.

Q. 46. Do you sell Sunshine Biscuits?

A. Yes, sir.

Q. 47. Are they made by the same company?

A. They are not.

2615 Q. 48. I show you a package of Beech-Nut Scrap tobacco which is in this case as Defendant's Cross Exhibit No. 1 and ask you to tell me whose name appears on the front of that package?

A. Lorillard's.

Q. 49. Have you seen that name there before?

A. Always seen it there.

Q. 50. What did it mean to you when you saw it there?

A. It represented to me, it represented the name of the manufacturer.

2616 Mr. Preston: That is all.

Cross Examination.

By Mr. Johnson:

X-Q. 51. How long have you been in the tobacco business?

A. About six months.

X-Q. 52. You never were employed in a tobacco store before?

A. It was not exactly an employment. It was, you know what I mean, helping out here and there is all it was.

X-Q. 53. Are you the proprietor of this store here? 2617
A. Yes, sir.
X-Q. 54. About how much space does your tobacco stand occupy in your grocery store here?
A. Oh, well, I would say about one-third of the store.
X-Q. 55. How many feet long by what deep?
A. About eight by five feet.
X-Q. 56. How many clerks do you have in this store, any besides yourself?
A. Just only in the morning for one hour.
X-Q. 57. You keep just one here most of the time as an extra? One in the morning; is that the idea?
A. Yes.
X-Q. 58. Do many people who come in to buy cigarettes and tobacco ask you who makes the thing they buy? 2618
A. No, sir.
X-Q. 59. Did anybody ever ask you that?
A. No, sir.
X-Q. 60. About cigarettes and tobacco?
A. Well, wait a minute. They have asked me about cigarettes and tobacco; yes, if they were made by the same concerns, that is, in regard to the different brands of cigarettes.
X-Q. 61. Like which ones? 2619
A. Well, for instance, Camels and Lucky Strikes, two of the most popular cigarettes that are made, that is, anyways, here.
X-Q. 62. What people asked you?
A. Purchasers.
X-Q. 63. For instance, what would they ask you?
A. They would ask if those two brands of cigarettes were manufactured by the same people.
X-Q. 64. Did anybody ever ask you who makes the Beech-Nut cigarettes?
A. Beech-Nut cigarettes? No.

2620 X-Q. 65. Did you ever hear anyone ask or remark as to whether the Beech-Nut cigarettes were made by the same people that make the Beech-Nut gum?

A. No, sir.

X-Q. 66. Did you ever try to remember any such instances if they happened to you,—ever try to remember them?

A. I would naturally remember it because it would really bring up a discussion.

X-Q. 67. In the six months you have been in this business you do not remember any?

A. No, sir.

2621 X-Q. 68. When did you first see a package of Beech-Nut cigarettes?

A. Oh, gee, I don't remember exactly now.

X-Q. 69. Was it before you took over this store six months ago?

A. Yes, sir.

X-Q. 70. When you first saw the package, who did you think put it out?

A. Well, sir, on account of being a smoker, I naturally thought that one of the tobacco companies was putting it on the market. Of course, I didn't know who. But that is one of the first things a customer will say,

2622 if a new tobacco comes in, "Who is putting that on the market now?"

X-Q. 71. Mr. Steidinger, did I understand you to say on direct examination that the trade-marks of the Beech-Nut tobacco and the Beech-Nut cigarettes and the Beech-Nut gum were not the same?

A. Yes, sir.

X-Q. 72. I place before you a package of each one of these articles I named, which are in this case as Defendant's Cross Exhibit No. 1, Plaintiff's Exhibit No. 1 and Defendant's Cross Exhibit No. 2, respectively. Now, will you tell me if on each one of these packages there is

the name "Beech-Nut" placed in a curve, with a hyphen in between the word "Beech" and "Nut?"

A. Yes, there is.

X-Q. 73. Is the center of the label in each case made up of an oval in all three of those packages?

A. Yes, sir.

X-Q. 74. Is there a representation in the center of that oval of a beech nut in each of those packages?

A. Somewhat similar.

X-Q. 75. Is there a red oval on the package of Beech-Nut gum?

A. Yes, sir.

X-Q. 76. And is there red around the oval on each of the other packages?

A. Not exactly the same kind of red; not exactly the same way. Entirely different. That is a red band upon the package of Beech-Nut gum, whereas the Beech-Nut cigarettes, almost the entire package is red. The Beech-Nut tobacco has red stripes extending in all directions.

X-Q. 77. But on each package there is red around the oval, isn't there?

A. Well, there is red all around the oval on the Beech-Nut cigarette, but not exactly as on the Beech-Nut tobacco.

X-Q. 78. Wouldn't you say there are similarities between those three?

A. Well, there is and there ain't.

Mr. Johnson: That is all.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 79. Mr. Steidinger, will you tell me what it is that catches your eye most prominently about the label on the package of Beech-Nut gum?

2626 A. What it is?

R-D. Q. 80. Yes.

A. Well, it would naturally be the trade-mark on it.

R-D. Q. 81. I mean what feature of the trade-mark. Is it the nut in the center, the name "Beech-Nut," the red band around the oval, or what is it that is the outstanding feature of the label?

A. The outstanding feature is, naturally, the red band, because at a short distance the nut is not quite discernible.

R-D. Q. 82. Is there any red band on the Beech-Nut cigarette package?

2627 A. There is no red band.

R-D. Q. 83. Is there a red band on the Beech-Nut Scrap tobacco?

A. I wouldn't call them bands. They are stripes, is what I would call them.

R-D. Q. 84. Does the label on the Beech-Nut gum package look to you like the label on the cigarette package or the scrap tobacco package?

A. No, sir.

R-D. Q. 85. Whose name appears on the front of the Beech-Nut Scrap tobacco above the oval shaped label?

A. Lorillard's.

2628 R-D. Q. 86. And whose name is written on the front of the cigarette package underneath the label?

A. Lorillard's.

R-D. Q. 87. Had you noticed the Lorillard name on both of these packages before I called your attention to it?

A. Oh, noticed it lots of times.

Mr. Preston: That is all.

Re-cross Examination. 2629

By Mr. Johnson:

R-X. Q. 88. Wouldn't you say, Mr. Steidinger, that there are points of similarity between those three labels?

A. Between the three?

R-X. Q. 89. Yes, the name "Beech-Nut" is on there with a hyphen in all three, isn't it?

A. Yes.

R-X. Q. 90. Wouldn't you say there are points of similarity in those three trade-marks?

A. Well, I can say there are, when you are in close proximity. By that I mean the nut on the wrapper of the gum is so small that in comparison with the nut shown on the package of cigarettes and scrap tobacco it is almost no comparison between the two. 2630

R-X. Q. 91. But the package is much smaller, the package of gum?

A. Yes, sir.

R-X. Q. 92. So everything is smaller on the package?

A. Oh, yes.

R-X. Q. 93. You keep the Lorillard products, do you not?

A. Yes, sir. 2631

R-X. Q. 94. Any others besides Beech-Nut cigarettes and Beech-Nut Scrap tobacco?

A. Well, let's see. That is one thing I have never paid much attention to, as I buy through jobbers. Climax tobacco and Havana Blossom. I don't know, I might have one or two more that I can't think of just now.

R-X. Q. 95. Do you know Mr. Brown, the head salesman for the P. Lorillard Company in the Chicago district?

2632 A. Oh, I might know him and might not; there are so many of them coming around.

R-X. Q. 96. Is this Mr. Brown, this gentleman standing here?

A. I don't know. He told me his name, but I might have forgotten it.

Re-direct Examination.

By Mr. Preston:

R-D. Q. 97. Mr. Steidinger, I call your attention to
2633 the design in the center of the label of the Beech-Nut gum package, which is in this case as Defendant's Cross Exhibit No. 2, and ask you whether there is a green leaf which forms the background of that representation of the nut?

A. There is a green leaf.

R-D Q. 98. And I call your attention to the design in the center of the label on the Beech-Nut Scrap tobacco package, which is in this case as Defendant's Cross Exhibit No. 1 and ask you whether there is any green leaf in that design?

A. There is no green leaf on the package of scrap
2634 tobacco.

R-D Q. 99. Mr. Steidinger, state whether or not the label on the Beech-Nut gum package, taken as a whole, looks to you like the label on either the scrap tobacco package or the Beech-Nut cigarette package?

A. Taken as a whole? Well, no.

R-D Q. 100. What would you think of a man, Mr. Steidinger, who could be fooled into accepting a package of the Beech-Nut Scrap tobacco or the Beech-Nut cigarettes if he wanted this package of Beech-Nut gum?

A. He would either have to be deaf, dumb and blind or crazy.

Mr. Preston: That is all. 2635

Mr. Johnson: I am through.

By agreement of counsel for the respective parties to the above entitled cause, the signature of the witness to the foregoing deposition was waived.

Which were all of the proceedings had at the time and place indicated heretofore.

STATE OF ILLINOIS, }
County of Cook. } ss.:

I, Alice M. Rankin, a Notary Public within and for the County of Cook and State of Illinois, duly commissioned and qualified and authorized to administer oaths, and to take and certify depositions, do hereby certify that in the equity cause pending in the District Court of the United States, for the District of New Jersey, wherein Beech-Nut Packing Company is plaintiff and P. Lorillard Company is defendant, No. 3056, I was attended at Chicago, Illinois, on the 7th of February, 1923, by counsel for the respective parties, as appears above, and by Wade H. Brown, Jacob Gay, Jr., Frank C. Degan, Philip Ludwig Burgeson, William G. Sues, J. S. Weiner, David Kossack, William H. Getzelman, B. Ganek, John A. Weber, Nathan Adelman, Jacob Shanfield and William Steidinger, the witnesses named in the foregoing depositions; that said witnesses, being of sound mind and lawful age, were by me duly cautioned and sworn to testify to the truth, the whole truth and nothing but the truth in said cause, and thereupon they testified as appears in the foregoing depositions, and that counsel for the respective parties in each case waived the signature of the witness to his deposition, that said depositions were taken by me in shorthand and later transcribed by me into typewriting; that said 2636 2637

2638 statements were all taken in the presence of said witnesses at the time set forth and that all was done in the presence of counsel for both parties.

I further certify that the reason for taking said depositions was and is that the testimony of said deponents is material and necessary to the cause in the caption of said depositions named, and that they, the said deponents, live and reside at a place more than one hundred miles from the place where the said equity cause is appointed to be tried, to-wit, Trenton, New Jersey, in the District of New Jersey.

I further certify that I am neither of counsel nor
2639 attorney to either of the parties to said suit, nor interested in the event of said cause, and that it being impractical for me to deliver said depositions with my own hand, I have retained the same for the purpose of being sealed up and directed and speedily and safely transmitted to the said court for which they were taken.

Witness my hand and seal as such Notary Public and Special Examiner, at Chicago, Illinois, on this 21st day of February, 1923.

ALICE M. RANKIN,
Notary Public

2640 (SEAL)

IT IS STIPULATED by and between the parties, through their respective counsel, that if CARL A. PAULSEN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is CARL A. PAULSEN, address 534 South Clark St., occupation, owner and manager of six retail tobacco stores, four of which are located in the business

section of Chicago known as the "loop." In addition to 2641
tobacco I carry in these stores a small line of confections and chewing gum. In each of my stores an average of 500 customers is served daily. Although much of my time is spent in my office at 534 South Clark St., I visit all my stores frequently and may say that I am in close touch with what goes on in all of them.

I have handled Beech-Nut Scrap tobacco since about 1915, and it is an excellent seller. I have always known that the Beech-Nut Scrap tobacco is a product of the P. Lorillard Co., and I have always known that company to be one of the largest and oldest tobacco concerns, since I have handled such of their well known brands as Mu- 2642
rads, Moguls, Egyptian Deities, Turkish Trophies, Helmars, Climax Plug, Beech-Nut Scrap tobacco, etc. I have sold Beech-Nut cigarettes since they first appeared on this market in 1921, and have always known that this cigarette was made by the Lorillard Co. I handle Beech-Nut chewing gum and may say that it is my best selling gum. I have always known this to be a product of the Beech-Nut Packing Co.

I regard tobacco and cigarettes as an entirely distinct line from chewing gum and confections and have never known of a food products company which made tobacco products, and have never seen a product of the Beech- 2643
Nut Packing Co. which looked at all like either the Beech-Nut cigarette package or the Beech-Nut Scrap tobacco package and I know that Lorillard's name appears upon both the Beech-Nut Scrap tobacco and Beech-Nut cigarette packages. I have never heard any remarks among my customers or others to the effect, or which would lead me to believe, that they thought the Beech-Nut Scrap tobacco or Beech-Nut cigarettes to be the products of the Beech-Nut Packing Company. I think that a man who would confuse tobacco or cigarettes with chewing gum must be crazy.

2644 *Cross Examination.*

I have handled Lorillard tobacco products and have known Lorillard salesmen for many years. I am acquainted with Mr. W. H. Brown, the Lorillard District Salesman for Chicago. I am kept very busy indeed and have not much opportunity to hear what customers are saying. They do not usually ask who makes the articles that they are buying. I have made no effort to remember any inquiries, remarks, or comments as to who makes the Beech-Nut Scrap tobacco or the Beech-Nut cigarettes, and had no reason to do so. When I say that I
2645 have never heard any such inquiries or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if FRANK GOLDSTEIN were
2646 called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is FRANK GOLDSTEIN, of legal age, address, 534 S. Clark St., occupation, Ass't to Carl A. Paulsen in the management of six retail tobacco stores owned by him, four of which are located in the business section of Chicago known as the "loop." I divide my time about equally among these six stores and myself wait upon customers in all of them. I have sold Beech-Nut Scrap

tobacco since about 1915, and have always known it to be a product of P. Lorillard Co. I remember that Beech-Nut cigarettes, which I have also always known to be a product of the Lorillard Co., were first put into my store in the Fall of 1921, and that at that time there was an introductory campaign on these cigarettes in progress. I remember that at the same time we put Beech-Nut cigarettes on sale, advertising matter such as posters and window displays were exhibited in all of our stores, being placed there by Lorillard salesmen who were taking part in the introductory campaign. I had a good deal of conversation at this time with salesmen of the Lorillard Co. relative to the Beech-Nut cigarette and nothing was ever said which I could construe as indicating there was any connection between the Beech-Nut cigarette and Beech-Nut chewing gum.

Beech-Nut chewing gum has been sold in my stores for a number of years and I have never heard any remarks among my customers or others to the effect, or which would lead me to believe, that they thought the Beech-Nut tobacco or the Beech-Nut cigarette to be the products of the Beech-Nut Packing Company. I have never heard of a food company being in the tobacco business and I regard the two lines, that is tobacco and food products, as in separate classes altogether. I do not think that the cigarette or scrap tobacco packages resemble in appearance the Beech-Nut gum package, and I certainly would not mistake one for the other.

Cross Examination.

I have sold Lorillard tobacco products for many years and have known the Lorillard salesmen for a long time. I have been acquainted with Mr. Brown, the Lorillard District Salesman for Chicago, for some time. I am kept very busy helping Mr. Paulsen look after the six retail

2650 stores. We make the 534 S. Clark Street store our headquarters and I frequently wait on counter there. I do not have much time to talk to customers; not many of them ask who makes the article they are buying.

I have made no effort to remember any inquiries, remarks, or comments as to who makes the Beech-Nut Scrap tobacco or the Beech-Nut cigarettes, and had no reason to do so. When I say that I have never heard any such inquiries or remarks, I mean that I do not remember any.

Re-direct Examination.

2651 If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if L. S. JONES were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

2652 My name is L. S. JONES, of legal age, and my occupation is manager of the cigar and candy departments of the Home Drug Co., of Chicago, Illinois. This company runs four drug stores, all of which are situated in the business section known as the "Loop," and one of which is at 65 W. Monroe Street. I have had this position for the past seven years and keep in constant touch with conditions in all of the stores, myself waiting on customers a great part of the time.

I have handled Beech-Nut Scrap Tobacco for several years. It is my best selling scrap tobacco. I have

handled Beech-Nut cigarettes since they were put on this market in the Fall of 1921, and have always known that both the Scrap Tobacco and the Cigarettes are the product of P. Lorillard Co. I remember that the salesman who first sold me Beech-Nut Cigarettes represented himself to be an agent of the Lorillard Co. and urged me to put these cigarettes on display in all of my stores. He had a supply of the cigarettes with him at the time and also advertising matter consisting of posters advertising the Beech-Nut Cigarette, some of which he put up in the store. 2653

I handle Beech-Nut Chewing Gum and Beech-Nut Mints, both of which I know to be products of the Beech-Nut Packing Company, the same concern that manufactures the Beech-Nut Peanut Butter. Gum and mints are sold at my candy counter. I regard tobacco and confections as entirely distinct classes of products and have never known of a food products company that made tobacco. I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the Beech-Nut Packing Company. 2654

Cross Examination. 2655

I have handled the Lorillard tobacco products and have known the Lorillard salesmen for a long time. I am acquainted with Mr. W. H. Brown, the Lorillard district salesman for Chicago. I am kept very busy and have not much time to listen to what customers are saying.

I have made no effort to remember any remarks, inquiries, or comments as to who made the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes and whether

2656 they were made by the same company that makes the Beech-Nut Gum, and had no reason to try to remember them. When I say I never heard any, I mean I do not remember hearing any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2657 IT IS STIPULATED by and between the parties, through their respective counsel, that if CHARLIE FRIEDMAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is CHARLIE FRIEDMAN, address 557 South Clark St., Chicago, Illinois, occupation, manager of retail tobacco store located just outside the business section of Chicago known as the "Loop." I have been in the retail tobacco business for sixteen years. In addition
2658 to tobacco I carry a small line of candy and chewing gum and serve about 600 customers a day. I have handled Beech-Nut Scrap Tobacco since 1915, and have always known that it was a product of the Lorillard Co., one of the oldest and largest of the tobacco companies. The Beech-Nut Scrap Tobacco has always been an excellent seller. I have handled Beech-Nut Cigarettes since they appeared on this market, in the Fall of 1921. When I first saw them I associated them with the Beech-Nut Scrap Tobacco. The salesman who first put it into my store represented himself to be an agent of the Lorillard Co., and mentioned the Beech-Nut Scrap

Tobacco in recommending the Beech-Nut Cigarette. I 2659
have handled Beech-Nut Chewing Gum for a number of years and have always known that it was made by the Beech-Nut Packing Company, a concern which I know to be manufacturers of food products and confections.

I have never seen a product of the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package. Lorillard's name is written on both the Beech-Nut Scrap Tobacco and Cigarette packages. I have never heard any remarks, comments, or inquiries among my customers or others to the effect, or which would lead me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be 2660
a product of the Beech-Nut Packing Company. I have never known a tobacco manufacturer to put out food products or confections and I do not think that the two lines have anything to do with one another.

Cross Examination.

I have handled Lorillard tobacco products for many years and have known the Lorillard salesmen. I know Mr. W. H. Brown, the Lorillard distrtict salesman for Chicago. I do not remember exactly the circumstances of my first purchasing Beech-Nut Cigarettes and cannot 2661
describe them any more than I already have done. I am kept busy in my store and have not much chance to listen to what customers are saying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

2662 *Re-direct Examination.*

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if D. H. KROPP were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2663 *Direct Examination.*

My name is D. H. KROPP, address The Fair Store, Dearborn and Adams Sts., Chicago, Illinois. I am of legal age, and my occupation that of Ass't Manager of the Tobacco Department in the Fair Store. This store is one of the three largest department stores in the city of Chicago and is located in the section known as the "Loop."

In the tobacco department alone we serve about 300 customers a day. For several years past I have handled Beech-Nut Scrap Tobacco and have always known this
2664 to be a product of the P. Lorillard Co. It is my best selling Scrap Tobacco. I have handled Beech-Nut Cigarettes since they were put on this market, in about September, 1921. The Beech-Nut Cigarette is a fair seller. I knew the salesman who first introduced the cigarette to be an agent of the Lorillard Co. I knew that the cigarette was made by that company. I had long handled their Beech-Nut Scrap Tobacco and connected the cigarette with it. Lorillard's name appears written on both the scrap tobacco package and the cigarette package. I have never heard any remarks from my customers or others to the effect, or which would

lead me to believe that they thought the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes to be made by the Beech-Nut Packing Company.

I regard gum and confections as in no way related to tobacco and cigarettes. In this store gum and mints are sold at the Candy Department, which is located on the other side of the store from the Tobacco Department.

Cross Examination.

I have handled Lorillard tobacco products for a good many years and have known their salesman. I have known Mr. W. H. Brown, the Lorillard distrtict salesman for Chicago, for some time. I wait on customers a good deal of the time. I am so busy that I have not much time to talk to customers or opportunity to hear what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2668 IT IS STIPULATED by and between the parties, through their respective counsel, that if D. A. ROGOFF were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is D. A. ROGOFF, of legal age, occupation manager of the Tobacco Department in the Boston Store, which is located at State and Madison Sts., Chicago, Illinois, and is one of the largest department stores in Chicago.

2669 I have handled Beech-Nut Scrap Tobacco for a number of years and Beech-Nut Cigarettes since the Fall of 1921. I have always known that both these products were put up by the Lorillard Co., tobacco manufacturers, having known of this company and having observed its name on both the cigarette package and the scrap tobacco package. I know of the Beech-Nut Packing Company and that it manufactures in addition to various food products, such articles as mints and chewing gum. I have never heard any remarks among my customers or others to the effect, which would lead me

2670 to believe, that they thought that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manufactured by the Beech-Nut Packing Company.

I have never known of a food concern that manufactured tobacco products, and I regard the two lines, that is, tobacco and food, as in no way related to one another.

In this store gum and mints are classed as "Confections," and are sold at the candy counter, which is located on the other side of the store from the Tobacco Department. I have never seen a product of the Beech-Nut Packing Company which looked like either a

Scrap Tobacco or a Cigarette package, and I know that 2671
Lorillard's name is written upon both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarette packages.

Cross Examination.

I have been familiar with the Lorillard products for many years and have known their salesmen. I am acquainted with Mr. W. H. Brown, the Lorillard district salesman for Chicago. We have a very busy tobacco department. I wait upon customers part of the time myself. Not many customers ask me who makes the tobacco or cigarette they are buying. I am 2672
kept too busy to listen much to what they are saying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

2673
If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2674 IT IS STIPULATED by and between the parties, through their respective counsel, that if M. S. WINERLACK were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. S. WINERLACK. I am of legal age and am the manager of the Tobacco Department of the large department store known as J. Oppeinheimer & Co., located at 47th St. and Ashland Avenue, South Side,
2675 Chicago, Illinois. I have bought and sold Beech-Nut Scrap Tobacco for about five years and it is my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market in the Fall of 1921. I have always known that both of these products were manufactured by the Lorillard Co., and I know that company to be the producer of such other well known brands as Murads, Helmars, Moguls, Egyptian Dieties, Climax Plug Tobacco, etc.

I know of the Beech-Nut Packing Company and of such of their products as Peanut Butter, Ginger Ale, Chewing Gum and Mints. I have never heard any re-
2676 marks, inquiries or comments among my customers or others to the effect, or which would lead me to believe, that they thought Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company.

I regard food products and gum as utterly unrelated to tobacco or cigarettes and I have never known of a food products concern which manufactured tobacco. In our store gum and mints are regarded as confections and are sold in the Candy Department, which is situated on the opposite side of the store from the Tobacco Department.

In the Tobacco Department we handle Beech-Nut 2677
Cigars, which are manufactured by some tobacco concern in Pennsylvania.

Cross Examination.

I have handled Lorillard tobacco products for a good many years and have known the Lorillard salesmen. I know Mr. W. H. Brown, the Lorillard district salesman for Chicago, and have known him for some time. I have a very busy tobacco department and wait on customers myself, with the help of usually two clerks. We do a big business. I have not much time to talk to 2678
customers or to listen to what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

2679

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2680 IT IS STIPULATED by and between the parties, through their respective counsel, that if O. H. OLSEN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is O. H. OLSEN, and I am the manager of a general store located at 5105 S. Halsted St., South Side, Chicago, Illinois. I employ one clerk besides myself and we serve about 400 customers a day. We carry such
2681 articles as tobacco, candy, toys, razor blades, dry-goods, games, pencils, stationery, flashlights, etc.

For the past seven years we have handled Beech-Nut Scrap Tobacco. We have no other scrap tobacco which sells half so well as Beech-Nut. We have also handled Beech-Nut Cigarettes since they appeared on this market, in the Fall of 1921. The cigarette is a fair seller. I have always known that both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were made by the Lorillard Co. I know the Lorillard Co. to be one of the oldest and largest of the tobacco companies. I handle a number of their brands, such as Murad cigarettes,
2682 Moguls, Helmars, and Climax Plug Tobacco. I am always glad to handle Lorillard's products.

I have handled Beech-Nut Chewing Gum and Beech-Nut Mints for several years and have always known that these articles were put out by the Beech-Nut Packing Company. I regard tobacco and cigarettes as entirely distinct lines from gum or mints and I have never known of a food products, candy or gum concern that manufactured tobacco products. I think that anyone who could confuse confections with tobacco must be crazy. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a Scrap

Tobacco or a Cigarette package. I have never heard any 2683
remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes to be a product of the Beech-Nut Packing Company.

I sell Climax Tobacco and Climax Cleaning Preparation; Star Tobacco and Star Razor Blades; Ever Ready Flashlights and Ever Ready Razor Blades. None of these articles are manufactured by the same company.

IT IS STIPULATED that objection is made by plaintiff's 2684
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled Lorillard tobacco products and have known the Lorillard salesmen for many years. I am acquainted with Mr. W. H. Brown, Lorillard district salesman for Chicago. A customer hardly ever asks who makes the tobacco or cigarette he is buying. 2685

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

2686 *Re-direct Examination.*

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULTED by and between the parties, through their respective counsel, that if A. THOMPSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2687 *Direct Examination.*

My name is A. THOMPSON. I am of legal age and am the owner and manager of a small grocery store located at 4737 S. Halsted St., South Side, Chicago, Illinois. At times I am the only clerk in this store, but at times I am assisted by one other clerk. In addition to groceries, I handle tobacco and confections and serve about 100 customers a day.

I have handled Beech-Nut Scrap Tobacco for about three years. It is my best selling scrap tobacco. I
2688 also handle Beech-Nut Chewing Gum which is a very good seller. I have always known that the Beech-Nut Scrap Tobacco was made by the Lorillard Co. and that the Beech-Nut Gum was put out by the Beech-Nut Packing Company, manufacturers of food products and confections. I regard food products or gum as entirely distinct lines from tobacco and I have never known of a food concern which made tobacco products. I think that anyone who could confuse gum and tobacco must be crazy.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or

which led me to believe that they thought the Beech-Nut Scrap Tobacco to be made by the same company that manufactured Beech-Nut Chewing Gum. 2689

I handle Tip Top Bread and Tip Top Tobacco; Blue Ribbon Mayonnaise Dressing and Blue Ribbon Tacks. None of these articles are manufactured by the same company.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 2690

Cross Examination.

I have made no attempt to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco, and as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

2691

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

1692 IT IS STIPULATED by and between the parties, through their respective counsel, that if A CHRISTIANSON were called as a witness on behalf of P. Lorilard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. CHRISTIANSON. I am of legal age and the owner and manager of a store located at 4142 S. Halsted St., South Side, Chicago, Illinois. I employ one clerk and myself wait upon customers in the store. I handle such products as tobacco, candy, quick-lunch, 1693 playing cards, gloves, shoe strings, shoe polish, etc., and serve about 300 customers a day.

I have handled Beech-Nut Scrap Tobacco for the past seven years. It is by far my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market in the Fall of 1921. The cigarette is a slow seller in my store. I have always known that both of these products were manufactured by the P. Lorillard Co. I remember that the salesman who first sold me Beech-Nut Cigarettes represented himself to be an agent for the Lorillard Tobacco Co. and that he had with him in addition to his supply of cigarettes, 1694 certain advertising matter and that he put up some posters advertising the Beech-Nut Cigarette in my store. Nothing that he said indicated to me any connection between the Beech-Nut Ciagarette and the makers of the Beech-Nut Chewing Gum.

I have handled the Beech-Nut Gum for several years. It never occurred to me to connect this product with the Beech-Nut Scrap Tobacco or Beech-Nut Cigarette. I regard Gum and Tobacco as entirely separate classes of products and I have never known of a food concern or a gum manufacturer to put out any tobacco products.

I know that Lorillard's name is written on both the Scrap Tobacco and Cigarette packages. 2695

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Cigarette to be a product of the same company that manufactured the Beech-Nut Chewing Gum.

Cross Examination.

I have known of the Lorillard Tobacco Co. for a good many years. The Lorillard salesmen frequently call on my store. I do not remember exactly the circumstances of my first purchase of Beech-Nut Cigarettes and cannot describe them any more than I already have done. I do not remember which salesman it was. A customer hardly ever asks who makes the tobacco or cigarette he is buying. 2696

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any. 2697

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2698 IT IS STIPULATED by and between the parties, through their respective counsel, that if C. BIASETTI were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is C. BIASETTI. I am of legal age and am the manager of a delicatessen store located at 3912 N. Ashland Ave., six miles north of the business section of Chicago known as the "Loop." In addition to
2699 groceries I carry tobacco and confectioneries. I have handled Beech-Nut Scrap Tobacco for several years and the Beech-Nut Cigarette since it appeared on this market in the Fall of 1921. I have always known that both of these articles were put out by the P. Lorillard Co. I have handled Beech-Nut Gum for some years and have known it to be a product of the Beech-Nut Packing Company, manufacturers of various food products and confections. However, I do not handle any of their products except the chewing gum.

I regard food products and chewing gum as entirely separate lines of goods from tobacco or cigarettes, and I
2700 have never known of a food products company to put out any tobacco products. I think that anyone who would confuse food prducts or gum with tobacco or cigarettes must be crazy.

I have never seen a package manufactured by the Beech-Nut Packing Company which looked like either a Scrap Tobacco or a Cigarette package, and I know that Lorillard's name appears written on the front of both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarette packages. I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought the

Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes 2701
to be the products of the Beech-Nut Packing Company.

I handle Uncle Sam Tobacco and Uncle Sam Bird Grit. These products are made by different companies. I also handle the Red Cross Spaghetti and Red Cross Bouillon Cubes. These products are made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and im- 2702
material.

Cross Examination.

I have known of the Lorillard Company for some years. The Lorillard salesmen frequently call in at my store. My customers do not often ask who makes a cigarette or tobacco which they are buying. I have not paid much attention to their talk about such things.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to 2703
whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2704 IT IS STIPULATED by and between the parties, through their respective counsel, that if J. W. COREY were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. W. COREY. I am of legal age and the manager of a store located at 3926 N. Ashland Avenue, Chicago, Illinois, where such articles as candy, tobacco, periodicals, stationery, collars, etc. are sold. This
2705 store is located about five miles north of the downtown section of Chicago known as the "Loop."

I have handled Beech-Nut Scrap Tobacco for several years and Beech-Nut Cigarettes since they appeared on this market in the Fall of 1921. I have always known both of these articles were the product of the Lorillard Co., which company I know to be one of the largest and oldest tobacco concerns. I handle Beech-Nut Chewing Gum and Beech-Nut Mints. It has never occurred to me to connect these products with Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes. I regard the two lines as entirely separate and have never known of a food
2706 concern that put out tobacco products. I have never seen a package manufactured by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package. I would think that any man who could be confused between gum or mints and tobacco or cigarettes must be crazy.

When the cigarettes first appeared I remember hearing four or five persons inquire whether the Beech-Nut Cigarette and Beech-Nut Chewing Gum were made by the same company. I told these persons that this was not the case and that the Lorillard Co. made the cigarettes and the Beech-Nut Packing Company made the chewing gum. Although I cannot say definitely that

four or five was the number of these remarks which I heard, I can state positively that it was not many more than that. Except for these instances, I have never heard any remarks, inquiries, or comments among my customers or others to the effect that they believed the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes to be manufactured by the same concern that manufactures Beech-Nut Gum or Beech-Nut Mints. 2707

Cross Examination

I have known of the Lorillard Co. for some years. The Lorillard salesmen frequently call at my store. I have made no particular effort to remember inquiries, remarks, or comments as to who made the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes, and had no reason to do so. When I say I only heard four or five inquiries or remarks as to whether the Beech-Nut Cigarettes were made by the Beech-Nut Gum people, I mean I cannot now remember any more than that. 2708

Re-direct Examination.

If I had heard an appreciably greater number than four or five remarks, inquiries, or comments among my customers or others to the effect that they thought the Beech-Nut Cigarette and Beech-Nut Chewing Gum to be manufactured by the same concern, I think I would have remembered that fact. 2709

2710 IT IS STIPULATED by and between the parties, through their respective counsel, that if A. HENDERICKX were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination

My name is A. HENDERICKX. I am of legal age and by occupation manager of a small general store located at 4702 N. Ashland Avenue, Chicago, Illinois. This store is about six miles north of the business section of
2711 Chicago known as the "Loop." There is one other clerk employed in addition to myself. We serve about 150 customers a day and handle such lines as candy, drygoods, tobacco, etc.

I have handled Beech-Nut Scrap Tobacco for several years past and Beech-Nut Cigarettes since they appeared on this market, in the Fall of 1921. Beech-Nut Scrap Tobacco is a very good seller, but the Beech-Nut Cigarette does not sell well in this store. I have always known that both of these products were put out by the P. Lorillard Co. I remember that the salesman who first put Beech-Nut Cigarettes into my store re-
2712 presented himself to be an agent of the Lorillard Co., and put up some advertising matter in the store at that time.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints, made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Tobacco or Beech-Nut Cigarettes to be put out by the Beech-Nut Packing Company. I regard tobacco and food products or confections as entirely separate lines and I have never known of a food concern that

manufactured tobacco or cigarettes. I have never seen 2713
a package put out by the Beech-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package. I would think that any man who confused cigarettes with gum or mints must be crazy.

Cross Examination.

I have handled Lorillard tobacco products for several years and the Lorillard salesmen frequently call in at my store. I do not remember exactly the circumstances the first time Beech-Nut Cigarettes were brought into my store for sale and cannot describe it any more than 2714
I already have. I do not remember who the salesman was who first came in with them. I do not pay much attention to remarks made by customers in my store. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination. 2715

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2716 IT IS STIPULATED by and between the parties, through their respective counsel, that if MORRIS GOLD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination

My name is MORRIS GOLD, I am of legal age, and the manager of the drug store located at 5005 Sheridan Road, Chicago, Illinois. This drug store is situated about seven miles north of the downtown section of Chicago known as the "Loop." I employ one clerk in
2717 addition to myself and we serve about 800 customers a day. We carry the usual varied line found in drug stores, including such articles as drugs, candies, toilet articles, tobacco, fountain pens, stationery, razors, etc.

I have handled Beech-Nut Scrap Tobacco for many years past and have handled Beech-Nut Cigarettes since they appeared on this market in the Fall of 1921. I have always known that both of these products are manufactured by the P. Lorillard Co. and which concern I know to be one of the oldest and largest tobacco companies, making such brands as Murads, Helmars, Moguls, Egyptian Dieties, etc,. all of which I handle in
2718 my store. I have handled Beech-Nut Chewing Gum and Beech-Nut Mints for several years. It never occurred to me to connect the Beech-Nut Scrap Tobacco or Cigarette with the Gum or Mints. I regard the two lines as in no way connected and have never known of a food concern that made tobacco products, or a tobacco concern that made food products. I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be a product of the Beech-Nut Packing

Company, and I do not see how anyone could confuse 2719
tobacco with gum or candy.

Cross Examination.

I have handled Lorillard tobacco products for many years and have known the Lorillard salesmen. They frequently come into my store to take my orders. I have a busy store and have not much time to talk to customers or much opportunity to hear what they are saying. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, 2720
and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 2721

IT IS STIPULATED by and between the parties, through their respective counsel, that if M. W. MASOR were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. W. MASOR. I am of legal age and the owner and manager of the drug store located at 4701

1783

2722 Sheridan Road, Chicago, Illinois. This store is located about seven miles north of the business section of Chicago known as the "Loop." I employ two clerks in addition to myself and we serve about 400 customers a day. Our stock consists of such varied lines as drugs, stationery, tobacco, toilet articles, confectioneries, etc.

I have handled the Beech-Nut Cigarette since it appeared on this market, in the Fall of 1921. The salesman who first put this cigarette into my store represented himself to be an agent of the Lorillard Co. and in no way indicated to me that the Beech-Nut Cigarette had any connection with the Beech-Nut Chewing Gum,
2723 which I was handling at the time and am still handling.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Cigarette was manufactured by the Beech-Nut Packing Company. I have never seen a package manufactured by the Beech-Nut Packing Company which looks like a cigarette package, and I regard tobacco and gum as entirely separate classes of goods. I think that any man who would confuse tobacco and gum must be crazy.

2724

Cross Examination.

I am familiar with the Lorillard tobacco products and know their salesmen. I do not remember exactly the circumstances of the first visit of the Lorillard man who first brought Beech-Nut Cigarettes into my store and cannot describe the incident any more in particular than I have already done. I do not rememer which salesman it was who first introduced them into my store. My store is in a thickly populated apartment district and I am kept pretty busy. I have not much

time to talk to customers or opportunity to hear what they are saying. 2725

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

2726

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. W. SCHREIBEL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

2727

My name is A. W. SCHREIBEL, I am of legal age and the owner and manager of a general store located at 289 Western Avenue, Blue Island, Illinois. I employ one clerk in addition to myself, and we serve about 200 customers a day. I carry such articles as glass and chinaware, tobacco, candy, stationery, novelties, sporting goods, etc.

I have bought and sold Beech-Nut Scrap Tobacco since 1915 and it is my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market in the Fall of 1921. They have not sold

2728 well with me. I have always known both these articles to be the products of the P. Lorillard Co., which concern I know to be one of the oldest and largest tobacco concerns. I handle such of their brands as Climax Plug tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Dieties, etc.

I have handled Beech-Nut Chewing Gum for several years and it is a good seller. I have always known it to be the product of the Beech-Nut Packing Company, and I know that concern to be the manufacturer of food products, such as Beech-Nut Bacon and Beech-Nut Peanut Butter.

2729 I regard food products or gum as an entirely separate line from tobacco or cigarettes. I have never seen a package put out by the Beech-Nut Packing Company that looks like either a scrap tobacco package or a cigarette package. I know that Lorillard's name is written on both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package. I think that anyone who could confuse tobacco or cigarettes with gum or food products must be crazy.

I have never heard any remarks, inquiries, or comments among my customers or others, to the effect or which led me to believe that they thought that either
2730 the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be the product of the Beech-Nut Packing Company.

I have sold Velvet Tobacco and Velvet Pencils. These articles are made by different companies. I also sell Star Razor Blades and Star Tobacco; Ever Ready Flashlights and Ever Ready Razor Blades. None of these articles are manufactured by the same concern.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same,

on the ground that the same is irrelevant and immaterial. 2731

Cross Examination.

I have handled a good many Lorillard tobacco products and have known their salesmen for some years, who have frequently called at my store. Not many customers ask who makes the tobacco or cigarettes they are buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether 2732
they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 2733

It is stipulated by and between the parties, through their respective counsel, that if C. H. Kappmeyer were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is C. H. KAPPMEYER. I am the owner and manager of a tobacco and novelty store, located at 1702 Halsted, Street, Chicago Heights, Illinois. I handle

2734 such articles as tobacco, periodicals, stationery, candy, toilet articles, novelties, kodaks, etc. I employ two clerks in addition to myself and we serve about 2,500 customers a day.

I know of the Lorillard Co. as one of the oldest and largest tobacco concerns, and I handle such of their brands as Beech-Nut Cigarettes, Climax Plug, Beech-Nut Scrap Tobacco, Murad Cigarettes, Helmars, Egyptian Dieties, Moguls, etc. I have handled the Beech-Nut Scrap Tobacco for about seven years and it is my best selling scrap tobacco. The Beech-Nut Cigarettes I have handled since they appeared on this market in the Fall
2735 of 1921. I have always known that both of these articles were the products of the Lorillard Co.

I handle Beech-Nut Chewing Gum, which is a good seller, and which I know to be the product of the Beech-Nut Packing Company, manufacturers of food products and confections. I regard food products and confections as an entirely distinct line from tobacco and cigarettes and I have never known a food products company which engaged in the tobacco business. I would think that any man who could confuse gum with either tobacco or cigarettes must be crazy. I have never heard any remarks, inquiries, or comments among my customers or others
2736 to the effect, or which would lead me to believe that they thought that the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes were manufactured by the same company that puts out the Beech-Nut Chewing Gum and Beech-Nut Food Products.

I handle Star Shaving Brushes and Star Tobacco. These articles are made by different concerns. I also sell Ever Ready Flashlights and Ever Ready Razor Blades; Chesterfield Pipes and Chesterfield Cigarettes, all made by different companies.

IT IS STIPULATED that objection is made by plaintiff's 2737
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled Lorillard Tobacco products and have known their salesmen for many years. I buy from them in large quantities. My store does a big business. I help wait on customers myself and have almost no time to talk to customers and little opportunity to hear what 2738
they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination. 2739

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2740

INDIANA WITNESSES.

IT IS STIPULATED by and between the parties, through their respective counsel, that if WM. T. VANVACTOR were called as a witness an behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is WM. T. VANVACTOR. I am of legal age and am manager of a retail store run by the Goodfellow Club and situated at the entrance to the United States
2741 Steel Co. at Gary, Indiana. As a rule I am the only clerk on duty in this store. I serve about 2,500 customers a day, the great mass of whom are employees in the steelworks. I handle such articles as candy, tobacco, gloves, caps, soap, etc.

I have sold Beech-Nut Scrap Tobacco since about 1915, and sell on an average of 300 packages a week. I have handled Beech-Nut Cigarettes since they appeared on the market in the Fall of 1921. It is a slow seller with me. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manu-
2742 factured by the P. Lorillard Co. I know that company to be one of the largest of the tobacco concerns. I handle Beech-Nut Chewing Gum, Beech-Nut Mints and some of the Beech-Nut Candies. I have always known that this line of confections was put out by the Beech-Nut Packing Company, and that that company also manufactures certain food products, such as Bacon and Canned Food products. I regard food products and gum as an entirely distinct line from tobacco or cigarettes, and I have never heard of a food products company that manufactured tobacco. I have never seen a package put out by the Beech-Nut Packing Company which looked

like either a scrap tobacco package or a cigarette package. I think that any man who would accept the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package in place of Beech-Nut Gum must be crazy. 2743

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be manufactured by the Beech-Nut Packing Company.

Cross Examination.

I have known of the Lorillard Company and have handled their tobacco products and have known their salesmen for a long time. Their salesmen frequently come into my store to take my orders. I buy considerable quantities from them. My store is just outside the gate of the U. S. Steel Mills and I do a rush business, especially at certain hours. I am kept on the jump and have not much time to listen to conversation. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 2744 2745

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2746

IT IS STIPULATED by and between the parties, through their respective counsel, that if HARRY BERNARD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is HARRY BERNARD. I am the manager of a large tobacco stand situated in the front part of a barber shop located at 706 Broadway, Gary Indiana. At this stand I handle in addition to tobacco and cigarettes, confections and playing cards and serve about 350
2747 customers a day.

I have handled Beech-Nut Scrap Tobacco for several years and it is my best selling scrap tobacco. I have sold Beech-Nut Cigarettes since they appeared on this market, in the Fall of 1921, and sell an average of about 70 packages a week. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were put out by the Lorillard Tobacco Co.

I handle Beech-Nut Chewing Gum and it is a good seller. I have always known it to be a product of the Beech-Nut Packing Company.

2748 I regard gum and tobacco as entirely distinct lines and I have never heard of a gum or food products company that put out tobacco products. I do not think that either the Scrap Tobacco package or the Cigarette package look like the gum package and I would think that any one who would accept the tobacco or the cigarettes in place of gum must be crazy. I know that Lorillard's name is written on both the Scrap Tobacco package and the Cigarette package. I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be manufactured by the Beech-Nut Packing Company.

Cross Examination.

2749

I have been familiar with the Lorillard tobacco products for a good many years and know the Lorillard salesmen who come into my store to take orders. I wait on the counter and am not a barber. I do a good business and as a rule have not much time to talk to customers. The customer does not often ask who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes 2750
the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2751

IT IS STIPULATED by and between the parties, through their respective counsel, that if JAKE KURLAND were called as a witness on behalf of the P. Lorillard Co. defendent, he would testify as follows:

Direct Examination.

My name is JAKE KURLAND. I am of legal age and the owner and manager of a general store located at 3332 Michigan Avenue, Indiana Harbor, Indiana. I employ one clerk besides myself and we serve about 300 customers a day. I carry such articles as tobacco, candy,

752 dry-goods, soap, playing cards, flashlights, toilet articles, glue, locks, key rings, etc.

I have handled Beech-Nut Scrap Tobacco for several years. It is my best selling scrap tobacco and I average about 290 packages a week. I have handled the Beech-Nut Cigarette since it appeared on this market in the Fall of 1921, and I sell on an average of 50 packages a week. I also handle Beech-Nut Chewing Gum and sell about one box of the gum a week, that is, 20 packages. I know that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes are both products of the Lorillard Tobacco Co. and that the Beech-Nut Chewing Gum is put
753 out by a different concern. I do not think that the gum package and the cigarette or scrap tobacco packages look alike and I think that any one who would take one for the other must be crazy.

I regard gum and tobacco or cigarettes as entirely separate lines and I have never known of a food products company that manufactured tobacco. I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be made by the same company that manufactures the Beech-Nut Gum.

754 I sell Chesterfield Cigarettes and Chesterfield Pipes. These articles are made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled Lorillard tobacco products and know the Lorillard salesmen who come into my store to take

orders. I am kept pretty busy and have not much op- 2755
portunity to hear what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 2756

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if C. P. BURDICK were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination. 2757

My name is C. P. BURDICK. I am of legal age and am the owner and manager of a restaurant at Michigan Ave. and Grand Blvd., Indiana Harbor, Indiana. In front of my restaurant I have a tobacco and candy stand where I do a considerable business.

I have handled Beech-Nut Scrap Tobacco for about seven years and it is my best selling scrap. I have handled Beech-Nut Cigarettes since they appeared on this market, but it has been a slow seller with me. I

2758 have always known that both of these articles were manufactured by the P. Lorillard Co., which company I know to be one of the largest of the tobacco concerns. I also handle Beech- Nut Chewing Gum and it is a very good seller. I know the gum to be one of the products of the Beech-Nut Packing Company and I know of some of their other products, such as Bacon and Peanut Butter. I have never seen a package put out by the Beech-Nut Packing Company which looks like either a scrap tobacco package or a cigarette package. I regard food products or gum as an entirely distinct line from tobacco or cigarettes and have never known of a
2759 food concern that engaged in the tobacco business. I know that Lorillard's name is written on both the Scrap Tobacco package and the Cigarette package. I think that anyone who could confuse tobacco with gum or food products must be crazy.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect or which would lead me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be manufactured by the Beech-Nut Packing Company.

2760 *Cross Examination.*

I have been familiar with Lorillard tobacco products for many years and know their salesmen who come into my store to take orders. I attend the cashier's desk in my restaurant and take care of the tobacco and candy stand at the same time. A customer hardly ever asks who makes the cigarette or tobacco that he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to

whether they are made by the same company that 2761
makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 2762

NORTH CAROLINA WITNESSES.

It is Stipulated by and between the parties, through their respective counsel, that if R. A. Carter were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is R. A. CARTER, I am of legal age and am a grocer by trade. I am the owner and manager of the 2763
grocery store located at 719 N. Graham St., Charlotte, North Carolina. My store is a small one. As a rule I am the only clerk on duty there and I serve about 100 customers a day.

I have handled Beech-Nut Tobacco for several years and Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. I have always known that both of these products were made by the Lorillard Tobacco Co. Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes are both fairly good sellers with me.

2764 I handle Beech-Nut Chewing Gum, which is also a fair seller. I know it to be the product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same company that manufactures the Beech-Nut Gum. I regard tobacco and cigarettes as an entirely separate line from gum or confections and I have never heard of a candy or gum concern which manufactured tobacco products.

2765 I do not think that the Scrap Tobacco package or the Cigarette package looks like the Gum package and I do not see how anyone could accept either the scrap tobacco or the cigarette package in place of the gum.

Cross Examination.

I have been handling Lorillard tobacco products for a long time. I knew that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were put out by the Lorillard Company before I ever bought them for my store. A customer hardly ever asks who makes the
2766 tobacco or cigarette that he is buying. I do not try to remember what they say to me.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and as to whether they are made by the same company that makes the Beech-Nut Gum or the other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 2767

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. M McGOWAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination. 2768

My name is J. M. McGOWAN. I am of legal age and am a clerk in the grocery store located at 903 N. Graham St., Charlotte, North Carolina. I have been a clerk in this store for three years. Since I have been here I have been handling Beech-Nut Scrap Tobacco. Beech-Nut Cigarettes were introduced into this store a little over a year ago. The Scrap Tobacco is a good seller, but the Cigarettes go very slowly. I have always known that Lorillard made both the Scrap Tobacco and the Cigarette and I know that company to be one of the foremost of the tobacco companies. 2769

I also handle Beech-Nut Peanut Butter and Beech-Nut Chewing Gum. I know these to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the same company that manufactures the Beech-Nut Gum or the Beech-Nut Peanut Butter.

I regard tobacco and cigarettes as an entirely separate line of stuff from food products or gum, and I have

2770 never known of a food products company which put out any tobacco products. I know that Lorillard's name is written on both the Scrap Tobacco package and the Cigarette package. I do not think that either the Scrap Tobacco package or the Cigarette package looks like the Gum package and certainly it would take a crazy person to confuse the two lines.

I sell Royal Safety Pins and Royal Baking Powder; Camel Cigarettes and Camel Dates, all made by different concerns.

2771 IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have been familiar with Lorillard tobacco products for a long time. I do not try to remember conversations which take place in my store. I have made no attempt to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette, and as to whether they are made by the same company that makes the Beech-Nut Gum or 2772 other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I had never heard of any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2773

IT IS STIPULATED by and between the parties, through their respective counsel, that if NORMAN A. LYNCH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is NORMAN A. LYNCH. I am of legal age and by occupation a druggist. My store is located at 201 N. Tryon St., Charlotte, N. C. In addition to drugs I carry such lines as stationery, tobacco, candy, toilet articles, etc. I employ two clerks in addition to myself. 2774

I have handled Beech-Nut Cigarettes since they appeared on this market and have always known that they were a product of the Lorillard Tobacco Co. The salesman who first sold me these cigarettes told me that it was a Lorillard product. I know that Lorillard's name is written on the front of the package. Beech-Nut Cigarettes are a slow seller with me.

I handle Beech-Nut Chewing Gum which I know to be a product of the Beech-Nut Packing Company. It is a good seller in my store.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Cigarettes to be a product of the same company that manufactures Beech-Nut Chewing Gum. 2775

I do not think that the cigarette package and the gum package look at all alike and certainly it would take a crazy man to accept one for the other.

I regard gum and tobacco as entirely unrelated articles and I have never known of a candy or gum concern that put out any tobacco products.

2776 *Cross Examination.*

I wait on counter myself and as a rule am kept pretty busy. I do not pay much attention to what customers are saying unless they are making a complaint or something like that.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I
2777 say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if James A. Henderson
2778 were called as a witness on behalf of the P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is JAMES A. HENDERSON. I am of legal age and by occupation a druggist. I am the manager of the largest drug store in Charlotte, N. C. located at 200 N. Tryon Street. I employ four clerks in addition to myself and serve about 2000 customers a day. There is a post office sub-station located in my store. I carry in addition to drugs such lines as candy, tobacco, stationery, toilet articles, etc.

I have handled Beech-Nut Cigarettes since they 2779
appeared on this market and have always known that they were a product of the Lorillard Tobacco Co. The salesman who first sold me these cigarettes told me that it was a Lorillard product. I know that Lorillard's name is written on the front of the package. Beech-Nut cigarettes are a slow seller with me.

I handle Beech-Nut Chewing Gum. I know this to be a product of the Beech-Nut Packing Company. This gum is a good seller in my store.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech- 2780
Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same company that manufactures Beech-Nut Chewing Gum.

I do not think the cigarette package and the gum package look alike, and certainly it would take a crazy man to accept one for the other.

I regard gum and tobacco as entirely unrelated articles and I have never known of a candy or gum concern that put out any tobacco products.

Cross Examination.

2781

I am familiar with Lorillard tobacco products. My store is a downtown corner drug store and does a big business. I am kept very busy as a rule and have not much time to talk to customers or opportunity to hear what they are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I

2782 say that I never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, by the respective counsel, that if T. A. WALKER were called as
2783 a witness on behalf of the P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is T. A. WALKER. I am of legal age and am a druggist. I am the manager of a drug store located at 340 N. Tryon St. Charlotte, N. C. I employ two clerks in addition to myself and handle in addition to drugs, such lines as confections, stationery, tobacco, toilet articles, fountain pens, etc.

I have handled Beech-Nut Cigarettes since they
2784 appeared on this market. They have been a good seller with me. The salesman who first put these cigarettes into my store told me that they were a product of the Lorillard Co. I know that Lorillard's name is written on the cigarette package.

I also handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought that the Beech-Nut Cigarettes to be a product of the Beech-Nut Packing Company.

I regard tobacco and gum as separate and distinct 2785
lines, and have never known of a candy or gum concern which put out any tobacco products.

I do not think that the gum package and the cigarette package look alike and I would think that any one who would accept one for the other must be crazy.

Cross Examination.

I have a busy downtown drug store and have not much time to talk to customers or opportunity to hear what they are saying.

I have made no effort to remember any inquiries, com- 2786
ments, or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or com- 2787
ments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if H. C. CHANDLER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is H. C. CHANDLER. I am of legal age and am the manager of the Liggett Store, which is

2788 located at the corner of North Tryon St. and East Trade St., Charlotte, N. C. I employ about eight clerks in my store and I do a big business in those articles which are usually carried in drug stores, confectionery stores, and tobacco stores.

I have long known of the Lorillard Tobacco Co. as one of the foremost of the tobacco companies. I have handled a large number of their brands and I am always glad to put Lorillard products into my stock. I have handled Beech-Nut Cigarettes since they appeared on this market something over a year ago and they have been a fairly good seller with me. I have carried Beech-
2789 Nut Scrap Tobacco for several years past, but only kept a small quantity of it on hand, as I do not have much demand for Scrap Tobacco among my trade. I have always known that both the Beech-Nut Cigarettes and the Beech-Nut Scrap Tobacco, were products of the Lorillard Co. I know that Lorillard's name is written on both the Scrap Tobacco and the Cigarette Packages, The salesman who sold me these articles represented himself to be an agent of the Lorillard Co.

I handle Beech-Nut Chewing Gum, which is a very good seller and I know this to be a product of the Beech-Nut Packing Company.

2790 I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought that either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be a product of the Beech-Nut Packing Company. I have never known of a food products concern that made tobacco products and I regard gum and tobacco as entirely distinct classes of goods.

I sell the following articles which bear the same name, but are made by different concerns: Black and White Cigarettes—Black and White Cosmetics; Ideal Chocolate—Waterman's Ideal Fountain Pens.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 2791

Cross Examination.

I have bought and sold Lorillard tobacco products and have known the Lorillard salesmen for a long time. I do not remember the circumstances of the first visit of the salesman who brought in Beech-Nut Cigarettes. I do not remember which salesman it was but he told me that he was from the Lorillard Co. My store is a very busy place. I wait on counter part of the time in whatever part of the store I may be needed. I have not much time to talk to customers or opportunity to hear what they are saying. 2792

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 2793

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2794 IT IS STIPULATED by and between the parties, through their respective counsel, that if JOHN GROSS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is JOHN GROSS. I am of legal age and am the manager of the Piedmont Cigar Stand which is located in the Piedmont Hotel, Charlotte, N. C. I employ one clerk besides myself and we serve about 1500 people a day.

2795 I have handled Beech-Nut Scrap Tobacco for the past two or three years. It is a good seller with me. I have handled Beech-Nut Cigarettes for some time after they appeared on this market, but as it was never a good seller at my stand I have discontinued handling it. I have always known that the Lorillard Tobacco Co. made both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes. I know that Lorillard's name is written on both the Beech-Nut Tobacco and the Beech-Nut Cigarette packages. The tobacco salesman who first sold me these products told me that they were products of the Lorillard Co.

2796 I handle Beech-Nut Chewing Gum and it is a very good seller. I know it to be the product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be a product of the same company that manufactured Beech-Nut Gum.

I regard gum and tobacco as entirely distinct lines and I do not think that either the scrap tobacco pack-

age or the cigarette package looks like the gum package. 2797

Cross Examination.

I have been familiar with Lorillard tobacco products for many years. The Lorillard salesmen call regularly to take my orders. I do not remember who the salesmen were who first introduced the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes to my stand. I have a busy hotel stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 2798

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed upon my memory. 2799

It is Stipulated by and between the parties, through their respective counsel, that if D. W. Holbrook were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is D. W. HOLBROOK. I am of legal age and am the manager of the "H & H" Cigar Company,

2800 located at 32 S. Tryon St., Charlotte, N. C. I handle tobacco, candy, gum, magazines, pencils, etc. I employ one clerk in addition to myself and serve about 1000 customers a day. I have been in this business for the past four years and for the five years preceding that I worked in a tobacco jobbing house.

I have handled Beech-Nut Scrap Tobacco for several years and the Beech-Nut Cigarette since it appeared on this market. Beech-Nut Scrap Tobacco is my best selling scrap, but Beech-Nut Cigarettes are a slow seller with me. I have always known that both of these products were made by the Lorillard Tobacco Co. and I
2801 have long known of that company as one of the foremost tobacco companies.

I also handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the Beech-Nut Packing Company. I have never heard of a food products or gum concern that manufactured tobacco articles.

I do not think that either the scrap tobacco package
2802 or the cigarette package looks like the Beech-Nut Gum package and I think that only a crazy man would accept either the scrap tobacco or the cigarette for the gum. I know that Lorillard's name is written on the front of both the scrap tobacco and the cigarette packages.

Cross Examination.

I have been in the tobacco business a good many years and have known of the Lorillard tobacco products during that time. I know the Lorillard salesmen who call

regularly to take my orders. I have a busy store and 2803
am kept on the jump waiting on customers most of the time. I have not much time to listen to what customers are saying. They almost never ask who makes the tobacco or cigarette which they are buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not re- 2804
member any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if Dean S. House were 2805
called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is DEAN S. HOUSE. I am of legal age and am the manager of a tobacco and confectionery store located at Church and Trade Street, Charlotte, N. C. In addition to tobacco and confections I carry such articles as razor blades, pencils, pens playing cards, etc., and also serve a quick lunch. I have about 1500 customers a day and employ two clerks in addition to myself.

2806 I have handled Beech-Nut Scrap Tobacco for several years. My average sale is about four dozen packages a week.I have handled Beech-Nut Cigarettes since they appeared on this market, more than a year ago. They are a slow seller with me. I have always known that the Beech-Nut Tobacco and Beech-Nut Cigarettes are made by the Lorillard Co.

I handle Beech-Nut Chewing Gum and it is my best selling gum. This gum I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my cusomers or others, to the effect or
2807 which would lead me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be a product of the Beech-Nut Packing Company. I have never heard of a food products concern which manufactures tobacco products and I regard the two lines as absolutely separate and distinct.

I do not think that either the Beech-Nut Scrap Tobacco Package or the Beech-Nut Cigarette Package looks like the Beech-Nut Gum Package. I know that Lorillard's name is written on both the Scrap Tobacco Package and the Cigarette Package.

Certainly it would take a crazy man to accept the
2808 tobacco or cigarettes for the chewing gum.

Cross Examination.

I have handled tobacco for a long time and have known the Lorillard tobacco products for years. I know the Lorillard salesmen, who call regularly at my store to take orders. I am kept pretty busy attending the different parts of my store. I do not pay much attention to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut

Scrap Tobacco or the Beech-Nut Cigarettes, or as to 2809
whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such 2810
would have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if C. W. Kirby were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is C. W. KIRBY. I am of legal age and am the owner and manager of the A. L. Kirby Grocery Co., 2811
of Winston-Salem, N. C. My store is located in the business section of the town. In addition to a complete grocery line I carry dry goods, tobacco, pencils, etc. I serve about 300 customers a day and employ one clerk in addition to myself.

I handle Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes. I have always known that both of these articles were put out by the Lorillard Co., and I have known of the Lorillard Co. a long time as one of the largest and best known of the tobacco companies.

I also handle Beech-Nut Chewing Gum, but do not handle any Beech-Nut Food Products. I know that

2812 these are the products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be made by the same company that manufactured Beech-Nut Gum. I do not regard gum and tobacco or cigarettes as in any way related to one another and I have never heard of any chewing gum or candy concern that made tobacco products. I do not think that the Beech-Nut Cigarette package or the Beech-Nut Scrap Tobacco
2813 package looks like the Beech-Nut Gum package. I would think that anyone who would accept either the scrap tobacco or the cigarette package in place of the gum must be crazy.

I sell Star Hams and Star Soap. These two articles are made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

2814

I have handled tobacco a long time and know the Lorillard products. It keeps me pretty busy waiting on the different parts of my store. I do not pay much attention to what people are saying about tobacco. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say

that I have never heard any such inquiries, comments 2815
or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if H. L. GRANT were called as a witness on behalf of P. Lorillard Co., defendant, 2816
he would testify as follows:

Direct Examination.

My name is H. L. GRANT. I am of legal age and am the manager of two cigar stands, one of which is located in the lobby of the Zinzendorf Hotel, and the other in the lobby of the Robt. E. Lee Hotel, both in Winston Salem, N. C. I divide my time about equally between the two stands. At each of them we serve about 200 customers a day.

I have handled Beech-Nut Scrap Tobacco for several 2817
years and the Beech-Nut Cigarette since it appeared on this market. Beech-Nut Scrap Tobacco is my best selling scrap, but the Cigarette is a very slow seller with me. I have always known that Lorillard made both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarette.

I handle Beech-Nut Chewing Gum and it is a very good seller. I know it to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-

2818 Nut Cigarette or the Beech-Nut Scrap Tobacco to be the product of the same company that manufactured Beech-Nut Gum. I regard gum and tobacco or cigarettes entirely different classes of products and I have never known of a food products, candy or gum concern that manufactured tobacco. I do not think that either the scrap tobacco package or the cigarette package looks like the gum package and I do not see how anyone could confuse the two lines. For my part I would rather handle tobacco from a company that made tobacco only than from a concern that was in the food products business as well.

2819

Cross Examination.

I have handled tobacco for a good many years and know the different brands. I am kept pretty busy looking after my two hotel stands and do not pay a great deal of attention to what people are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes

2820 the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2821

IT IS STIPULATED by and between the parties, through their respective counsel, that if I. H. RIDER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is I. H. RIDER. I am of legal age and am a druggist. I manage the Zinzendorf Pharmacy, which is in the Zinzendorf Hotel Building, Winston Salem, N. C. My store is in the center of the downtown section of Winston Salem and I have about 400 customers a day, employing two clerks in addition to myself.

2822

I have handled Beech-Nut Cigarettes for more than a year now and I sell about 20 packages a week. I have always known that the Beech-Nut Cigarettes were made by the Lorillard Co., and I know of the Lorillard Co. as one of the most prominent of the tobacco companies.

I also handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company. It is my best selling gum.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Cigarettes to be a product of the Beech-Nut Packing Company.

2823

I do not think that the gum package and the cigarette package look like each other and I think that any one who would accept one for the other must be crazy. I know that Lorillard's name is written on the front of the cigarette package.

Tobacco and gum are entirely separate classes and I have never heard of a food products company that manufactured tobacco products or a tobacco company that manufactured food products or confections.

2824 *Cross Examination.*

I have handled tobacco for a number of years and know the different brands. I have a busy hotel drug store and have a good deal to do to look after the different parts of it. I never pay much attention to what is said at the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason
2825 to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2826 IT IS STIPULATED by and between the parties, through their respective counsel, that if ALLISON JAMES were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is ALLISON JAMES. I am of legal age and am the manager of three drug stores, all located in Winston Salem, N. C. One of these stores is in the downtown section of Winston Salem and is known as "Owen's Drug Co." The other two stores are known as the "Thompson Drug Co." and the "Crescent Drug Co."

I have handled Beech-Nut Cigarettes for a little over 2827
a year past. I have always known that this cigarette was a product of the Lorillard Co. and I have always known of the Lorillard Co. as one of the largest tobacco concerns. I handle a number of their brands, such as Murads, Moguls, Egyptian Dieties, etc.

I carry Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Ginger Ale. I have always known these products to be made by the Beech-Nut Packing Company and I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech Nut Scrap Tobacco or the Beech-Nut Cigarettes to be 2828
products of the Beech-Nut Packing Company. I do not think that the Beech-Nut Gum package looks like the Beech-Nut Cigarette package, and I think it would take a crazy man to confuse gum with tobacco.

I sell Mavis Candy and Mavis Talcum Powder These two articles are made by different companies. I also sell Ever-Ready Matches and Ever-Ready Razor Blades; Velvet Pencils and Velvet Tobacco. None of these articles are made by the same company.

IT IS STIPULATED that objection is made by plaintiff's 2829
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for some years and know the different brands. I spend most of my time in our downtown store which is on the central square of the town and does a good business. I wait on counter in the dowtnown store for part of the time and give my

2830 attention to all parts of the store. I have not paid much attenion to what is being said at the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

2831

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if F. A. Smithdeal were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2832

Direct Examination.

My name is F. A. SMITHDEAL. I am of legal age and am the manager of a grocery store located at 438 Trade Street, Winston Salem, N. C. This store is in the business section and is known as the "Basketeria." I serve approximately 700 customers a day and employ four clerks in addition to myself.

I handle a full line of the Beech-Nut Packing Company's food products and I may say that it is my leading line of food products.

I handle Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes and I have always known that both of these products were made by the Lorillard Co. I also handle Beech-Nut Stogies, which I know to be made by some Tobacco Company located somewhere in Pennsylvania, and which I know is not the Lorillard Co. 2833

I have never heard any remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as entirely separate classes of products from food products or confections. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package and I do not see how anyone could confuse tobacco or cigarettes with chewing gum or confections and food products. I would prefer to handle tobacco made by a straight tobacco concern rather than tobacco produced by a food concern that was also in the tobacco business. 2834

With me Beech-Nut Scrap Tobacco is a good seller and Beech-Nut cigarettes sell fairly well. As I have already stated, Beech-Nut Food Products and Beech-Nut Chewing Gum sell well in my store. 2835

Cross Examination.

I have a busy "Basketeria" Grocery. The tobacco and cigar stand is alongside the cashier's desk. My store covers considerable area and I look after all parts of it. It keeps me pretty busy and I have not much chance to hear what is being said at the tobacco stand and never paid much attention to that. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap

336 Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

I do wait on the tobacco counter myself at times, but most of my time is spent in a general supervision of the store.

337 If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if E. W. HANRON were called as a witness on behalf of P. Lorillard Co., defenadnt, he would testify as follows:

Direct Examination.

338 My name is E. W. HANRON. I am of legal age and am a druggist and have for 15 years past been a druggist. I own the drug store situated at 4th and Liberty Streets, which is one of the oldest and largest drug stores in Winston Salem, serving about 1200 customers a day. I employ four clerks in addition to myself.

I handle Lorillard's Beech-Nut Cigarettes as well as a number of other of Lorillard's brands. I sell about 50 packages of Beech-Nut Cigarettes per month. I have always known that the cigarette was made by the Lorillard Co.

I handle Beech-Nut Chewing Gum and have always 2839
known it to be a product of the Beech-Nut Packing Company. I sell about 30 boxes of the gum in a month. I have never heard any comments, remarks or inquiries among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Cigarette to be a product of the Beech-Nut Packing Company. I do not think that the cigarette package and gum package look alike. I think it would take a crazy man to accept one in place of the other.

I regard tobacco and gum as entirely separate lines. For my part I would prefer a tobacco product made by a well known straight tobacco company, like 2840
Lorillard, than by a company which produced food products as well as tobacco.

I sell Mavis Candy and Mavis Talcum Powder. These articles are made by different concerns.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination. 2841

I have handled tobacco for some years and handle a good deal of it now, including Lorillard brands, and am familiar with the different brands. I have a good sized and busy store. I wait on customers in all parts of the store myself, including the tobacco stand. I do not pay much attention to what is being said at the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes or as to whether they are made by the same

2842 company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2843

IT IS STIPULATED by and between the parties, through their respective counsel, that if E. I. FATER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is E. I. FATER. I am of legal age and am part owner and manager of the D. H. Fater Cigar Co. The D. H. Fater Cigar Co. operates a retail tobacco and novelty store located at No. 6 Haywood St., Ashe-
2844 ville, N. C. Besides myself there is, as a rule, one clerk on duty there. We sell such articles as tobacco, stationery, confections, toilet articles, pens and pencils, novelties, playing cards, periodicals, flashlights, etc. We serve about 500 customers a day.

I have handled Beech-Nut Scrap Tobacco for about five years and Beech-Nut Cigarettes since they appeared on this market about two years ago. I have always known that both of these articles were manufactured by the Lorillard Tobacco Co. I have always known of that Company as one of the oldest and largest tobacco companies and I handle a number of their

brands, such as Climax Plug, Havana Blossom Chewing Tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Deities, etc. 2845

I handle Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Candy. I have always known these articles to be put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe that they thought the Beech-Nut Cigarette or Beech-Nut Scrap Tobacco to be products of the Beech-Nut Packing Company. I know that Lorillard's name is written on the front of both the Scrap Tobacco package and the Cigarette package. 2846

I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package. I would think that any one who would accept a package of Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes in place of Beech-Nut Gum must be crazy.

I have never known of a food, candy or gum concern that manufactured any tobacco products and I regard confections and tobacco as entirely unrelated classes of goods.

I handle Pall Mall Cigarettes and Pall Mall Candy. These articles are not manufactured by the same company. 2847

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

1848 *Cross Examination.*

I have been in the tobacco business for some years and am familiar with the different brands. I have handled many of the Lorillard tobacco products and know the Lorillard salesmen who come into my store to take orders. A customer hardly ever asks who makes the cigarette or tobacco he is buying. I do not pay much attention to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to
1849 whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such
1850 would have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if E. S. Gulyear were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is E. S. GULYEAR. I am of legal age and am the owner and manager of a general store located on the ground floor of the Gladstone Building, Depot St., Asheville, N. C. My store is just across the street

from the railway station. As a rule I have one clerk on duty here in addition to myself and we serve about 300 customers a day. I handle such articles as soap, towels, overalls, bats, tops, tobacco, soft drinks, stationery, chewing gum, watch fobs, suit cases, shoes, shots and shells, etc. 2851

I have handled Beech-Nut Scrap Tobacco for about five years and it is my best selling scrap tobacco. I have sold Beech-Nut Cigarettes since they appeared on this market, somewhere around two years ago. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarette were manufactured by the Lorillard Tobacco Co. I remember that the salesman who first sold me Beech-Nut Cigarettes had advertising matter with him at the time and that he put up some posters advertising the cigarettes in my store. 2852

I handle Beech-Nut Chewing Gum and Beech-Nut Mints, which I have always known to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the Beech-Nut Packing Company.

I have never known of a candy or gum concern which manufactured any tobacco products and I do not regard tobacco or cigarettes as in any way related to gum or candy. I have never seen a package put out by the Beech-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package. I know that Lorillard's name is written on the front of the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package. 2853

2854 *Cross Examination.*

I have handled tobacco for some years and am familiar with the different brands. I wait on customers in all parts of my store as well as the tobacco section. I do not pay much attention to what customers are saying at the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or the other Beech-Nut Packing
2855 Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2856 It is Stipulated by and between the parties, through their respective counsel, that if M. E. Parthemas were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. E. PARTHEMAS. I am of legal age and am the manager of a store at 404 Depot St., Asheville, N. C. My store is located directly across the street from the railway station. As a rule I have one clerk on duty here in addition to myself and we serve about 400 customers a day. We handle fruit, confections and tobacco.

I have sold Beech-Nut Scrap Tobacco for about five 2857
years and Beech-Nut Cigarettes since they first appeared on this market about a year and a half ago. I have always known that both of these products were manufactured by the P. Lorillard Co. I remember that the salesman who first sold me the Cigarettes told me that he was a representative of the Lorillard Co. and that he put up some posters advertising the cigarette in my store. I know that Lorillard's name is written on the front of both the Scrap Tobacco package and the Cigarette package.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints. 2858

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes to be manufactured by the same concern that manufactures Beech-Nut Gum and Beech-Nut Mints.

I have never heard of a food, candy or beverage concern that manufactured any tobacco products and I regard tobacco and cigarettes as in an entirely separate class from any of these articles.

I do not think that the Scrap Tobacco package or the Cigarette package look like the Beech-Nut Chewing 2859
Gum package. I think that anyone who would accept the gum package for either the scrap tobacco or the cigarette packages must be crazy. Beech-Nut Scrap Tobacco is my best selling scrap. The Beech-Nut Cigarette is a slow seller with me. Beech-Nut Chewing Gum is a good seller with me, but the Beech-Nut Mints and Ginger Ale sell slowly with me.

Cross Examination.

I have handled tobacco for some years and know the different brands. I have handled Lorillard brands and

360 know the Lorillard salesman who calls at my store on his rounds. I do not pay much attention to what my customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or the other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

361 *Re-direct Examination.*

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if JOHN H. MONTEATH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

362 *Direct Examination.*

My name is JOHN H. MONTEATH. I am of legal age and am the manager of a grocery, confectionery and tobacco store located at 13½ College St., Asheville, N. C. My home address is 29 Blanton St., Asheville, N. C.

I have handled Beech-Nut Scrap Tobacco for four or five years and it has been my best selling scrap tobacco. I have handled Beech-Nut Cigarettes ever since they appeared on this market. They have been a slow seller with me. I have always known that both of these pro-

ducts were manufactured by the Lorillard Tobacco Co. 2863
I remember that the salesman who first sold me Beech-Nut Cigarettes told me that they were a product of the Lorillard Co. and that he put up some advertising matter advertising the cigarette in my store at that time. I know that Lorillard's name is written on the front of both the Scrap Tobacco package and the Cigarette package. I have long known of the Lorillard Co. as one of the oldest and largest of the tobacco companies. I handle several of their brands, such as Havana Blossom Chewing Tobacco, Climax Plug Tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Dieties, etc.

I handle Beech-Nut Chewing Gum, which I know to 2864
be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a cigarette package or a scrap tobacco package. I think that anyone who would accept the Beech-Nut Gum package for either the Beech-Nut Scrap Tobacco or Cigarette package must be crazy. 2865
I have never known of a candy concern that put out tobacco products and I regard candy and gum as in no way related to tobacco or cigarettes.

I handle Star Soap and Star Tobacco. It never occurred to me that these two products might be made by the same company and I know that this is not the case.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

2866 *Cross Examination.*

I have handled tobacco for some years and know the different brands. I am familiar with the Lorillard brands. I cannot remember exactly the circumstances of the first visit of the salesman who introduced Beech-Nut Cigarettes to my store and cannot describe it any more than I already have done. I cannot remember who the salesman was who first sold them to me. I do not pay much attention to what my customers are saying about tobacco.

2867 I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

2868 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if L. J. WILSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination:

My name is L. J. WILSON. I am of legal age and am the manager of Teagues Drug Store at 33 Patton Ave., Asheville, N. C. In addition to drugs we handle such

articles as tobacco, toilet articles, stationery, candy and chewing gum. I employ two clerks in addition to myself. 2869

I have handled Beech-Nut Scrap Tobacco for several years and Beech-Nut Cigarettes since they appeared on this market. They are both fairly good sellers with me. I have always known that the Lorillard Co. made both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes. I know the Lorillard Tobacco Co. to be one of the oldest and largest of the tobacco companies. I handle a great many of their brands, such as Helmars, Murads, Moguls, Egyptian Dieties, etc.

We serve about 800 customers a day in this store. I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the BeechNut Company. 2870

I handle Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Candy and have always known that these articles were put out by the Beech-Nut Packing Company.

I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package. I have never known of a food or candy concern that manufactured any tobacco products, and I regard gum or candy as in an entirely different class from tobacco or cigarettes. 2871

I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package.

I sell Every-Ready Flashlights and Ever-Ready Razor Blades and Every-Ready Matches. None of these articles are manufactured by the same concern.

2872 IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination:

I have handled tobacco for some years and know the different brands. I have handled Lorillard tobacco products and am familiar with their brands. I wait on customers in the different parts of my drug store, in-
2873 cluding the tobacco stand. I have not much time to listen to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

2874 *Re-direct Examination:*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2875

IT IS STIPULATED by and between the parties, through their respective counsel, that if FRED HESTER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination:

My name is FRED HESTER. I am of legal age and am the manager of the Aiken & Hester Drug Co., at 12 Broadway, Asheville, N. C. In addition to drugs we carry such articles as candy, jewelry, tobacco, hair nets, stationery, flashlights, toilet articles, etc. I em- 2876
ploy two clerks besides myself and we serve about 500 customers a day.

I have handled Beech-Nut Cigarettes since they appeared on this market, about a year and a half ago. I have always known that Lorillard made this cigarette and I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought the Beech-Nut Cigarette to be a product of the Beech-Nut Packing Company.

I handle Beech-Nut Gum and Beech-Nut Mints and I have always known that these were products of the 2877
Beech-Nut Packing Company.

I have never known of a food products concern that put out any tobacco products and I regard tobacco and gum as entirely separate classes of products.

I have never seen a package put out by the Beech-Nut Packing Company which looked like a cigarette package, and I think that anyone who would accept the Beech-Nut Cigarette Package for the Beech-Nut Gum package, must be crazy. I know that Lorillard's name is written on the front of the cigarette package.

I remember that when I first put Beech-Nut Cigarettes into stock there was a drive on, introducing

2878 them into this market, and that a Lorillard salesman took my first order for them. He requested that I allow him to display posters advertising the cigarette in my store, and I allowed him to do so.

Cross Examination.

I have handled tobacco for some years and know the different brands. I know the Lorillard salesmen who call at my store to take orders. I cannot remember who the salesman was who first brought Beech-Nut Cigarettes into my store. I wait on customers in all
2879 parts of my store. I do not pay much attention to what the customers are saying around the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

2880 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2881

SOUTH CAROLINA WITNESSES.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. R. SHEDD were called as a witness on behalf of the P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. R. SHEDD. I am of legal age and am a clerk at the tobacco and confection counter in Wingfield's Drug Store, which is located at 1443 Main Street, Columbia, S. C. This is the largest drug store in Columbia and in addition to drugs, sodas, candy and tobacco, we carry a varied line, including such things as toilet articles, fountain pens, stationery, etc. In the tobacco and candy department alone I average more than 500 customers a day. 2882

I have handled Beech-Nut Scrap Tobacco for over a year and it is the only scrap that I carry. It sells very well. I remember that the salesman who first sold me Beech-Nut Tobacco introduced himself to me as a Lorillard agent. He neither said or did anything which left me under the impression that there was any connection between Beech-Nut Tobacco and the Beech-Nut Packing Company. I put Beech-Nut Cigarettes on sale in my store when they were first introduced into this territory and I remember that on that occasion also, the salesman who sold them to me stated that he was from the Lorillard Tobacco Co., and told me that the cigarette was a new addition to their line of products. Beech-Nut Cigarettes were never a good seller in my store. 2883

I handle Beech-Nut Gum, Beech-Nut Mints, Beech-Nut Lime Drops and Beech-Nut Caramels. The gum is a very good seller. I have always known that these products were made by the Beech-Nut Packing Company.

884 I never knew the Beech-Nut Packing Company to put
2 out a tobacco product and I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be a product of the Beech-Nut Packing Company. I regard tobacco and gum or candy in entirely distinct classes. I have never seen a package put up by the Beech-Nut Packing Company that looked like a cigarette or a scrap tobacco package. I would think that anyone who would accept a package of Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes in place
885 of Beech-Nut Gum must be crazy.

Cross Examination.

I have handled tobacco for some years and know the different brands. I know the Lorillard salesman who calls in at our store to take orders. I cannot remember who the salesman was who first sold me Beech-Nut Scrap Tobacco, or the salesman who first sold me Beech-Nut Cigarettes. I cannot remember the circumstances of the first visit of either of these salesmen and cannot describe what took place at the time of these visits any more than I have already done. The Wingfield Drug
886 Store is a good sized store and does a good business. I am kept pretty busy in my section and have not much time to talk to customers. I do not pay much attention to what they are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 2887

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if SAM CARNAGGIO were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination. 2888

My name is SAM CARNAGGIO. I am of legal age and am the owner and manager of a grocery store located at 1810 Main St., Columbia, S. C. My store is a small one, but we do a good business and as a rule I have one clerk on duty in addition to myself.

I have handled Beech-Nut Scrap Tobacco for about a year. The salesman who first put the Scrap Tobacco into my store introduced himself to me as a representative of the P. Lorillard Co. He told me the Scrap Tobacco was one of Lorillard's brands, and said nothing which left me under the impression that the Beech-Nut 2889
Scrap Tobacco was a product of the Beech-Nut Packing Company. I was then and still am handling a number of the products of the Beech-Nut Packing Company, such as Beech-Nut Gum, Beech-Nut Peanut Butter and Beech-Nut Ginger Ale. I have never heard any comments, inquiries or remarks among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company.

I have never heard of a food products concern which

2890 put out any tobacco products and I regard tobacco or food and gum as bearing no relation to one another.

I have never seen a package put up by the Beech-Nut Packing Company that looked like a scrap tobacco package. I know that Lorillard's name is written on the front of the Beech-Nut Scrap Tobacco package.

Cross Examination.

I cannot remember who the salesman was who first introduced Beech-Nut Scrap Tobacco to my store. I cannot remember exactly the circumstances of his first
2891 visit when he offered to sell me Beech-Nut Scrap Tobacco and cannot describe that visit any more than I already have done. I wait on all parts of my store. I have not paid much attention to what my customers are saying about tobacco.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not
2892 remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2893

IT IS STIPULATED by and between the parties, through their respective counsel, that if M. L. MOORE were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. L. MOORE. I am of legal age and am the owner and manager of a grocery store located at 933 Main St., Columbia, S. C. My store is a small one, where I serve about 100 customers a day. I am located only one block from the Capital Cash & Carry Grocery 2894
Co. and I know Mr. Jefferson D. Hayden, who is the manager there. As a usual thing I am the only clerk on duty in my store.

I have handled Beech-Nut Scrap Tobacco for about a year and the salesman who first sold me this tobacco introduced himself to me as a representative of the Lorillard Tobacco Co. and represented the tobacco to be a product of the Lorillard Co.

He said nothing which left me under the impression or suggested to me that the Beech-Nut Tobacco might be made by the Beech-Nut Packing Company. I handle a good many of the food products put out by the 2895
Beech-Nut Packing Company. It did not occur to me that the Beech-Nut Tobacco might be the product of the Beech-Nut Packing Company. I regard tobacco as an entirely separate line from food products and I have never known of a food concern that produced tobacco.

I have never seen a package put out by the Beech-Nut Packing Company which looked like a scrap tobacco package and I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company.

2896 *Cross Examination.*

I do not know the salesman who first sold me the Beech-Nut Scrap Tobacco. I cannot remember exactly what this salesman said or did at that time and cannot describe his visit any more than I have already done. I have not paid much attention to what my tobacco customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-
2897 Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2898 It is Stipulated by and between the parties, through their respective counsel, that if S. A. Sabbagha were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is S. A. SABBAGHA. I am of legal age and am the owner and manager of a grocery store located at 727 Main Street, Columbia, S. C. My store is on the same street with the Capital Cash & Carry Grocery Co., and it is only one block away from that store. I

know Mr. Jefferson D. Hayden, who is the manager there. My store is not a very large one. I employ one clerk besides myself and serve between 100 and 150 customers a day. 2899

I have handled Beech-Nut Scrap Tobacco for about six months. I do not know the name of the salesman who first put it into my store, but I do remember that he introduced himself as a representative of the Lorillard Co. and said nothing which led me to believe that the Beech-Nut Scrap Tobacco was made by the Beech-Nut Packing Company.

I was then and still am carrying Beech-Nut Bacon, Beech-Nut Peanut Butter and Beech-Nut Ketchup. It never did occur to me that the Beech-Nut Tobacco might be made by the Beech-Nut Packing Company. I have never heard of a food products company making tobacco and I regard the two as entirely separate lines. 2900

I have never seen a package put out by the Beech-Nut Packing Company which looked like a scrap tobacco package and I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought that the Beech-Nut Tobacco was a product of the Beech-Nut Packing Company.

2901

Cross Examination.

I cannot remember any more details in regard to the visit of the salesman who first put Beech-Nut Scrap Tobacco into my store. I wait on customers in all parts of my grocery store. I do not pay much attention to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other

2902 Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2903 IT IS STIPULATED by and between the parties, through their respective counsel, that if R. L. BURNETT were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is R. L. BURNETT. I am of legal age and by occupation a druggist. My store is located at 829 Main Street, Columbia, S. C. It is a corner store and is next door to the Capital Cash & Carry Co. I know Jefferson D. Hayden, who is the manager of that store.

2904 I have known of the Lorillard Tobacco Co. as one of the biggest of the tobacco companies. I handle several Lorillard brands, including Beech-Nut Scrap Tobaco and Beech-Nut Cigarettes. Beech-Nut Scrap Tobacco is a good seller with me, but the cigarettes sell slowly. I cannot now remember who the salesman was that first put Beech-Nut Cigarettes into my store. I do remember, however, that he told me he was a Lorillard agent and when he left I knew the cigarettes to be a product of the Lorillard Co. I come into contact a great deal with Lorillard salesmen and I have never

known one of them to misrepresent any of his goods to me.

I handle Beech-Nut Chewing Gum, which is a very good seller. I do not think that either the Beech-Nut Cigarette package or the Beech-Nut Scrap Tobacco package looks like the gum package and I do not think that anyone would accept one for the other. I have always known myself that the tobacco was a product of the Lorillard Co., and that the gum was put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe that they thought the Beech-Nu Scrap Tobacco or the Beech-Nut Cigarrette to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as in entirely different classes from chewing gum.

Cross Examination.

I have handled tobacco for a good many years and know the different brands, and have been familiar with the Lorillard brands for a long time. The Lorillard salesmen are frequently in my store on their rounds. My drug store is on a corner and I am kept pretty busy waiting on trade. I have not paid much attention to what customers are saying at the tobacco stand.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

2908 *Re-direct Examination:*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. B. TOMLINSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2909 *Direct Examination.*

My name is A. B. TOMLINSON. I am of legal age. My address is 142 S. Liberty Street, Spartanburg, S. C., where I own and manage a grocery store. My store is located about three blocks from the grocery store formerly run by Robt. L. Bowen, with whom I am acquainted.

I handle a number of the products of the Beech-Nut Packing Company, such as Peanut Butter and Beans.

When the Beech-Nut Cigarette was first introduced in this neighborhood about a year and a half ago, two
2910 salesmen called and asked me to put it on sale in my store. They told me that they were Lorillard Salesmen and that the Beech-Nut Cigarette was one of that company's products. They said nothing to me which left me under the impression that the cigarettes were put up by the Beech-Nut Packing Company. I bought some of the cigarettes and allowed the salesmen to sample customers in my store. I continued to sell Beech-Nut Cigarettes for several months.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-

Nut Cigarettes to be a product of the Beech-Nut Packing Company. I stopped handling the cigarette because I had very few calls for it. 2911

Cross Examination.

I cannot give the names of the two salesmen who first introduced the Beech-Nut Cigarettes in my store. I cannot describe any more in detail the circumstances of their visit than I have already done.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 2912

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 2913

It is Stipulated by and between the parties, through their respective counsel, that if J. F. Drake were called as a witness on behalf of P. Lorilard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. F. DRAKE. I am of legal age and am the proprietor of a grocery store located at 148 S. Liberty St., Spartanburg, S. C. My store is three

2914 blocks from the grocery store formerly run by Robt. L. Bowen. I have been in business here only six months but have for a number of years been engaged in the grocery business at different places. Ever since I have been in this store I have handled a number of the food products manufactured by the Beech-Nut Packing Company.

About September, 1922, a man named Doyle called upon me and offered Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes for sale. He told me that he was a Lorillard salesman and made it plain that both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes
2915 were Lorillard's products. He said nothing which in any way indicated to me that there was any connection between the Beech-Nut Packing Company and Beech-Nut Scrap Tobacco and Cigarettes.

I regard tobacco and food products as in entirely separate classes and I have never known of a food concern that manufactured tobacco. I did not buy any Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes and I explained to Mr. Doyle that my tobacco business was practically negligible and I did not care to increase my stock. I know, however, that both the Beech-Nut Tobacco and Beech-Nut Cigarettes are now sold in this
2916 neighborhood.

I have never heard any remarks, inquiries or comments anywhere to the effect, or which led me to believe, that people thought either the Beech-Nut Cigarette or the Beech-Nut Scrap Tobacco to be the products of the Beech-Nut Packing Company.

Cross Examination.

The visit of Mr. Doyle which I have described, when he offered to sell me Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes was not in connection with the introductory campaign on either, but was at a much

later date, but this was the first time these articles had been offered to me for sale. I cannot remember exactly what the salesman said or did at the time and cannot describe the incident any more than I have already done. I do not keep much tobacco and do not pay much attention to it.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel that if J. J. BATES were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. J. BATES. I am of legal age and my occupation is that of grocer. My grocery store is located at 407 South Liberty St., Spartanburg, S. C., and is only one block from the grocery store formerly run by Robt. L. Bowen, with whom I am personally acquainted. I have been in business here for about fifteen years but have handled the grocery line for the past year only.

2920 Up until then I had carried tobacco and confections. I still handle tobacco, but my main business is in the grocery line. I carry a number of the Beech-Nut Packing Company's products, such as peanut butter, spaghetti, and bacon, as well as chewing gum.

The first time I ever saw Beech-Nut Cigarettes was when two missionary men visited me at my store and wanted me to put them on sale here. They introduced themselves to me as Lorillard's men and told me that the cigarette was Lorillard's product. I allowed them to put up a cigarette poster advertising the Beech-Nut Cigarette, in front of my store, and I remember that it
2921 had Lorillard's name on it. Nothing was said which in any way indicated to me any connection with the Beech-Nut Packing Company. I did not buy any Beech-Nut Cigarettes at that time, but told the salesmen that if I had any calls for them in the future I would put them in. This took place when the cigarettes were first introduced into this neighborhood, in the Fall of 1921. Several times after that tobacco salesmen called to sell me the Beech-Nut Cigarettes. On all of these occasions they made it plain to me that they were representing the Lorillard Co. and never left me under the impression that the cigarettes were in any way connected with the
2922 Beech-Nut Packing Company. Having had some calls for Beech-Nut Cigarettes I put them in stock when the salesmen called on me the second time and they sold well for me until such brands as Camels, Peidmonts and Chesterfields dropped in price. That was in the Fall of 1922 and I have not sold many Beech-Nut Cigarettes since.

I have known of the Lorillard Company for many years as one of the oldest and largest of the tobacco concerns and I have always thought of them as as highly reputable concern. I have handled many of their products ever since I have been in business.

I have never seen a package put out by the Beech-Nut Packing Company which looked like a cigarette package, nor have I ever heard any remarks, inquiries or comments among my customers or others, to the effect or which would lead me to believe that they thought the Beech-Nut Cigarette to be a product of the Beech-Nut Packing Company. I regard tobacco and gum or food products as in entirely separate classes.

Cross Examination.

I have handled tobacco for many years and am familiar with the different brands. I do not know who the two salesmen were who first came into my store offering to sell me Beech-Nut Cigarettes. I cannot remember exactly what they said or did at that time and cannot describe their visit any more than I already have done.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2926

IT IS STIPULATED by and between the parties to the above entitled case, through their respective counsel, that if R. L. WALDROP were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is R. L. WALDROP, and I am part owner of and buyer for the firm of Waldrop & Turner, grocers, located on Coffee St., Greenville, S. C. We do quite
2927 a large grocery business, serving 400 or 500 customers a day, and in addition to the usual line of groceries I also buy and sell some confections and tobacco. I carry a number of the products of the Beech-Nut Packing Company, such as the peanut butter, beans, spaghetti, and the like, but do not carry the Beech-Nut Gum. However, I do buy and sell in this store the Beech-Nut Scrap Tobacco, and know that we have had it on sale for a number of years past. I have always known that it is Lorillard's product since I put it in this store, for on the first occasion when I purchased it I gave the order to a tobacco salesman who told me that it was a brand of the Lorillard Co.

2928 However, it did not occur to me that a manufacturer of food products, like the Beech-Nut Packing Company, would put out tobacco products, such as Scrap Tobacco or Cigarettes. I never heard of a food concern putting out tobacco and I regard tobacco as an entirely independent business from the food, confectionery, or gum business. I have never heard any comments, remarks or inquiries which indicated to me that any of my customers connected the tobacco with the Beech-Nut Packing Company, manufacturers of Beech-Nut food products and Beech-Nut Gum, nor have I ever seen a package put out by the Packing Company which looked

like a scrap tobacco package. I know that the name 2929
Lorillard is printed on the front of the Scrap Tobacco package. So far as scrap tobaccos go, this Lorillard Beech-Nut Tobacco is a good seller.

Cross Examination.

My grocery store is one of the larger grocery stores of Greenville. Both my partner, Mr. Turner, and I are in the store a greater part of the time and wait on customers in all parts of the store as needed. I am not necessarily in the store all of the time and my partner, Mr. Turner, is apt to be there when I am not, and vice 2930
versa. We handle various products of the Beech-Nut Packing Company and the Beech-Nut Packing Company salesmen are in our store at frequent intervals. I do not pay a great deal of attention to what the customers are saying in the tobacco section.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not 2931
remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

932 IT IS HEREBY STIPULATED by and between counsel for the parties that if C. W. RIDGWAY were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is C. W. RIDGWAY. I am of legal age, and am buyer for the Rogers Grocery Co. located at 318 N. Main St., Greenville, S. C. In addition to groceries I buy and sell tobacco and confections, and I carry a number of the products of the Beech-Nut Packing Com-
933 pany, such as the Beech-Nut Gum, Peanut Butter, Canned Goods, and the like, and these products of the Beech-Nut Packing Company sell fairly well.

I recollect that the salesman who first offered the cigarette in this store, about the Fall of 1921, introduced himself as a Lorillard man and he said nothing to me which indicated to me that there was any connection between the Beech-Nut Cigarettes and the Beech-Nut Packing Company, manufacturers of food products and gum. I was then handling the various Beech-Nut food products and I was never under the impression, nor did it ever occur to me that the cigarettes might be put out
934 by the same company that made the food products and the Beech-Nut Gum. I know that Lorillard's name is written on the front of the package of Beech-Nut Scrap as well as the Cigarettes. I have never heard any comments, remarks or inquiries on the part of any persons, to the effect, or which would lead me to believe that such persons thought the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were made by the Beech-Nut Packing Company.

I regard tobacco as an entirely different class from food products, gum and candies, and I personally would never connect the Beech-Nut Packing Company with the

Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes. 2935
I would think that a man was crazy who would accept one class of goods when he wanted the other.

Cross Examination.

The Rogers Grocery Co. store where I am employed is a store of some size, although not one of the largest ones. I wait on customers in all parts of the store and do not pay particular attention to what is going on in the tobacco section. I cannot remember exactly what the salesman who first offered Beech-Nut Cigarettes for sales in this store said or did during his visit and cannot describe it any more than I have already done. 2936
I do not know who the salesman was and I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, coments or remarks, I mean that I do not remember any.

Re-direct Examination.

2937

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2938

IT IS STIPULATED by and between counsel for the respective parties, that if P. R. JAMESON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is P. R. JAMESON, of legal age, address 219 N. Main St., Greenville, S. C., and I am by occupation a druggist and a clerk in the drug store located at the above address and known as the Greenville Pharmacy.
2939 We serve about 700 customers a day and employ two other clerks besides myself. In addition to drugs we carry such articles as candy, stationery supplies, tobacco, hair nets, toilet articles, etc. We carry Beech-Nut Gum and Candies of the Beech-Nut Packing Company and also Beech-Nut Cigarettes and Scrap Tobacco of the Lorillard Co. The Beech-Nut Gum is my best selling gum and the Beech-Nut Scrap Tobacco my best selling tobacco. The Beech-Nut Cigarette is a poor seller in this store. I have always known that the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were put out by the Lorillard Co., tobacco manufacturers, having
2940 known of this company and having observed its name on both the cigarette package and scrap tobacco package. I have also always known that the gum and candies were put out by a separate concern, to-wit, The Beech-Nut Packing Company, the same people who make Beech-Nut peanut butter and other food products. I have never heard of a food product company being in the tobacco business and I regard the two lines, that is, tobacco and food products as in separate classes altogether. I have never seen a package put up by the Beech-Nut Packing Company which looks like either a scrap tobacco or a cigarette package. I would think that anyone who accepted a package of Beech-Nut Scrap

Tobacco or Beech-Nut Cigarettes in place of Beech-Nut Gum or candies must be crazy. I have never heard of any remarks, comments or inquiries from customers or others to the effect, or which would lead me to believe, that they thought that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were made by the Beech-Nut Packing Company. As a matter of fact, I never heard any discussion about the matter at all. 2941

Cross Examination.

I wait on customers in all parts of our drug store. We are kept pretty busy. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 2942

Re-direct Examination.

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 2943

2944

IT IS STIPULATED by and between the parties, through their respective counsel, that if JOHN D. ASHMORE were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is JOHN D. ASHMORE, I am of legal age, my occupation is druggist at the Armstrong Pharmacy, 301 N. Main St., Greenville, S. C., and I am the manager of this store, where we serve about 1,000 customers a day, the store being located in the business section of
2945 the city. I carry a varied line of goods, tobacco, confections, toilet articles, stationery supplies and the like. I handle Beech-Nut Gum and Beech-Nut Confections, of the Beech-Nut Packing Company, and also Beech-Nut Cigarettes and Beech-Nut Tobacco of P. Lorillard Co.

I recollect that when the Beech-Nut Cigarettes were first introduced into Greenville, in the Fall of 1921, a heavy set, dark complexioned man, first offered them for sale here and asked us to put them in. He had with him small cartons of the cigarettes, each carton containing a number of individual packages, and he also had with him certain advertising matter, advertising
2946 these Beech-Nut Cigarettes, which he asked permission to put up in the store. He introduced himself as a Lorillard tobacco man and said nothing that left me under the impression that the cigarette was a product of the Beech-Nut Company, but stated that the cigarette was being put out by P. Lorillard Co. I know that both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes are Lorillard's products and have never been under the impression that they were made by the Beech-Nut Packing Company or the manufacturer of the Beech-Nut Gum. I do not think that either the scrap tobacco

package or cigarette package look like the Beech-Nut gum package. I know that Lorillard's name is written on the front of both tobacco packages. 2947

I have never heard any comments, remarks or inquiries made by my customers, or anyone, to the effect, or which would lead me to believe that they were under the impression that the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were manufactured by the Beech-Nut Packing Company. So for as I am concerned, I have always known that the tobacco and cigarettes were a product of the Lorillard people and I have never been under any other impression.

2948

Cross Examination.

We have a busy downtown drug store. I wait on customers in all parts of the store. I have handled tobacco for some years and know the different brands. The Lorillard Company salesmen call on us at frequent intervals to take orders. I do not know who the salesman was who first introduced the Beech-Nut Cigarettes into our store. I cannot remember exactly what this salesman did or said at that time and cannot describe his visit any more than I already have done. I am kept busy in the store and as a rule have not much opportunity to hear what is being said by customers. 2949

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

2950 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between counsel for the respective parties, that if J. O. SLOMAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2951 *Direct Examination.*

My name is J. O. SLOMAN, grocer by occupation, and my store is located at 111 W. Coffee St., Greenville, S. C. I am the buyer in this store, where we do a comparatively large business for a city of this size and employ five clerks.

We carry certain food products of the Beech-Nut Packing Company, for example Peanut Butter, but we do not carry Beech-Nut Gum. While we carry Beech-Nut Scrap Tobacco of Lorillard Co., we do not carry the Beech-Nut Cigarette. When the Scrap Tobacco was
2952 first introduced into this store, several years ago, I bought it from a Lorillard salesman, who stated that he represented the Lorillard Co. and said nothing which led me to believe that the tobacco was a product of the Beech-Nut Packing Company, that is, the food company, and personally I am not sure that I would have believed the salesman had he made any such statement, because as a grocery buyer I have never heard of a food concern making tobacco, and I cannot see what they have to do with one another. I would regard them as entirely separate and distinct classes of goods. I know of the Lorillard Co. and know that it makes well known

brands of tobacco products, for example, Climax Tobacco. I have never heard any comments, remarks, or inquiries made by my customers, or others, to the effect or which would lead me to believe that they thought the Beech-Nut Scrap Tobacco was made by the same concern that makes the Beech-Nut food products, and, in deed, I have never heard any discussion in this respect. As I said before, I could not myself connect up tobacco with the Beech-Nut Packing Company. 2953

Cross Examination.

I have handled tobacco for some years and have bought considerable quantities from the Lorillard Co. and I have from time to time known the Lorillard salesmen who come into our store to take orders. We have one of the larger grocery stores in Greenville. I am kept pretty busy waiting on customers in all parts of the store. I do not wait particularly on customers in the tobacco section and have not a great deal of opportunity to hear what customers are saying. 2954

I have made no special effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any. 2955

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

1956 It is hereby stipulated by and between the parties, through their counsel, that if T. J. Sayle was called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is T. J. SAYLE, and I am a retail merchant, having two stores, one a grocery store on Pendleton St. in West Greenville, and the other a dry goods store. These stores are next door to one another and open into one another and I run them practically as one estab-
1957 lishment. On the grocery side I carry a general line of groceries, canned goods, and the like, as well as confections and tobacco, and I handle products of the Beech-Nut Packing Company, including canned and bottled goods and Beech-Nut Chewing Gum. I also buy and sell the Beech-Nut Cigarettes and the Beech-Nut Scrap Tobacco. I also carry clothes, umbrellas and such articles in the dry goods part of the store. This store is two blocks away from the grocery store run by a man Wm. T. Hill at 10 Mason St., West Greenville, S. C. West Greenville may be called a small town and I may say
1958 that my establishment is the leading one in the town so far as grocery and clothing concerns go. I usually employ about eight clerks and serve several hundred customers a day. I have always known that the Lorillard Co. made the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes and I have never associated or connected such tobacco and cigarettes with the Beech-Nut Packing Company, manufacturers of the gum and food products which I sell, nor have I ever heard any comments, remarks, or inquiries made by my customers or, indeed, anyone to the effect or which would indicate to me that they thought that the Beech-Nut Scrap Tobacco and

Beech-Nut Cigarettes were made by the Beech-Nut Packing Company. As a matter of fact, I regard tobacco and foods as entirely unrelated products of entirely different classes and I have never heard of any food concern that manufactured tobacco. I have never seen a product of the Beech-Nut Packing Company that looked like either the cigarette or scrap tobacco packages. I do the buying for this store and the salesman who introduced the Beech-Nut Cigarettes into my store stated that they were Lorillard Company's product and in no way represented to me or left me under the impression that there was any connection between the tobacco and cigarettes and the Beech-Nut Packing Company. I have never known a Lorillard man to mislead me in any respect. With me the Beech-Nut Packing Company's food products and gum are good sellers. The Beech-Nut Cigarette does not sell well, but the Beech-Nut Scrap Tobacco is a fast seller and is about my best seller in scrap brands. 2959 2960

Cross Examination.

I am the proprietor of the grocery and dry goods stores mentioned. I spend most of my time in them and wait on customers part of the time. I carry many lines of goods and am apt to be in all parts of the store. I have known of the Lorillard Co. for a long time and have handled their products. I have known the Lorillard salesmen from time to time as they come into my store to take orders. I do not remember who the salesman was who first introduced the Beech-Nut Cigarettes into my store. I cannot exactly remember what he did or said at that time and cannot describe his visit any more than I already have. I have not any more opportunity of hearing what customers are saying in the tobacco section than in any other part of my store. I have made 2961

2962 no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

2963 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between counsel for the respective parties that if F. C. CALDER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

2964 My name is F. C. CALDER. I am of legal age, and my occupation is that of Manager of the Bryan-Wood Drug Co. of West Greenville, S. C. I have been in the drug business for the past twenty-five years and in business here at this place of the Bryan-Wood Drug Co. for the past fifteen years. This store is at the central corner of the town, just where the cars from Greenville stop, and one block back of me is the grocery store of Wm. T. Hill, 10 Mason St., West Greenville, S. C. The Bryan-Wood Drug Co. has a very good business for a town of this size, and will serve probably 200 customers a day. We usually have three clerks, including myself. In this store I handle, buy and sell drugs, sodas, tobacco,

stationery supplies, toilet articles, safety pins, hair nets, garters, belts, razors, gasoline and motor oil, and a variety of miscellaneous articles. I handle Beech-Nut Gum, Mints and Chewing Gum candy by the Beech-Nut Packing Company and also the Beech-Nut Cigarettes and Scrap Tobacco of the P. Lorillard Co. The gum is a good seller and both the cigarettes and scrap tobacco are fair sellers. I have always known that the Lorillard Co. made the tobacco and cigarettes and I have never heard any comments, remarks or inquiries made by my customers or others to the effect, or which would lead me to believe, that they thought the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were made by the Beech-Nut Packing Company. I do not think that the gum and other Beech-Nut confections look like a cigarette or scrap tobacco package. I think it would certainly take a crazy man to accept a package of Beech-Nut scrap tobacco or Beech-Nut cigarettes in place of Beech-Nut gum or candies. Tobacco and gum, as I see it, have nothing to do with one another. I have never heard of a food concern making tobacco. The salesman who first introduced the cigarette and tobacco into this store said that they were Lorillard now and said nothing which led me to believe that there was any connection between these tobaccos and the Beech-Nut Packing Company. As I recall it is the usual thing for the Lorillard tobacco man when he comes in to my store to say to me, in substance: "I am Lorillard's man, do you want any tobacco?", and the Beech-Nut Gum man comes in and says to me, in substance: "I am the Beech-Nut Packing man, do you want any gum or mints today?"

I have now on sale in my store Velvet Lotion, Velvet Powder, Velvet Candy and used to sell Velvet Tobacco as well. These are all made by different companies. Also, I have Red Cross Talcum Powder, Red Cross

2968 Cotton and Red Cross Castor Oil made by different companies, respectively. Again, I sell Black and White Cigarettes made by one company and Black and White Ointment, Black and White Soap, and Black and White Dental Cream, all made by another company, and I myself do not take these products to be made by the same concern merely because they have the same name.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same,
2969 on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and know the different brands. I have handled Lorillard brands for a long time and know the Lorillard salesmen who come into my store at frequent intervals to take orders. I do not remember who the salesman was who first introduced the Beech-Nut Scrap Tobacco into my store or who the salesman was who first introduced the Beech-Nut Cigarettes to me. I cannot remember exactly what either one of them said or did at the time and cannot
2970 describe those visits any more than I have already done. I look after all departments of my drug store. I have not given particular attention to the tobacco section any more than the other sections.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 2971

If I had heard any such remarks, inquiires, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

TENNESSEE WITNESSES.

IT IS STIPULATED by and between the parties, through their respective counsel, that if ROY MCDONALD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 2972

Direct Examination.

My name is ROY McDONALD. I am of legal age and am the manager of a chain of grocery stores, all located in Knoxville, Tennessee, and known as the "White" stores. My headquarters is at one of these stores, located at 1007 S. Gay St., Knoxville, Tennessee. My estimate of the average number of customers served at each of my stores is about 250 customers a day. I have held my present position for one year. Prior to that time I was a student. 2973

Ever since I have been managing this chain of stores, all of them have handled Beech-Nut Scrap Tobacco. It is a very good seller. I have always known that Lorillard made the Beech-Nut Scrap Tobacco. I know that Lorillard's name is written on the front of the Beech-Nut Scrap Tobacco package.

My stores also handle Beech-Nut Chewing Gum and Beech-Nut Peanut Butter.

I have never heard any remarks, inquiries, or comments among my customers, or others, to the effect or

2974 which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the same company that manufactures the Beech-Nut Chewing Gum and the Beech-Nut Peanut Butter.

I do not think that the Beech-Nut Gum package looks like a scrap tobacco package and I think that only a crazy man would accept one for the other.

I have never known of a food or gum concern which manufactured any tobacco products and I regard tobacco and cigarettes as in no way related to food products or chewing gum.

2975 *Cross Examination.*

I know the Lorillard brands of tobacco and know the Lorillard salesmen who call in at our stores. I divide my time between the different stores in our chain, but spend more of my time at 1007 S. Gay Street store than in any other. I have not a great deal of opportunity to hear what customers are saying in the tobacco section.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut
2976 Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2977

IT IS STIPULATED by and between the parties, through their respective counsel, that if W. E. DOUGLAS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. E. DOUGLAS. I am of legal age and am the manager of a store known as "Douglas & Cobble," which is located at 31 N. Gay St., Knoxville, Tennessee, where such articles as tobacco, magazines, quick-lunch, pens, candy, key rings, etc., are sold. As a rule, I have one clerk on duty in addition to myself and we serve about 400 customers a day. 2978

I have handled Beech-Nut Cigarettes ever since they first appeared on this market, which was about a year and a half ago. I remember that the salesman who first sold me Beech-Nut Cigarettes told me that they were a product of the P. Lorillard Co. and I also remember that he put up some posters advertising these cigarettes in my store at that time.

I have handled Beech-Nut Chewing Gum for a number of years and have always known that it was made by the Beech-Nut Packing Company. 2979

When the cigarette first appeared I remember that two or three people asked me whether the Beech-Nut Cigarettes and the Beech-Nut Chewing Gum were manufactured by the same company, I cannot remember who these people were. I am sure, however, that there were only two or three of these instances. Since that time I have heard no remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Cigarette and the Beech-Nut Gum to be manufactured by the same concern. I know that Lorillard's name is written on

980 the front of the Beech-Nut Cigarette package. I have never known of a food products, candy, or gum concern that manufactured any tobacco products, nor have I ever seen a package put out by the Beech-Nut Packing Company which looked like a cigarette package. I regard gum and cigarettes as in entirely separate classes.

I sell Velvet Ice Cream and Velvet Tobacco. These articles are not manufactured by the same concerns.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on
981 the ground that the same is irrelevant and immaterial.

Cross Examination.

My store is a long and narrow room and I sell many kinds of articles and have a quick-lunch counter in the rear portion. I wait on customers in all parts of the store myself. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Cigarettes or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had
982 no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or comments in appreciably greater numbers than the two or three instances which I have mentioned, I think that the same would have been impressed upon my memory and that I would now recall them.

2983

IT IS STIPULATED by and between the parties, through their respecitve counsel, that if A. R. SMITH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. R. SMITH. I am of legal age and am the manager of the Rexall Stores in Knoxville, Tennessee. My headquarters are at one of our stores which is located at 301 S. Gay St., Knoxville, Tenn. The Rexall Co. owns four stores in Knoxville, and I am buyer for 2984
all of these stores. My stores average about 1,000 customers each a day. I am constantly in one or the other of these stores and spend some of my time waiting on the trade. I may say that I am in close contact with what goes on in all of them. In addition to drugs we handle toilet articles, perfume, tobacco, candy, hair nets, stationery, pens, pencils, etc.

Our stores have handled Beech-Nut Cigarettes since they appeared on this market about one and a half years ago. I have always known this article to be manufactured by the Lorillard Tobacco Co. I have long known the P. Lorillard Co. to be one of the most prominent of 2985
the tobacco companies and I am familiar with many of their brands, such as Murad Cigarettes, Moguls, Helmars, Egyptian Dieties, etc.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints and have always known that these products were put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments from my clerks, customers, or others to the effect or which led me to believe that they thought the Beech-Nut Cigarette to be a product of the Beech-Nut Packing Company. I know that Lorillard's name is written

2986 on the front of the Beech-Nut Cigarette package. I have never known of a candy or gum concern to put out any tobacco products and I regard confections and tobacco as entirely unrelated classes of products. I have never seen a package put out by the Beech-Nut Packing Company which looked like a cigarette package. I think that anyone who would accept the Beech-Nut Gum package for the Beech-Nut Cigarette package, or vice versa must be crazy.

I remember my first order for Beech-Nut Cigarettes was taken by a tobacco salesman who called upon me in my store and represented himself to be an agent of
2987 the Lorillard Co. I also remember that he had some advertising matter with him when he called and that he asked me to put some posters advertising the Beech-Nut Cigarettes on display in my store.

I handle Blue Ribbon Cigarettes and Blue Ribbon Malt Extract, which articles are made by different companies. I handle Black and White Cigars and Black and White Toilet Preparations, such as cold cream and talcum powder. The cigars are manufactured by one company and the toilet preparations by another. I handle Velvet Pencils and Velvet Tobacco These articles are not manufactured by the same con-
2988 cern. I sell Camel Cigarettes and Camel Cigars, made by different companies; Murad Perfume and Murad Cigarettes, made by different companies; Red Cross Tooth Ache Outfit and Red Cross Bandages, made by different companies; Mavis Candy and Mavis Talcum Powder, made by different companies; Mary Garden Candy and Mary Garden Toilet Preparations, made by different companies; Ever-Ready Flashlights and Ever-Ready Razor Blades, made by different companies; Ideal Ink, Ideal Brushes and Ideal Perfume, all made by different companies.

IT IS STIPULATED that objection is made by plaintiff's 2989
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I run four very busy Rexall drug stores. I travel about from one to the other but spend more time at the 301 S. Gay Street store than at any of the others. When I am waiting on customers I am in all parts of the store. I have not paid particular attention to what 2990
was being said around the tobacco stand and have not much time to listen to what customers are saying unless they come to me with a complaint or something like that.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 2991

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

2992 IT IS STIPULATED by and between the parties, through their respective counsel, that if F. W. GEISS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is F. W. GEISS. I am of legal age and am the manager of and buyer for the Economy Drug Co. of Knoxville, Tennessee. The Economy Drug Co. owns three stores, all located in Knoxville. My headquarters is at one of these stores, which is located at 521 S. Gay
2993 Street. I am continually in one or the other of these stores and may say that I am in close contact with conditions in all of them. In addition to drugs, we handle such articles as tobacco, stationery, toilet articles, kodak supplies and confectioneries. In each store I employ six or seven clerks and each store serves about 4000 customers a day.

I have bought and sold Beech-Nut Scrap Tobacco for about five years and Beech-Nut Cigarettes since their appearance on this market about two years ago. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. I know that
2994 Lorillard's name is written on the front of both packages. The salesmen from whom I bought the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were well known to me as Lorillard salesmen, or introduced themselves as such.

I have bought and sold Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Candy, all of which products I know to be manufactured by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-

Nut Scrap Tobacco or Beech-Nut Cigarettes to be pro- 2995
ducts of the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package. I have never known of a food products, candy or gum concern that manufactured any tobacco products, and I regard gum and cigarettes as entirely separate from food or confections.

I sell Star Tobacco, Star Razor Blades and Star Electrical Apparatus, such as Waffle Irons, Vibrators, etc. None of these articles are manufactured by the same concern. I handle Velvet Tobacco and Velvet Pencils, both of which are made by different companies; 2996
Ever-Ready Razor Blades and Ever-Ready Flashlights, manufactured by different companies.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

It takes all my time running these three very busy stores. I have not a great deal of time to wait on counter 2997
and have not much opportunity to hear what customers are saying in the tobacco sections of our stores. I am too busy to talk much to customers myself unless they have some complaint, or something like that, to make.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

2998 *Re-direct Examination.*

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. BLAUFIELD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

2999 *Direct Examination.*

My name is J. BLAUFIELD. I am of legal age and am the owner and manager of a tobacco store located at 524 Gay St., Knoxville, Tennessee. Besides tobacco I sell periodicals, candy, gum, fountain pens, razor blades, etc. As a rule there is one clerk on duty in my store besides myself and we serve about 800 customers a day.

I have handled Beech-Nut Scrap Tobacco for four or five years. It is my best selling scrap tobacco. I have always known it to be a product of the Lorillard Tobacco Co. I have handled Beech-Nut Cigarettes since they 3000 appeared on this market about two years ago. I have always known that this cigarette was made by the Lorillard Tobacco Co., and I remember that the salesman who first sold them to me represented himself to be an agent of the Lorillard Co., and he put some posters advertising the cigarette in my store at the time. I have long known of the Lorillard Co. as one of the foremost of the tobacco companies. I handle a number of their leading brands such as Climax Tobacco, Beech-Nut Scrap Tobacco, Havana Blossom Chewing Tobacco, Union Leader Smoking Tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Dieties, etc.

I sell Beech-Nut Chewing Gum and Beech-Nut Mints, 3001
which I know to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco package or a cigarette package. I have never known of a food products, candy, or gum concern that manufactured any tobacco products, and I regard tobacco and 3002
cigarettes as an entirely separate line from food products, candy or gum.

Cross Examination.

I have handled tobacco for a long time and know the different brands. I know the Lorillard salesmen who call in at my store at frequent intervals to take orders. I do not know who the salesman was who first sold me Beech-Nut Cigarettes and I cannot remember in more detail the circumstances of his visit. I am kept pretty busy in the store and have not a great deal of time to 3003
talk to customers.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

3004 *Re-direct Examination.*

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

It is stipulated by and between the parties, through their respective counsel, that if C. F. Crawford were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3005 *Direct Examination.*

My name is C. F. CRAWFORD. I am of legal age and am the manager of the Atkins Hotel Cigar Stand, located in the Atkins Hotel Building, on Gay Street, Knoxville, Tennessee. In addition to tobacco I sell soft drinks, chewing gum, candy, postal cards, rings, etc. I am the only clerk on duty here and I serve about 350 customers a day. All told I have been in the tobacco business for twenty-five years, and for the past ten years have retailed tobacco and confections. Prior to that I worked for a tobacco jobbing house.

3006 I have bought and sold Beech-Nut Scrap Tobacco for the past five or six years and it is my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market about two years ago. These cigarettes are a poor seller with me. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. I have known of the Lorillard Co. ever since I have been in the tobacco business as one of the largest of the tobacco concerns and I am thoroughly familiar with their brands, having handled many of their chewing tobaccos, smoking tobacco and cigarettes.

I sell Booth-Nut Chewing Gum and Booth-Nut Mints, both of which products I know to be put out by the Booth-Nut Packing Company. 6867

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Booth-Nut Scrap Tobacco or the Booth-Nut Cigarettes to be the products of the Booth-Nut Packing Company. I have never seen a package put up by the Booth-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package. I know that Lorillard's name is written on the front of both the scrap tobacco package and the cigarette package. I have never known of a food concern, or a candy or gum company, that manufactured any tobacco products, and I regard tobacco and cigarettes as an entirely distinct line from food products or confections. 6868

Cross Examination.

I am the only clerk in this store and am kept pretty busy waiting on customers. I have not paid particular attention to what they are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Booth-Nut Scrap Tobacco or the Booth-Nut Cigarettes, or as to whether they are made by the same company that makes the Booth-Nut Gum or other Booth-Nut Packing Company products, and I had not reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 6869

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

1879

3010 It is Stipulated by and between the parties, through their respective counsel, that if Geo. H. Bell were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is GEO. H. BELL. I am of legal age and am the owner and manager of a small grocery store located in the residential section of Knoxville, Tennessee, at 2000 Forest Avenue. Besides food products I carry such articles as tobacco, talcum powder, handkerchiefs, 3011 suspenders, collar buttons, darning thread, brooms, etc. As a rule I am the only clerk on duty in my store and I serve about 150 customers a day.

I have handled Beech-Nut Scrap Tobacco for about five years and it is my best selling scrap tobacco. I have always known that this Scrap Tobacco was made by the P. Lorillard Co. I know that Lorillard's name is written on the front of the Beech-Nut Scrap Tobacco package.

I sell Beech-Nut Chewing Gum and it is a very good seller with me. I do not know the name of the company that manufactures this gum.

3012 I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be manufactured by the same concern that produces the Beech-Nut Chewing Gum.

I do not think that the gum package looks like a scrap tobacco package and I think that anyone who would accept one for the other must be crazy. I have never known of a gum concern that manufactured any tobacco products, and I regard gum and tobacco as entirely separate classes.

Cross Examination. 3013

I have handled tobacco for some years and am familiar with the brands. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 3014

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

KENTUCKY WITNESSES

It is Stipulated by and between the parties, through their respective counsel, that if the parties whose names are appended hereto were called to testify in behalf of P. Lorillard Co., defendant, they would each testify as 3015 follows:

Direct Examination.

I am of legal age and am a retail merchant doing business at the address given in the appended list. In addition to tobacco and cigarettes I handle other sorts of goods.

I have handled Beech-Nut Scrap Tobacco for several years. It is a fair but not a large seller with me. Hopkinsville is a large dark, loose-leaf tobacco market and

most people in this neighborhood use dark tobacco. I have known that Beech-Nut Scrap Tobacco was made by the Lorillard Tobacco Co. since I have been handling it. I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago. These Cigarettes are not a good seller with me. I have always known that the Beech-Nut Cigarettes were also a product of the Lorillard Tobacco Co.

I sell Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company. I have never heard any remarks, inquiries or comments among my customers to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the Beech-Nut Packing Company.

I do not think that the Beech-Nut Chewing Gum package looks like a scrap tobacco package or a cigarette package. I know that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette Package. I have never heard of a candy or gum concern that manufactured any tobacco products and I regard tobacco and cigarettes as an entirely separate class of products from gum or candy. I would think that any one who would accept a package of Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes in place of a package of Beech-Nut Gum must be crazy.

Cross Examination.

I have handled tobacco for some years and am familiar with the different brands. I am kept pretty busy in my store and have not had a great deal of opportunity to hear what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that

makes the Beech-Nut Gum or other Beech-Nut Packing 3019
Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

M. O. Willis, Druggist, 9th & Main Sts. 3020
Hopkinsville, Ky.
E. H. Higgins, Druggist, Hopkinsville, Ky.
W. H. Martin, Druggist, Lathan Hotel
Hopkinsville, Ky.
F. Rogers, Grocer, 6th & Virginia Sts.
Hopkinsville, Ky.
Byrl Bullard Tobacco, Candy & Fruit, 9th
Street, Hopkinsville, Ky.

It is Stipulated that W. H. Martin, whose name appears in the above list of witnesses, would testify on direct examination that he handles Velvet Pencils and Velvet Tobacco, made by different companies; Ever- 3021
Ready Flashlights and Ever-Ready Razor Blades, made by different companies; and that E. H. Higgins, whose name appears in the above list of witnesses would testify on direct examination that he sells Favorite Cigarettes and Favorite Medicines, made by different companies, Ever-Ready Flashlights and Ever-Ready Razor Blades, made by different companies; Black and White Cigars and Black and White Toilet Preparations, made by different companies; Velvet Tobacco and Velvet Pencils, made by different companies.

3022 IT IS FURTHER STIPULATED that counsel for Beech-Nut Packing Company objects to above testimony by witnesses W. H. MARTIN and E. H. HIGGINS concerning the different articles sold under similar names and who makes the same, as being irrelevant and immaterial.

IT IS STIPULATED by and between parties, through their respective counsel, that if L. M. LAVIN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3023 *Direct Examination.*

My name is L. M. LAVIN. I am of legal age and am part owner and manager of a general store known as Lavin & Conwell, located at 8th and Main Sts., Paris, Kentucky. My store measures about 70 x 40'. I employ one clerk in addition to myself and we handle about 400 customers a day. I sell such articles as tobacco, locks, candy, groceries, flashlights, brooms, buckets, kettles, soap, chinaware, knives, baskets, horse-whips, axles, tricycles, stove plates, fishing tackle, rugs, mops, toys, roller skates, etc. My store is located directly across the
3024 street from the grocery store run by Chas. P. Cook, at 716 Main St., Paris, Ky. I know Mr. Cook personally. I have handled Beech-Nut Scrap Tobacco for four or five years and it is my best selling scrap. I have handled Beech-Nut Cigarettes since they appeared on this market. They are not a fast seller with me. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manufactured by the P. Lorillard Co. and I know that company to be one of the most prominent of the tobacco companies. I know that Lorillard's name is written on the front of both the scrap tobacco package and the cigarette package.

I handle Beech-Nut Chewing Gum and Beech-Nut 3025
Mints. I know both these products to be manufactured by the Beech-Nut Packing Company and have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the Beech-Nut Packing Company. I have never known of a food products, or candy, or gum concern that manufactured any tobacco products, and I regard tobacco or cigarettes as in an entirely separate class from gum or confections. I have never seen a package put out by the Beech-Nut Packing Company that looked like either a scrap tobac- 3026
co package or a cigarette package.

I sell Velvet Tobacco and Velvet Pencils, manufactured by different companies, Yale Locks and Yale Extracts, manufactured by different companies; Royal Baking Powder and Royal Shoe Polish, manufactured by different companies; Magic Yeast and Magic Cleanser, manufactured by different companies; Sunshine Cigarettes and Sunshine Biscuits, manufactured by different companies; Blue Ribbon Figs, Blue Ribbon Stove Polish, Blue Ribbon Tobacco, Blue Ribbon Oil Cans, all manufactured by different companies; Argo Starch, Ar- 3027
go Salmon and Argo Peaches, all manufactured by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for a good many years and am familiar with most of the brands sold in this part of the

3028 country. I wait on customers in all parts of my grocery store and have not paid particular attention to what customers at the tobacco stand are saying.

I have made no attempt to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

3029

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if EMMET HOWARD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3030 *Direct Examination.*

My name is EMMET HOWARD. I am of legal age and am the manager of a restaurant, located at 722 Main St., Paris, Kentucky. In my restaurant there is a tobacco and confection counter, which is located just at the right of the entrance. I wait on this counter myself. My restaurant is located next door to the grocery store run by Chas. P. Cook, and I am personally acquainted with Mr. Cook. I have been handling tobacco as a retailer for the past 18 years, before prohibition

in connection with my business as a barkeeper, and since 3031
then in connection with my restaurant business.

I have handled Beech-Nut Scrap Tobacco for the past four or five years and Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. I have always known that the Lorillard Tobacco Co. manufactured both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints. I do not know the name of the company that manufactures these products.

I have never heard any remarks, inquiries, or com- 3032
ments among any customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the same company that manufactures the Beech-Nut Gum and the Beech-Nut Mints. I have never heard of a candy or gum concern that put out any tobacco products and I regard tobacco and cigarettes as an entirely separate class of products from chewing gum or candy. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look like a chewing gum package. I serve about 200 customers a day and have a good deal of conversation with my customers as my trade does not occupy all my 3033
time.

Cross Examination.

I wait on customers both in my restaurant and at the tobacco and candy counter, which are in the same room. I work back and forth between the two portions of the room. I have been in the retail tobacco trade for many years and have known of the Lorillard Co. and various of its brands for a long time. A customer hardly ever asks who makes the tobacco or cigarette which he is buying.

3034 I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

3035 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. E. CRAVEN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

3036 My name is J. E. CRAVEN. I am of legal age and am the owner and manager of a general store located at 708 Main St., Paris, Kentucky. I handle such articles as groceries, tobacco, quick-lunch, buggy-whips, baskets, etc. My store is located less than one block from the grocery store run by Chas. P. Cook, and I am personally acquainted with Mr. Cook. I employ one clerk besides myself.

I have handled Beech-Nut Scrap Tobacco for about two years. I remember the first salesman who sold me this Scrap Tobacco, though I do not know his name. I do remember that he told me that he represented the Lorillard Tobacco Co. and that the Beech-Nut Scrap

Tobacco was made by that company. Beech-Nut Scrap 303
Tobacco is my best selling Scrap.

I handle Beech-Nut Chewing Gum and it is a very good seller. I know it to be a product of the Beech-Nut Packing Company and I know that the Beech-Nut Packing Company puts out a line of food products, although I do not handle any of them.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company. I have never heard of a food or gum concern that put out any tobacco products and I 303
regard the two lines as entirely unrelated. I know that Lorillard's name is written across the front of the Beech-Nut Scrap Tobacco package.

I think that anyone who would accept the Beech-Nut Scrap Tobacco package for the Beech-Nut Gum package must be crazy.

Cross Examination.

I have handled tobacco for some years and know the different brands that come into this part of the country. I have handled a number of the Lorillard tobacco prod- 303
ucts and have know from time to time the Lorillord salesmen who come into my store at frequent intervals to take orders. I do not remember the name of the salesman who first sold me the Beech-Nut Scrap Tobacco, and cannot remember the details of his visit any more than I have already described. I wait on counter in all parts of my general store and have not paid particular attention to what was being said by customers in the tobacco section. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or as to whether it is made by the same company that makes the Beech-Nut

3040 Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3041 It is Stipulated by and between the parties, through their respective counsel, that if L. R. Bramblett were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is L. R. BRAMBLETT. I am of legal age and am the owner and manager of a grocery store located at 215 Main St., Paris, Kentucky. I employ one clerk besides myself. I have handled Beech-Nut Scrap Tobacco for the past five or six years. I have always
3042 known it to be a product of the P. Lorillard Co. At the time when Beech-Nut Scrap Tobacco was first introduced into my store I was handling some of the food products put up by the Beech-Nut Packing Company, such as Beech-Nut Bacon and Beech-Nut Peanut Butter. It did not occur to me that the tobacco might be put out by the Beech-Nut Packing Company.

I have never heard of a food products company that manufactured any tobacco and I regard the two lines as entirely distinct from one another. I know that Lorillard's name is written on the front of the Scrap Tobacco package. I have always known the Lorillard To-

bacco Co. as one of the largest of the tobacco companies. 3043
I have always had a good opinion of it. Beech-Nut Scrap Tobacco is by far my best selling scrap.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company. I have never seen a package put up by the Beech-Nut Packing Company which looked like a scrap tobacco package.

For my own part I would prefer tobacco made by a straight tobacco company to tobacco put up by a company in the food products business as well as the tobacco 3044
business.

Cross Examination.

I have handled tobacco for a good many years, including many of the Lorillard tobacco products. I have known from time to time the Lorillard salesmen who come into my store at frequent intervals to take orders. I wait on customers in all parts of my grocery store. I have not paid much attention to what customers were saying at the tobacco counter and have made no effort to remember any inquiries, comments or remarks as to who 3045
makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that manufactures the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3046 IT IS STIPULATED by and between the parties, through their respective counsel, that if LOUIS EVERS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is LOUIS EVERS. I am of legal age and am a grocer, doing business as Evers Bros., 601 W. Chestnut St., Louisville, Kentucky. As a rule I have one clerk assisting me in my store, and we serve about 300 customers a day.

3047 I have handled Beech-Nut Scrap Tobacco for the past three or four years. It is by far my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market, somewhere around two years ago. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. The cigarette is not a good seller with me.

I now handle Beech-Nut Chewing Gum and it is a fairly good seller. I formerly handled some of the Beech-Nut Food Products, such as Beech-Nut Peanut Butter and Beech-Nut Pork & Beans, but I no longer carry any

3048 of these products. I have always known that the Beech-Nut Gum was manufactured by the Beech-Nut Packing Company, the same company that makes the Peanut Butter and Pork & Beans.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same concern that produces the Beech-Nut Chewing Gum. I do not think that the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a gum package. I have never heard of a

food products or gum concern that manufactured any to- 3049
bacco products and I regard tobacco and cigarettes as an entirely separate line of merchandise from food products or gum.

I sell Rosebud Matches and Rosebud Cherries, made by different companies; Magic Soap and Magic Yeast, made by different companies; Home Run Sardines, Home Run Cigarettes and Home Run Cigars, all manufactured by different companies; Argo Salmon and Argo Starch, made by different companies; Star Soap and Star Tobacco, made by different companies; Picnic Twist Tobacco and Picnic Mustard, made by different companies; Blue Ribbon Tobacco, Blue Ribbon Cheese 3050
and Blue Ribbon Figs, all made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for some years and know the different brands. I wait on customers in all parts of 3051
my grocery store. I have not paid much attention to what people are saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties through their respective counsel, that if F. ODELL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is F. ODELL. I am of legal age and am the manager of thirteen tobacco and candy stores, all located in Louisville, Ky., and owned by the J. B. Moose Co. My headquarters are at 518 W. Main Street, Louisville, Ky. The J. B. Moose Co. are wholesalers and retailers of tobaccos and confections. I have been manager of their retail department for the past fifteen years. I am constantly at one or the other of my retail stores or stands, and am in close touch with what goes on in all of them.

We have handled Beech-Nut Scrap Tobacco for about seven years. I have always known it to be a product of the Lorillard Co. We have handled Beech-Nut Cigarettes since they appeared on this market. I remember that the salesman who first sold me the Beech-Nut Cigarettes told me that it was a new product of the Lorillard Co. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package.

We have handled Beech-Nut Gum for several years at all of our stands and Beech-Nut Mints at some of them.

We handled Beech-Nut Scrap Tobacco several years before we first put in Beech-Nut Chewing Gum or Beech-Nut Mints. I know the gum to be a product of the Beech-Nut Packing Company and never heard any remarks, inquiries, or comments among my customers, clerks or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the Beech-Nut Packing Company. 3055

I have never seen a package put out by the Beech-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package, and I think it would take a crazy man to accept either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package for the Beech-Nut Chewing Gum. 3056

I have never heard of a food products, candy, or gum concern that manufactured any tobacco products.

I have known of the Lorillard Tobacco Co. ever since I have been in business and know it to be one of the most prominent of the tobacco companies. I have handled a great many of their brands, notably Beech-Nut Scrap Tobacco, Climax Plug, Union Leader Smoking Tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Deities, etc.

3057

Cross Examination.

We do a big business at our thirteen retail tobacco stores and I divide my time between the different stores. I wait on customers myself only occasionally at one or other of the stores. I have so much else to do that I have not a great deal of opportunity to hear what people are saying in the stores. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap,

3058 Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same or such would have been impressed on my memory.

3059

IT IS STIPULATED by and between the parties, through their respective counsel, that if H. A. TAYLOR were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is H. A. TAYLOR. I am of legal age and am a member of the firm of T. P. Taylor & Co. This firm owns and operates four drug stores, all located in

3060 Louisville, Ky. I am the active manager of these stores and my headquarters is at one of them, which is situated at 458 Fourth Ave., Louisville, Ky. In addition to drugs all of our stores carry such articles as perfumes, toilet articles, stationery, candy, tobacco, razor blades, kodaks, etc. I very seldon wait on customers in these stores myself, but I may say that I am in close contact with what goes on in all of them.

We have handled Beech-Nut Scrap Tobacco for the past five or six years and it is a good seller. Beech-Nut Cigarettes we have handled for about two years. The Cigarette is a slow seller with us. I have always known

that both of these products were manufactured by the Lorillard Co. 3061

We handle Beech-Nut Chewing Gum and Beech-Nut Mints, both of which I know to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my clerks, customers, or others to the effect, or which led me to believe that they thought the Beech-Nut Cigarettes or Beech-Nut Scrap Tobacco to be manufactured by the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company that looks like either a scrap tobacco package or a cigarette package. I think that anyone who 3062 would accept either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package for the Beech-Nut Gum package must be crazy. I have never heard of a candy or gum concern that made any tobacco products and I regard tobacco and cigarettes as a distinct line of merchandise from candy or gum.

Cross Examination.

I divide my time between the four drug stores of the T P. Taylor Co. I have too much else to do to have much opportunity to listen to what people in my stores 3063 or elsewhere are saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

3064 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks, in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if CHARLIE BRADSHAW were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3065 *Direct Examination.*

My name is CHARLIE BRADSHAW. I am of legal age and am a clerk at the tobacco and candy counters in the T. P. Taylor store at 458 Fourth Avenue, Louisville, Kentucky. I serve about 300 or 400 customers a day.

I have been selling Beech-Nut Scrap Tobacco for the past four or five years and Beech-Nut Cigarettes since they appeared on this market about two years ago. The Beech-Nut Scrap Tobacco is a good seller, but the Beech-Nut Cigarette does not sell well with me. I have always known that both the Scrap Tobacco and the Cigarettes
3066 were products of the Lorillard Co. I handle many other Lorillard brands, such as Climax Plug, Murad Cigarettes, Moguls, Helmars, Egyptian Dieties, etc.

I sell Beech-Nut Chewing Gum, and Beech-Nut Mints, which I know to be products of the Beech-Nut Packing Company.

I have never heard any remarks, comments or inquiries among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as entirely separate lines from chewing

gum or candy, and I have never heard of a candy or 3067
gum concern that manufactured any tobacco products.

I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package and I would think that anyone who would accept the Beech-Nut Gum package for either the Scrap Tobacco package or the Cigarette package must be crazy.

Cross Examination.

I have handled tobacco for many years and know the different brands. I am kept pretty busy waiting on 3068
customers. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

3069

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressd on my memory.

3070 IT IS STIPULATED by and between the parties, through their respective counsel, that if E. R. TURNER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is E. R. TURNER. I am of legal age and am part owner and manager of a corner drug store, located at 2000 Cherokee Parkway, Louisville, Kentucky. My store is located in the residential section of Louis-
3071 ville. There are two clerks on duty here besides myself, and we serve about 500 customers a day. I have charge of the Candy and Tobacco Departments of this store and spend most of my time waiting on customers in these departments.

I have handled Beech-Nut Scrap Tobacco for several years and the Beech-Nut Cigarette since it appeared on this market about one and a half years ago. Beech-Nut Scrap Tobacco is my best selling Scrap, but Beech-Nut Cigarettes do not sell well with me. I have always known that both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were products of the Lorillard Tobacco
3072 Co., and I have long known of that company as one of the oldest and largest of the tobacco companies. In addition to Beech-Nut Tobacco and Beech-Nut Cigarettes, I handle many of Lorillard's brands, such as Murad Cigarettes, Helmars, Moguls, Egyptian Deities, etc., also Union Leader Smoking Tobacco and Climax Plug Tobacco. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints. They are good sellers with me. When the Cigarettes first appeared I heard perhaps four customers

ask whether the Beech-Nut Cigarettes and Beech-Nut Gum were made by the same company. I told them who made each article. Aside from these incidents I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same concern that puts out the Beech-Nut Chewing Gum. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package, and I think that anyone who would mistake either the tobacco or cigarette package for the gum package must be crazy. I have never heard of a candy or gum concern that manufactured any tobacco products and I regard tobacco and cigarettes as an entirely separate line from chewing gum or mints. 3073 3074

I sell Star Tobacco and Star Razor Blades, made by different companies.

It is stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3075

Cross Examination.

I have handled tobacco for some years. I am kept pretty busy waiting on customers. I do not remember any more than the four incidents already mentioned of people who asked whether the Beech-Nut Cigarettes and Beech-Nut Gum were made by the same company. I cannot describe these incidents any more in detail. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap

076 Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company *products*, and I had no *reason to do so. When I say* that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard such remarks, inquiries, or comments in appreciably greater numbers than the four I have mentioned, I think that the fact would have been im-
077 pressed on my mind, and that I would have remembered it.

IT IS STIPULATED by and between the parties, through their respective counsel, that if WM. H. J. MEYER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as folows:

Direct Examination.

My name is WM. H. J. MEYER. I am of legal age and am the owner and manager of a small retail store lo-
078 cated at 1,605 Bardstown Ave., Louisville, Kentucky. I handle canned vegetables, confections, sodas and tobacco. My store is located in the residential section of Louisville. As a rule I am the only clerk on duty here and I serve about 200 customers a day.

I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago. I remember that the salesman who first sold me these cigarettes told me that he was a representative of the Lorillard Co. and that he had advertising matter with him at the time, and put up some posters advertising Beech-Nut Cigarettes in my store.

I sell Beech-Nut Chewing Gum, Beech-Nut Beanut But- 3079
ter, Beech-Nut Pork & Beans and Beech-Nut Ginger Ale. All of these products I know to be made by the *Beech-Nut Packing Company.*

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company that looked like either a cigarette package or a scrap tobacco package. I have never heard of a food products or gum company that manufactured any to- 3080
bacco products and I regard the tobacco industry as an entirely separate business from food products or gum.

During the war I worked in an ammunition factory in Dayton, Ohio. While I was thus occupied, I was a chewer of Beech-Nut Scrap Tobacco. It was very popular among the workers there. I knew then that the Lorillard Co. was the maker of the Beech-Nut Scrap Tobacco.

I sell Chesterfield Cigarettes and Chesterfield Cigars made by different companies.

It is Stipulated that objection is made by plaintiff's 3081
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I do not remember the name of the salesman who first introduced Beech-Nut Cigarettes to my store. I cannot remember exactly the circumstances of his first visit and cannot describe them any more than I have already done. I have not paid particular attention to what people are saying about tobacco or cigarettes.

3082 I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such remarks, inquiries, or com-
3083 ments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if W. P. SCHAEFER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. P. SCHAEFER. I am of legal age
3084 and am the owner and manager of a retail tobacco store located at 518 W. Warren St., Louisville, Kentucky. As a rule I have one clerk on duty in my store besides myself. In addition to tobacco I handle periodicals, razor blades, candy and gum. We serve about 400 customers a day.

I have handled Beech-Nut Scrap Tobacco for the past five or six years. It is by far my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were

manufactured by the Lorillard Co. I know that Lorillard's name is written on the front of both packages. 3085

I sell Beech-Nut Chewing Gum and it is a good seller with me. I know it to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be products of the same concern that manufactures the Beech-Nut Chewing Gum. I have never heard of a gum concern that made any tobacco products and I do not think that chewing gum has anything whatever to do 3086
with either tobacco or cigarettes. I do not think that the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package and I think that only a crazy person would accept either the Scrap Tobacco package or the Cigarette package for the Beech-Nut Chewing Gum package.

I sell Chesterfield Cigarettes and Chesterfield Cigars, manufactured by different companies.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different 3087
goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for a good many years and know the different brands. I know the Lorillard salesmen who come into my store at frequent intervals to take orders. A customer hardly ever asks who makes the tobacco or cigarette he is buying. I am kept busy waiting on customers.

088 I have made no effort to remember any inquiries, comments or remarks, as to who makes the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

089 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. G. BLOCK were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

090 My name is J. G. BLOCK. I am the owner and manager of a small grocery store located at First and Walnut Sts., Louisville, Kentucky. I serve about 200 customers a day.

I have handled Beech-Nut Scrap Tobacco for five or six years and Beech-Nut Cigarettes since they appeared on this market about two years ago. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package.

I handle Beech-Nut Chewing Gum and Beech-Nut 3091
Spaghetti, both of which I know to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never seen a package put out by the Beech-Nut Packing Company that loked like either a scrap tobacco package or a cigarette package.

I have never heard of a food products concern that made any tobacco products and I regard tobacco and 3092
cigarettes as entirely separate classes of merchandise from food products or chewing gum.

Cross Examination.

I have not paid much attention to what people were saying about tobacco or cigarettes. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I 3093
had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

094 IT IS STIPULATED by and between the parties, through their respective counsel, that if H. G. SAAM were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is H. G. SAAM. I am of legal age and am the owner and manager of a store located at 800 E. Broadway, Louisville, Kentucky. I sell tobacco, candy, toilet articles, drugs, magazines, razors, flashlights, etc. As a rule I have one clerk on duty in my store besides 095 myself and we serve about 400 customers a day.

I have sold Beech-Nut Scrap Tobacco for two years and Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. I do not remember the name of the salesman who sold me either of these products, but I do remember that when I bought the Beech-Nut Scrap Tobacco and also when I bought the Beech-Nut Cigarettes the salesman who sold them to me told me that he represented the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette packages. I have long known of the Lorillard 096 Tobacco Co. as one of the oldest and largest of the tobacco companies.

I handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as an entirely separate class of merchandise from chewing gum and I have never

known of a gum concern that made any tobacco products. 3097

I handle Chesterfield Cigars and Chesterfield Cigarettes, made by different companies; Star Tobacco, Star Razor Blades and Star Mints, all made by different companies Ever-Ready Razors and Ever-Ready Flashlight, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

3098

Cross Examination.

I have handled tobacco for some years and know the different brands, including the Lorillard products. The Lorillard Co. salesmen come into my store from time to time to take orders. I do not remember exactly what the salesman said or did who first brought in for sale the Beech-Nut Scrap Tobacco, or the salesman who first brought in for sale the Beech-Nut Cigarettes, and I cannot describe their visits any more in detail than I already have done. I wait on customers in all parts of my store, selling them my various lines of articles. I have not 3099
paid much attention to what they have said about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

100 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. E. COBB were called as a witness on behalf of the P. Lorillard Co., defendant, he would testify as follows:

101 *Direct Examination.*

My name is J. E. COBB. I am of legal age and am the owner and manager of a store located at 341 E. Broadway, Louisville, Kentucky, where I handle such articles as tobacco, confections, sodas, magazines, quick-lunch, dolls, etc. I have two clerks besides myself and we serve on an average of about 1,000 customers a day.

I have sold Beech-Nut Scrap Tobacco for the past seven years. It is by far my best selling scrap tobacco. I have always known it to be a product of the Lorillard Tobacco Co. and I have long known of that company as
102 an important tobacco company. I handle many Lorillard brands, including Climax Plug Tobacco, Havanna Blossom Chewing Tobacco, Union Leader Smoking Tobacco, and such Turkish Cigarettes as Murads, Moguls, Helmars, Egyptian Dieties, etc. I have handled Beech-Nut Cigarettes for about two years. I remember that the salesman who first sold them to me told me that he was a Lorillard salesman and that he put up posters in my store at that time advertising the Beech-Nut Cigarette.

I sell Beech-Nut Chewing Gum and it is a good seller. I also sell Beech-Nut Candies, Beech-Nut Caramels,

Beech-Nut Peanut-Butter and Beech-Nut Ginger Ale. I know that these products are made by the Beech-Nut Packing Company. 3103

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as an entirely separate line of merchandise from chewing gum or candy or food and I have never heard of a food products, candy or gum concern that manufactured any tobacco products. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package. I think it would take a crazy man to accept either of them in place of the Beech-Nut gum package. 3104

I sell Star Tobacco, Star Mints and Star Lobster, all made by different companies; Chesterfield Cigarettes and Chesterfield Cigars, made by different companies; Babe Ruth Ice Cream and Babe Ruth Candy, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3105

Cross Examination.

I have handled tobacco for many years and know the different brands. I have handled a good many of the brands put out by the Lorillard Co. and have known from time to time the Lorillard salesmen who have come into my store frequently to take orders. I do not remember who the salesman was who first sold me Beech-Nut

3106 Cigarettes and cannot remember exactly what he did or said at the time and cannot describe in detail the circumstances of his visit any more than I have already done. I have a pretty busy store. I wait on customers in all parts of it. I have not much opportunity to hear what people are saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I
3107 say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if H. R. PETTY were called
3108 as a witness in behalf of the P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is H. R. PETTY. I am of legal age and am the manager of a retail tobacco store located at 610 Fourth St., Louisville, Kentucky. There is one clerk on duty in this store besides myself and we serve between 800 and 1,000 customers a day. In addition to tobacco we handle periodicals, candy and toys.

I have handled Beech-Nut Scrap Tobacco for the past

six or seven years. It is a big seller. I sell twice as 3109
much Beech-Nut Scrap as any other scrap tobacco. I have sold Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. Beech-Nut Cigarettes are not a very good seller with me. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manufactured by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette packages. I have long known of the Lorillard Tobacco Co. as one of the oldest and largest of the tobacco companies. I handle a great many of their brands, such as Havanna Blossom tobacco, Union Leader 3110
tobacco, Yacht Club tobacco, Murad Cigarettes, Moguls, Helmars, Egyptian Dieties, etc.

I sell Beech-Nut Chewing Gum and Beech-Nut Candies. The Beech-Nut Gum is a good seller. I have always known that these products were made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I do not think that either the Beech-Nut Scrap Tobacco package 3111
or the Beech-Nut Cigarette package look like a chewing gum package, and I think that any one who would accept either the Scrap Tobacco package or the Cigarette package for the Beech-Nut Chewing Gum package must be crazy. I have never heard of a candy or gum concern that made any tobacco products, and I regard tobacco and cigarettes as an entirely separate line of merchandise from candy or chewing gum.

I sell Chesterfield Cigarettes, Chesterfield Cigars and Chesterfield Pipes; none of these articles are made by the same concern.

3112 IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under siamilr names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for a good many years and know the different brands. The Lorillard salesmen call at my store frequently to take orders. I wait on the different parts of my store myself and am kept pretty busy. I have not paid much attention to what was being
3113 said about tobacco and cigarettes.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

3114 If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3115

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. DEKING were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. DeKING. I am of legal age and am the manager of the Paulsen Cigar Store at 134th St., Louisville, Kentucky. As a rule there is one clerk on duty in this store besides myself, and we serve about 500 customers a day.

3116

I have handled Beech-Nut Scrap Tobacco for the past six or seven years. It is a very good seller and is the only scrap tobacco that I carry. I have handled Beech-Nut Cigarettes since they appeared on this market about two years ago. I have always known that both of these articles were manufactured by the Lorillard Tobacco Co. I remember that the salesman who first sold me Beech-Nut Cigarettes told me that he was a representative of the Lorillard Tobacco Co., and that at that time he put up some posters in my store advertising the Beech-Nut Cigarettes. I know that Lorillard's name is written on both the Scrap Tobacco package and the Cigarette package. I handle many Lorillard brands, such as Climax Plug Tobacco, Union Leader Smoking Tobacco, Murad Cigarettes, Helmars, Moguls, Egyptian Dieties, etc. I have long known of the Lorillard Co. as one of the largest and most important of the tobacco companies.

3117

I sell Beech-Nut Cigars, but I do not know the name of the company that manufactures these cigars. I think that it is made somewhere near Pittsburg, Pa.

I sell Beech-Nut Chewing Gum and Beech-Nut Mints. I know both of these products to be made by the Beech-Nut Packing Company.

3118 I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never heard of a candy or gum concern that manufactured any tobacco products. I regard tobacco and cigarettes as an entirely separate class of merchandise from gum or mints, and I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package.

3119 I would think that anyone who would accept either the Beech-Nut Scrap Tobacco or the the Beech-Nut Cigarettes in place of Beech-Nut Chewing Gum must be crazy.

I sell Chesterfield Cigars and Chesterfield Cigarettes. These articles are made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

3120 I have handled tobacco for many years and know the different brands. I am kept pretty busy in my store and have not much opportunity to listen to what customers are saying. I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

I have known from time to time the Lorillard salesmen who call in at my store. I do not remember who the salesman was who first sold me Beech-Nut Cigarettes. I cannot remember exactly what he did or said, and cannot describe in detail the circumstances of his visit any more than I have already done. 3121

Re-direct Examination.

If I had heard any remarks, inquiries, or comments among my customers or others which indicated to me that they thought the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes to be the product of the Beech-Nut Packing Company, I think that they would have been impressed on my memory, and that I would now remember the same. 3122

IT IS STIPULATED by and between the parties, through their respective counsel, that if W. B. ZULWOOD were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. B. ZULWOOD. I am of legal age and am part owner and manager of a drug store, known as Geo. Zulwood & Co., located at 311 W. Market St., Louisville, Kentucky. In addition to drugs we handle such lines as toilet articles, stationery, candy, tobacco, etc. There are two clerks besides myself on duty in this store and we serve about 600 customers a day. 3123

We have sold Beech-Nut Scrap Tobacco for the past five years and the Beech-Nut Cigarettes since they appeared on this market. The Scrap Tobacco is a very good seller, but the Cigarette does not sell well with us.

3124 I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were products of the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package. I have long known of Lorillard as one of the oldest and largest tobacco companies.

I sell Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Ginger Ale. I know that all of these products are manufactured by the Beech-Nut Packing Company. I remember that in all my experience I have heard about six people ask whether either the Beech-
3125 Nut Scrap Tobacco or the Beech-Nut Cigarettes were made by the same company that manufactures the Beech-Nut Gum and Beech-Nut Mints. I think that this occurred soon after the cigarettes appeared on the market. I cannot say positively whether or not all of these inquiries were made after the cigarette appeared on the market or not. I know that I have heard no such inquiries since shortly after the appearance of the cigarette. Of course I told the people that asked me this question that the Beech-Nut Tobacco and the Beech-Nut Cigarettes were the product of the Lorillard Co. and that the other articles were made by the Beech-
3126 Nut Packing Company. I can state positively that I have never heard more than ten such remarks and I do not think it was more than six.

Except for these instances I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Cigarettes or Beech-Nut Scrap Tobacco to be the products of the Beech-Nut Packing Company. I have never heard of a gum or candy concern that manufactured any tobacco products and I regard tobacco and cigarettes as a line of merchandise entirely separate from candy or chewing gum.

I have never seen a package put out by the Beech-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package and I think that anyone who would accept the tobacco or cigarette packages in place of the gum package must be crazy. 3127

I sell Ever-Ready Flashlights and Every-Ready Razor Blades. These articles are manufactured by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3128

Cross Examination.

I have handled tobacco for a long time and know the different brands. I wait on customers in all parts of my drug store. I do not remember now any more than the half dozen to ten cases of where people asked me whether the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes were made by the same company that makes the Beech-Nut Gum and Mints. I cannot remember who these people were or any other details of the incidents. I have made no particular effort to remember such things and have no reason to do so. 3129

Re-direct Examination.

If I had heard such remarks, inquiries or comments in appreciably greater number than the six I have mentioned. I think that they would have been impressed upon my mind and that I would now remember them.

3130 IT IS STIPULATED by and between the parties, through their respective counsel, that if BERTHA ROSENFIELD were called as a witness on behalf of P. Lorillard Co., defendant, she would testify as follows:

Direct Examination.

My name is BERTHA ROSENFIELD. I am of legal age and for the past year have been the manager of the tobacco and candy counters in the Rice Drug Store at 5th and Walnut Sts., Louisville, Kentucky. I
3131 serve about 250 customers a day at these counters.

Ever since I have been here we have sold Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes. The Scrap Tobacco is our best selling scrap, but the Cigarette is a slow seller. I know that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes are manufactured by the Lorillard Tobacco Co. I have noticed Lorillard's name on the front of both the Scrap Tobacco and the Cigarette packages.

I sell Beech-Nut Gums and Beech-Nut Mints. I know that those articles are manufactured by the Beech-Nut Packing Company.

3132 I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same concern that puts out Beech-Nut Chewing Gum and Mints. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette Package looks at all like a Chewing Gum package, and I would think that anyone who would accept either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package for the Beech-Nut Gum package must be crazy.

I sell Chesterfield Cigars and Chesterfield Cigarettes. These articles are made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3133

Cross Examination.

I have not paid a great deal of attention to what people are saying around my counter. A customer hardly ever asks who makes the cigarette or tobacco he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 3134

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 3135

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. L. SHINFESSEL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. L. SHINFESSEL. I am of legal age and am the manager of the tobacco and confection department at the Reo Bus waiting station at Short &

3136 Upper Sts., Lexington, Kentucky. This waiting station is a room which measures about 50x50'. My tobacco and confection stand extends across one side of this room. I wait on these counters myself and as a natural thing in such an establishment as this I have a good deal of conversation with my customers.

I have handled Beech-Nut Scrap Tobacco for about five years. It is my best selling scrap. I have always known it to be a product of the Lorillard Co. I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago and have always known that this product was also made by the Lorillard To-
3137 bacco Co. I know that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette packages.

I handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package looks at all like a
3138 gum package and I think that anyone who would accept either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette in place of the Beech-Nut Gum must be crazy.

I have never known of a confection or gum concern which put out any tobacco products and I regard tobacco and cigarettes as an entirely separate line from gum or confections.

Cross Examination.

I have handled tobacco for a good many years and know the different brands. I have made no effort to remember any inquiries, comments, or remarks as to who

makes the Beech-Nut Scrap Tobacco or the Beech-Nut 3139
Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would 3140
have been impressed on my memory.

It is Stipulated by and between the parties, through their respective counsel, that if the men whose names and addresses here appear, to wit:

E. W. Spears, Retail Tobacconist, Fayette Bank Bldg., Lexington, Ky.
L. D. Armstead, Druggist, Mill & Short Sts., Lexington, Ky.
C. E. McCarthy, Druggist, 309 W. Main St. Lexington, Ky. 3141
R. V. Harp, Grocer, 316-318 W. Short St., Lexington, Ky.

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as follows:

Direct Examination.

I am of legal age, and have for some years retailed tobacco along with other lines of merchandise. I have handled Beech-Nut Scrap Tobacco for several years. It is a very good seller. I have handled Beech-Nut Ciga-

3142 rettes for about two years. These cigarettes do not sell well with me. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manufactured by the Lorillard Co. I know the Lorillard Tobacco Co. to be one of the oldest and largest of the tobacco companies.

I sell Beech-Nut Chewing Gum and Beech-Nut Candies, and I know that these products are made by the Beech-Nut Packing Company. I have never heard any inquiries, comments or remarks from my customers or others, to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco and the Beech-
3143 Nut Cigarettes to be manufactured by the Beech-Nut Packing Company.

I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look like the Gum package. I know that Lorillard's name is written on the front of the Scrap Tobacco and Cigarette packages. I would think that anyone who would accept either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes in the place of Beech-Nut Chewing Gum must be crazy.

I have never heard of a candy or gum concern which put out any tobacco products, and I regard tobacco and
3144 cigarettes as a distinct line of merchandise from gum and candies.

Cross Examination.

I have handled tobacco for some years and am familiar with the different brands. I am kept pretty busy in my store and have not paid much attention to what people were saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the

Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 3145

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS FURTER STIPULATED that R. V. HARP, whose, name appears in the above list of witnesses, would testify in addition on direct examination that he sells Camel Cigarettes and Camel Dates, made by different companies; Star Hams and Star Milk and Star Tobacco, all put up by different companies. 3146

IT IS FURTER STIPULATED that counsel for Beech-Nut Packing Company objects to the testimony by the witness R. V. HARP in regard to Camel Cigarettes and dates and Star Hams, Milk and Tobacco, and as to who makes same, as irrelevant and immaterial.

3147

PENNSYLVANIA WITNESSES

IT IS STIPULATED by and between the parties, through their respective counsel, that if P. J. ROSSWOG were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is P. J. ROSSWOG. I am of legal age and am a retail tobacco merchant, doing business at 960 Liberty Ave., Pittsburg, Pa. I have been in the retail

3148 tobacco business for 45 years and have been in this same store for more than twenty years. I have two clerks on duty here besides myself and serve about 2,000 customers a day. My store measures about 50x30' and is in the heart of the business section of Pittsburg.

I sell Lorillard's Beech-Nut Scrap Tobacco and have sold it for four or five years. I know that Beech-Nut Scrap Tobacco is a product of the Lorillard Tobacco Co. and I have known of the Lorillard Co. ever since I have been in business and have handled some of their brands all that time. I now handle such Lorillard brands as Climax Plug Tobacco, Beech-Nut Scrap Tobacco, Ha-
3149 vana Blossom Scrap Tobacco, Union Leader Smoking Tobacco, Yacht Club Smoking Tobacco, Egyptian Dieties Cigarettes, Murads, Moguls, Helmars, London Life, etc., and a good many others. I have handled the Beech-Nut Cigarettes since they appeared on this market about one and a half years ago and have always known that they were a product of the Lorillard Co. I know that Lorillard's name is written on the front of the Beech-Nut Cigarette package and the Beech-Nut Scrap Tobacco package.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints, which I know to be products of the Beech-Nut
3150 Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the Beech-Nut Packing Company.

Beech-Nut Scrap Tobacco is by far my best selling scrap and has been for a number of years. When I first saw the Beech-Nut Cigarette I naturally associated it with the Scrap Tobacco which I have long known as a Lorillard product.

I have never heard of a candy or gum concern that 3151
made any tobacco products. I regard tobacco and cigarettes as in no way connected with food, candy, or gum. I look upon tobacco and cigarettes as an entirely separate line from either gum or candy. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package looks like a chewing gum package and I would think that anyone who would accept either the Scrap Tobacco or the Cigarette package for the Beech-Nut Gum package must be crazy.

I sell Chesterfield Cigarettes and Chesterfield Pipes. These articles are made by different companies.

I might further say that as far back as 1900 I sold a 3152
scrap tobacco which bore the name "Beechnut." This old Beech-Nut Scrap was originally put out by Harry Weissinger Tobacco Co., and the package bore the picture of a squirrel, together with the name "Beechnut," and as I recall it, the name of the Weissinger concern or its successor. I sold this Weissinger Beechnut Tobacco for several years following 1900, but did not keep or sell it after 1910.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same 3153
on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled large quantities of Lorillard Co. tobacco products and have for many years known the Lorillard salesmen in the Pittsburg district who are frequently in my store to take orders. I have known Mr. Hirsh, the Lorillard District Manager for the Pittsburg District for some years. I do not remember the circum-

3154 stances of the first time when Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes were introduced into my store, and I cannot remember the name of the salesman from whom I made the first purchase in either case. I have a busy downtown tobacco store and am kept very busy waiting on customers. I have made no attempt to remember any remarks, inquiries, or comments as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

I do not remember exactly when I first began to handle
3155 the Weissinger Beech-Nut tobacco or exactly when I made my last sale of it.

Re-direct Examination.

If I had heard any remarks, inquiries, or comments among my customers or others which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette to be manufactured by the Beech-Nut Packing Company, frequently, or in appreciable numbers, I think that the same would have been impressed on my memory and that I would recall them.

3156

IT IS STIPULATED by and between the parties, through their respective counsel, that if M. BORENSTEIN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. BORENSTEIN. I am of legal age and have been in the retail tobacco business at 120 East Ohio St., North Side, Pittsburg, Pa., for the past fifteen years. In addition to tobacco I now handle candy, periodicals,

clocks, toilet articles, stationery, etc. As a rule I have 3157
one clerk on duty in my store besides myself and we serve about 700 customers a day.

I have handled Lorillard's Beech-Nut Scrap Tobacco since it came on the market several years ago. For a number of years past Lorillard's Beech-Nut Scrap Tobacco has been by far my best selling scrap. I do not sell half as much of any other scrap tobacco as I do of the Beech-Nut. I have known of the Lorillard Co. as one of the largest and most important of the tobacco companies, ever since I have been in the tobacco business. I have handled Beech-Nut Cigarettes since they appeared on this market about two years ago and have 3158
always known that the Lorillard Co. manufactured them.

I handle Beech-Nut Chewing Gum which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I regard gum as in no way related to tobacco and cigarettes. I have never known of a candy or gum concern that manufactured any tobacco products. I do not think that either the Beech-Nut Scrap Tobacco pack- 3159
age or the Beech-Nut Cigarette package looks at all like a Chewing Gum package and I would think that anyone who would accept the Scrap Tobacco package or the Cigarette package in place of the Beech-Nut Gum package must be crazy.

I sell Chesterfield Cigarettes and Chesterfield Pipes, manufactured by different companies; Star Tobacco and Star Blades, made by different companies; Velvet Tobacco and Velvet Pencils, made by different companies; Every-Ready Razor Blades and Ever-Ready Flashlights, made by different companies.

160 I might further say that as far back as 1900 I sold a scrap tobacco which bore the name "Beechnut." This old Beechnut Scrap was originally put out by Harry Weissinger Tobacco Co., and the package bore *the picture of a squirrel, together with the name "Beech-*nut," and as I recall it, the name of the Weissinger concern or its successor. I sold this Weissinger Beechnut Tobacco for several years following 1900, but did not keep or sell it after 1910.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different
161 goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled considerable quantities of tobacco products of the Lorillard Co., and have for many years known the Lorillard salesmen in the Pittsburg district who have called in at my store. I have known the Lorillard District Manager for Pittsburg, Mr. Hirsh, for some time. I keep other lines of goods besides tobacco, and am kept pretty busy waiting on the differ-
162 ent parts of the store. I have not had a great deal of opportunity to listen to what tobacco customers are saying. I have made no attempt to remember any remarks, inquiries or comments as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, and had no reason to do so. When I say that I have never heard any such inquiries or remarks, I mean that I do not remember any.

I do not remember exactly when I first began to handle the old Weissinger Beechnut Tobacco or when I made my last sale of it.

Re-direct Examination. 3163

If I had heard any remarks, inquiries or comments among my customers or others which led me to believe *that they thought the Beech-Nut Scrap Tobacco or the* Beech-Nut Cigarette to be manufactured by the Beech-Nut Packing Company, frequently, or in appreciable numbers, I think that the same would have been impressed on my memory, and that I would recall them.

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. J. FLEISCHAUER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 3164

Direct Examination.

My name is A. J. FLEISCHAUER. I am of legal age and am the manager of a tobacco store located in the heart of the business section of Pittsburg, Pa., at 326 Federal Street. I have, as a rule, one clerk on duty here in addition to myself and we serve about 800 customers a day.

I handled Beech-Nut Scrap Tobacco since 1915 and have always known it to be manufactured by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of the Beech-Nut Scrap Tobacco package. Beech-Nut Scrap is by far my best selling scrap tobacco. I believe that I sell on an average of about 288 packages a week. I have handled Beech-Nut Cigarettes since they appeared on this market in the fall of 1921. I do not have a very good sale for these cigarettes. I remember that the salesman who first sold me Beech-Nut Cigarettes represented himself to be an agent of the Lorillard Tobacco Co. I naturally associated the Beech-Nut Cigarette with the Beech-Nut 3165

3166 Scrap Tobacco, which has been one of my leading brands for several years.

I sell Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Caramels, all of which I know to be made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I regard tobacco and cigarettes as an entirely separate line of merchandise from chewing gum or candy and I have
3167 never known of a candy or gum concern that made any tobacco products. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a Chewing Gum package. I would think that anyone who would accept the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette in place of the Beech-Nut Gum package must be crazy.

I sell Velvet Tobacco and Velvet Pencils, made by different companies; Chesterfield Pipes and Chesterfield Cigarettes, made by different companies; Ever-Ready Razor Blades and Ever-Ready Flashlights, made
3168 by different companies; Star Tobacco and Star Razor Blades, made by different companies.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and am famailiar with the different brands. I have bought

considerable quantities of Lorillard tobacco products and have known the Lorillard salesmen for a long time as they come into my store to take orders. I have known Mr. Hirsh, the Lorillard District Manager for Pittsburg, for some years, I do not remember the name of the salesman who first sold me Beech-Nut Cigarettes. I cannot remember exactly what he did or said on that occasion. I cannot describe his visit any more than I have already done. I have a busy store and have not much opportunity to talk to customers or hear what they are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. GORENSTEIN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. GORENSTEIN. I am of legal age and am a retail merchant doing business at 220 Federal

3172 Street, Pittsburg, Pa. I carry such articles as tobacco, candy, clocks, magazines, stationery, etc. I employ one clerk besides myself.

I have handled Beech-Nut Scrap Tobacco for about seven years and Beech-Nut Cigarettes since they appeared on this market. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. and I have long known of that company as one of the oldest and largest of the tobacco concerns. I handle a number of the Lorillard brands, such as Climax Plug, Havanna Blossom and such Turkish Cigarettes as Egyptian Deities, Helmars, Moguls, Murads,
3173 etc. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package. Beech-Nut Scrap Tobacco is by far my best selling scrap tobacco, but Beech-Nut Cigarettes do not sell well with me.

I handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I do not
3174 think that either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette package looks at all like a chewing gum package. I have never heard of a gum or candy concern that manufactured any tobacco products. I regard cigarettes and tobacco as an entirely distinct line of merchandise from gum or confections.

I sell Velvet Tobacco and Velvet Pencils, made by different companies; Star Tobacco and Star Razor Blades, made by different companies; Yankee Peanut Brittle and Yankee Watches, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3175

Cross Examination.

I have handled tobacco for many years and know the different brands. I have known the Lorillard salesmen in this district for a long time as they come into my store to take orders. I am kept pretty busy in the different parts of my store and have not a great deal of opportunity to hear what customers are saying. 3176

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory. 3177

3184 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if CHAS. F. SMITH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3185 *Direct Examination.*

My name is CHAS. F. SMITH. I am of legal age and am the manager of three retail tobacco stores, all located in the business section of Pittsburg, Pa. I am usually to be found in one of these stores at 444 Wood St., Pittsburg, Pa. I employ two clerks in each of these stores and spend all of my time in one or the other of them and may say that I am in close contact with what goes on in all of them.

I have handled Beech-Nut Scrap Tobacco for the past six or seven years and have always known it to be manu-
3186 factured by the Lorillard Co. I have handled Beech-Nut Cigarettes since they first appeared on this market and have always known that this article was also made by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette packages.

I handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut

Scrap Tobacco or the Beech-Nut Cigarettes to be manufactured by the Beech-Nut Packing Company. I do not think that either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette packages look at all like a gum package, and I think that anyone who would accept the scrap tobacco or cigarette packages in place of the Beech-Nut gum package must be crazy. I have never heard of a candy or gum concern that made any tobacco products, and I regard tobacco and cigarettes as an entirely distinct line of merchandise from candy or gum. 3187

Beech-Nut Scrap Tobacco is by far my best selling scrap. Beech-Nut Cigarettes sell fairly well with me. Beech-Nut Gum is a good seller. 3188

I sell Chesterfield Cigarettes and Chesterfield Pipes, made by different companies; Velvet Tobacco and Velvet Pencils, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

3189

I have been in the retail tobacco business for many years and am familiar with the different brands. I have bought large quantities of Lorillard tobacco products and have known for a long time the Lorillard salesmen in this district. I divide my time between my three stores. They all do a good business and it keeps me busy looking after them. I have not had a great deal of time to listen to what customers are saying. A customer hardly ever asks who makes the cigarette or tobacco he is buying.

3190 I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

3191 If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. E. DETWILER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

3192 My name is J. E. DETWILER. I am of legal age and have been in the retail tobacco business for the past ten years. I now do business at 440 Wood St., Pittsburg, Pa., where I serve about 300 customers a day. As a rule I am the only clerk on duty here, but I have one assistant during the rush hour.

I have handled Beech-Nut Scrap Tobacco for five or six years and have always known it to be a product of the Lorillard Co. It is my best selling scrap tobacco. I have handled Beech-Nut Cigarettes since they appeared on this market. I remember that the salesman who first sold me these cigarettes represented himself to be an agent of the Lorillard Tobacco Co., and that he had ad-

vertising matter with him at the time and put up some posters in my store advertising the Beech-Nut Cigarettes. I do not have a very good sale for Beech-Nut Cigarettes.

I handle Beech-Nut Chewing Gum, which is a good seller, and which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have always regarded tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum or confections, and I have never known of a candy or gum concern that made any tobacco products.

I think that anyone who would accept the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette package in place of the Beech-Nut Chewing Gum package must be crazy.

Cross Examination.

I have bought brands put out by the Lorillard Co. for many years and have known the Lorillard salesmen in this district, who come into my store to take orders. I do not remember the name of the salesman who first sold me Beech-Nut Cigarettes and cannot remember the details of his visit at that time any more than I have already described. I am kept pretty busy in my store, and have not much opportunity as a rule to listen to what customers are saying. A customer hardly ever asks who makes the cigarettes or tobacco he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to

3196 whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3197

IT IS STIPULATED by and between the parties, through their respective counsel, that if LOUIS HUCK were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is LOUIS HUCK. I am of legal age and am a retail tobacco merchant doing business at 508 Liberty Ave., Pittsburg, Pa. Besides tobacco I handle such articles as candy, chewing gum, and razor blades.
3198 I serve abut 300 customers a day and as a rule I am the only clerk on duty in my store.

I have handled Beech-Nut Scrap Tobacco for about six years and Beech-Nut Cigarettes since they first appeared on this market. Beech-Nut Scrap Tobacco is my best selling scrap tobacco and the Beech-Nut Cigarettes sell fairly well with me. I have always known that both of these products were manufactured by the Lorillard Tobacco Co., and I have long known of that company as one of the oldest and largest of the tobacco companies. I handle a number of their brands, such as

Murad Cigarettes, Moguls, Egyptian Deities, Helmars, etc. 3199

I handle Beech-Nut Chewing Gum, which is a good seller and which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the same concern that manufactures Beech-Nut Chewing Gum. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look like a gum package and I would think that 3200 anyone who would accept the Scrap Tobacco package or the Cigarette package in place of Beech-Nut Gum must be crazy. I have never known of a candy or gum concern that put out any tobacco products and I regard tobacco and cigarettes as an entirely different line from chewing gum.

I sell Chesterfield Pipes and Chesterfield Cigarettes, made by different companies; Star Razor Blades and Star Tobacco, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different 3201 goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

A customer hardly ever asks who makes the cigarettes or tobacco which he is buying. I am pretty busy looking after my store and have not a great deal of opportunity to listen to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether

202 they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

203

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. PETTY were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. PETTY. I am of legal age and am the manager of the Russell Co., Inc., having my headquarters at 957 Federal Ave., Pittsburg, Pa. The Russell Co. Inc., runs fourteen retail tobacco stores, ten of which
204 are located in the business section and four of which are located in other parts of the city. I would say roughly that each of my stores averages about 700 customers a day. I am the buyer for this company and I spend all of my time in one or another of my stores and may say that I am in close contact with conditions in all of them. At times I wait on customers myself, especially in the store located at 967 Federal Avenue.

I have bought and sold Beech-Nut Scrap Tobacco for about seven years and it is my best selling scrap tobacco. I do not think that I sell more than half as much of any other scrap tobacco. I have always known that the Lor-

illard Tobacco Co. made the Beech-Nut Scrap Tobacco, and I have long known of the Lorillard Co. as one of the largest and most important of the tobacco companies. I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago and have always known that this cigarette was a product of the Lorillard Co. I know that Lorillard's name is written on the front of both the Scrap Tobacco package and the Cigarette package.

I handle Beech-Nut Chewing Gum and Beech-Nut Mints, which I know to be products of the Beech-Nut Packing Company. The Beech-Nut Gum is a good seller with me.

I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a gum package. I think that anyone who would accept either in place of Beech-Nut gum must be crazy. I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company.

I sell Mogul Playing Cards and Mogul Cigarettes, manufactured by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and have bought large quantities of brands made by the Lorillard Co. I have known the Lorillard salesmen in this district and have known Mr. Hirsh, the District Sales Manager for Pittsburg, for some years. It keeps me very busy

3208 looking after the fourteen stores and I have not a great deal of opportunity to listen to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

3209 *Re-direct Examination.*

If I had heard any such remarks, inquiries or comments in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if A. KIDNER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3210 *Direct Examination.*

My name is A. KIDNER. I am of legal age and am a retail merchant doing business at the corner of Penn and Hyland Aves., E. Liberty, Pittsburg, Pa. I sell such articles as candy, tobacco, novelties and periodicals. I employ one clerk besides myself and we serve between 400 and 500 customers a day. I have handled Beech-Nut Scrap Tobacco since 1915 and I have always known this to be a product of the Lorillard Tobacco Co. It is my best selling scrap tobacco. I have handled Beech-Nut Cigarettes for the past month. The salesman who first sold me these cigarettes a month ago told me that he

was a representative of the Lorillard Tobacco Co. and in 3211
recommending the Beech-Nut Cigarettes to me he called my attention to the fact that it was made by the Lorillard Co., and spoke of that company as the manufacturer of Beech-Nut Scrap Tobacco, also mentioning some other Lorillard brands.

I sell Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never 3212
heard of a candy or gum concern that manufactured any tobacco products and I regard tobacco and cigarettes as an entirely distinct line from gum or confections.

I do not think that the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package and I regard the two lines of merchandise as entirely separate from one another.

I sell Velvet Tobacco and Velvet Pencils, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's 3213
counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I keep a varied line of articles in my store. I have handled tobacco for some years. I have known from time to time the Lorillard salesmen who call in at my store to take orders. I am kept pretty busy attending the different parts of my store and have not much time to pay attention to what people are saying around the tobacco section.

3214 I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

3215 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if Jos. H. ROSSWOG were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

3216 My name is JOS. H. ROSSWOG. I am of legal age and am a retail tobacco merchant doing business at 62-63 Frankstown Ave., E. Liberty, Pittsburg, Pa I employ two clerks besides myself and we serve about 500 customers a day. I have handled Beech-Nut Scrap Tobacco for about six years and have always known it to be a product of the Lorillard Co. It is my best selling scrap tobacco. I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago and have always known that these cigarettes were manufactured by the Lorillard Co. I know that Lorillard's name is written on the front of

both the Scrap Tobacco package and the Cigarette package.

I sell Beech-Nut Chewing Gum, which is a good seller, and which I know to be a product of the Beech-Nut Packing Company. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look like a chewing gum package.

I have never heard more than four or five remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I told the four or five persons who did inquire of me that Lorillard made the tobacco and the cigarettes and that the Beech-Nut Packing Company made the gum. I regard chewing gum and tobacco as entirely separate classes of goods. I have never heard of a gum or confection concern that manufactured any tobacco products.

I sell Ever-Ready Razor Blades and Every-Ready Flashlights, made by different companies; Chesterfield Cigars and Chesterfield Pipes, made by different companies; Mogul Cigarettes and Mogul Playing Cards, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and know the different brands. I have known the Lorillard salesmen who call at my store at frequent intervals to take orders. I am kept pretty busy in my store and have

220 not paid a great deal of attention to remarks at the counter. A customer hardly ever asks who makes the cigarette or tobacco he is buying. I do not remember any more instances than the four or five which I have mentioned where people have asked me whether the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes were the products of the Beech-Nut Packing Company. I cannot remember who these people were or give any more details as to what occurred at the respective times. I have made no particular effort to remember such inquiries, remarks or occurrences.

221 *Re-direct Examination.*

If I had heard an appreciably greater number than four or five such remarks, inquiries or comments I think that that fact would have been impressed upon my mind and that I would have remembered it.

IT IS STIPULATED by and between the parties, through their respective counsel, that if M. J. FARRELL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

222 *Direct Examination.*

My name is M. J. FARRELL. I am of legal age and am the manager of Bocks-Stauffer Co., 1111 Pennsylvania Ave., Pittsburg, Pa. The Bocks-Stauffer Co. is mainly engaged in the retail tobacco business and does a small tobacco jobbing business in addition. This company runs eleven tobacco stores, all located in Pittsburg, Pa. I do the buying for all of these stores and spend most of my time in one or another of them. I am in close contact with what goes on in all of them.

I have bought and sold Beech-Nut Scrap Tobacco for

six or seven years and have always known it to be a 3223
product of the Lorillard Co. I have handled Beech-Nut Cigarettes since they appeared on this market about two years ago and have always known that this cigarette was manufactured by the P. Lorillard Co. I know that Lorillard's name is written on the front of both the Beech-Nut Scrap Tobacco package and the Beech-Nut Cigarette package. I know the Lorillard Co. to be one of the largest and most important of the tobacco concerns and I handle many of their brands.

I buy and sell Beech-Nut Chewing Gum, Beech-Nut Mints and Beech-Nut Candies, which I know to be products of the Beech-Nut Packing Company. 3224

I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package, and I think that anyone who would accept either the scrap tobacco or the cigarette package in place of Beech-Nut Gum must be crazy.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never known of a gum or candy concern that manu- 3225
factured any tobacco products, and I regard tobacco and cigarettes as entirely distinct lines from chewing gum or candy.

Cross Examination.

I have bought large quantities of Lorillard tobacco products and have for many years known the Lorillard salesmen in the Pittsburg district. I divide my time among our eleven stores. They do a good business and it takes all of my time looking after them. I have not

3226 much opportunity to listen to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

3227 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if WM. C. DICKEL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as folows:

3228 *Direct Examination.*

My name is WM. C. DICKEL. I am of legal age and am a grocer, doing business at 1008 Madison Ave., North Side, Pittsburg, Pa. I have handled Beech-Nut Scrap Tobacco for several years and I know it to be a product of the Lorillard Co. I know that Lorillard's name is written on the front of the package.

I sell Beech-Nut Chewing Gum and I know it to be made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-

Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company. I do not think that the Beech-Nut Scrap Tobacco package looks at all like a chewing gum package and I think that anyone who would accept the scrap tobacco in place of Beech-Nut gum must be crazy. I have never known of a gum concern which manufactured any tobacco products and I regard tobacco and gum as entirely unrelated products.

I sell Jack Frost Tobacco and Jack Frost Sugar, made by different companies; Mozart Cigars and Mozart Canned Foods, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I wait on all parts of my grocery store. I do not pay much attention to what people are saying at the tobacco counter. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3232 IT IS STIPULATED by and between the parties, through their resepctive counsel, that if S. SAMUELS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is S. SAMUELS. I am of legal age and for the past six months have been part owner and manager of a first class drug store located at Forward and Murray Ave., Squirrel Hill, Pittsburg, Pa. My store is
3233 located in the best residential section of Pittsburg. I employ three clerks besides my self. In addition to drugs we handle such articles as toilet articles, stationery, tobacco, sodas, candy, etc. Before coming here I was for nine years a retail tobacco merchant, doing business at the corner of 6th and Pennsylvania Avenues, Pittsburg, Pa.

I have sold Beech-Nut Scrap Tobacco for six or seven years and Beech-Nut Cigarettes for about two years. I have handled these articles both at my former location and in my present location. The Beech-Nut Scrap Tobacco is my best selling scrap. Beech-Nut Cigarettes
3234 sold very well for me prior to the time that I moved to my present store. I do not sell many of them here. I have always known that both the Beech-Nut Scrap Tobacco and Beech-Nut Cigarettes were manufactured by the Lorillard Co. I know that Lorillard's name is written on the front of the Scrap Tobacco and the Cigarette packages. I have long known of the Lorillard Co. as one of the most prominent of the tobacco companies, and I am always glad to handle a Lorillard product.

I have sold Beech-Nut Chewing Gum, both before and since I went into business here and I know it to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or com- 3235
ments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package look at all like a chewing gum package, and I would think that anyone who would accept either of them in place of Beech-Nut Gum must be crazy.

I have never known of a candy or gum concern that manufactured any tobacco products and I regard to-
bacco and cigarettes as an entirely distinct line of mer- 3236
chandise from chewing gum or candy.

I sell Mavis Candy and Mavis Talcum Powder, manufactured by different companies.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

3237

I have handled tobacco for many years. I have bought considerable quantities of Lorillard tobacco products and have known the Lorillard salesmen from time to time who come around to take orders. I have been in a busy store both downtown and up here on Squirrel Hill and have not had much time to converse with customers or opportunity to hear what they are saying.

I have made no effort to remember any inquiries, comments, or reports as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company

3238 products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any .

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3239 IT IS STIPULATED by and between the parties, through their respective counsel, that if MAX SELTZMAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is MAX SELTZMAN. I am of legal age and am a grocer doing business at 1534 Electric Ave., East Pittsburg, Pa. I run a small grocery store where I serve about 100 customers a day. I am usually the only clerk on duty here.

I have handled Beech-Nut Scrap Tobacco for the past
3240 five or six years, and it is a very good seller. I know it to be a product of the Lorillard Tobacco Co.

I handle Beech-Nut Chewing Gum, which I know to be a product of the Beech-Nut Packing Company.

I know that Lorillard's name is written on the front of the Scrap Tobacco package. I do not think that the Scrap Tobacco package looks like a gum package. I have never known of a candy or gum concern that manufactured any tobacco products. I regard tobacco and gum as entirely distinct lines of merchandise.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or

which led me to believe, that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company.

I sell Gold Medal Flour, Gold Medal Coffee and Gold Medal Tooth Paste, all of which are made by different companies; Ideal Salad Oil and Ideal Salt, made by different companies; Royal Baking Powder and Royal Bluing made by different companies; Eagle Brand Milk, Eagle Brand Sardines and Eagle Brand Noodles, all made by different companies; White House Coffee and White House Ketchup, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I wait on the different parts of my grocery store myself. I have not paid much attention to what people are saying about tobacco.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

244 IT IS STIPULATED by and between the parties, through their respective counsel, that if A. W. MEYERS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. W. MEYERS. I am of legal age and am a grocer doing business at 611 Market St., McKeesport, Pa. As a rule my wife and myself are the only clerks on duty in this store, which is not a large one.

I have handled Beech-Nut Scrap Tobacco for a number
245 of years and Beech-Nut Cigarettes since they appeared on this market. I know that both of these products are made by the Lorillard Tobacco Co., and that Lorillard's name is written on the front of both packages.

I handle Beech-Nut Chewing Gum and Beech-Nut Peanut Butter. I know that both of these articles are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to beileve that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I have never
246 seen a package put out the Beech-Nut Packing Company that looked like either a scrap tobacco package or a cigarette package, and I think that anyone who would accept the Beech-Nut Scrap Tobacco or Cigarette package in place of the Beech-Nut Gum package must be crazy. I regard tobacco and cigarettes as an entirely separate class of products from chewing gum or food products. I have never known of a food products or gum concern that manufactured any tobacco products.

I sell Velvet Tobacco and Velvet Pencils, made by different companies; Argo Salmon and Argo Starch made by different companies; Jersey Bluing and Jersey

Corn Flakes, made by different companies; Mothers' 3247
Oats and Mothers' Coffee, made by different companies; Swan's Down Cake Flour and Swan's Down Sugar, made by different companies; Baker's Cocoa and Baker's Corn, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I wait on different parts of my grocery store myself. 3248
I do not pay much attention to what people are saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination. 3249

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

250 IT IS STIPULATED by and between the parties, through their respective counsel, that if M. J. MURRAY were called as a witness on behalf of the P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is M. J. MURRAY. I am of legal age and am the owner and manager of a grocery store located at 33 Braddock Avenue, Braddock, Pa. I employ two clerks besides myself and we serve between 250 and 300 customers a day.

251 I have sold Beech-Nut Scrap Tobacco for four or five years. It is my best selling scrap tobacco. I have always known that it was manufactured by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of the Scrap Tobacco package.

I sell Beech-Nut Peanut Butter, Beech-Nut Bacon, Beech-Nut Spaghetti and Beech-Nut Pork & Beans, all of which products I know to be manufactured by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut 252 Scrap Tobacco to be a product of the Beech-Nut Packing Company. I have never heard of a food products company that manufactured any tobacco products. I regard tobacco and gum or food products as entirely unrelated lines of merchandise. I have never seen a package put out by the Beech-Nut Packing Company that looked like a scrap tobacco package. I think that any one who would accept a package of Beech-Nut Scrap Tobacco in the place of any of the Beech-Nut food products that I have ever handled must be crazy.

I sell Star Lobsters and Star Soap, made by different companies; Argo Salmon and Argo Starch, made by

different companies; Royal Baking Powder and Royal 3253
Bluing, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I wait on different parts of my grocery store myself. I do not pay much attention to what people are saying about tobacco or cigarettes.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or re- 3255
marks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3256 IT IS STIPULATED by and between the parties, through their respective counsel, that if

I. L. MILLER, Grocer, 507 E. Eighth St., Homestead, Pa.,
JULIUS WEISS, Grocer, Lincoln St., East Pittsburg, Pa.,
L. G. LAMBRIGHT, Retail Tobacconist, 927 Wood St., Wilkinsburg, Pa.,
FRANK ANNENDOLA, Grocer, 18 Braddock Ave., Braddock, Pa.,
J. GILBERT, Grocer, 201 Third St., Braddock, Pa.,
WM. HALER, Retail Candy Merchant, 2718 Fifth Ave., East End, McKeesport, Pa.,
3257 GEO. BASHUR, Retail Tobacconist, 809 Fifth Ave., McKeesport, Pa.,
ABE BIBENSTEIN, Retail Tobacconist, 508 Trust Bldg., McKeesport, Pa.,
MORRIS WEINTRAUB, Retail Tobacconist, Locust & Hingold Sts., McKeesport, Pa.,
H. E. VENSEL, Retail Tobacconist, 916 Walnut St., McKeesport, Pa.

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as folows:

Direct Examination.

3258 I am of legal age, and have for a number of years been engaged in retailing tobacco along with some other lines of merchandise.

I have handled Beech-Nut Scrap Tobacco for several years. It is a very good seller with me. I have sold Beech-Nut Cigarettes since they appeared on this market about two years ago. These cigarettes are not a good seller with me. I have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were manufactured by the Lorillard Tobacco Co.

I know that Lorillard's name is written on the front of both packages. I have known of the Lorilard Co. for a long time as one of the largest of the tobacco companies. 3259

I have handled Beech-Nut Chewing Gum and Beech-Nut Mints for several years. I know these to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be manufactured by the Beech-Nut Packing Company.

I do not think that either the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package looks at all like a chewing gum package. I have never known of a candy or gum concern that put out any tobacco products, and I regard tobacco and cigarettes as an entirely different class of merchandise from gum or candies. 3260

I would think that anyone who would accept a package of Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes in the place of a package of Beech-Nut Gum must be crazy.

Cross Examination.

I have handled tobacco for some years and am familiar with the different brands. I know the Lorillard salesmen who call in at my store at frequent intervals to take orders. I wait on customers in the different parts of my store and have not paid much attention to what people are saying about tobacco or cigarettes. 3261

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company

3262 products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

WEST VIRGINIA WITNESSES.

3263

IT IS STIPULATED by and between the parties, through their respective counsel, that if ALECK BOLTON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is ALECK BOLTON. I am of legal age and am a retail tobacco merchant, doing business at 1325 Market St., Wheeling, W. Va. I have handled Beech-Nut Scrap Tobacco for about seven years. It is my
3264 best selling scrap. I have handled Beech-Nut Cigarettes since they appeared on this market about two years ago. These cigarettes do not sell well with me. I have always known that both of these products were put out by the Lorillard Tobacco Co., and I have long known of that company as one of the largest and oldest of the tobacco concerns. I handle a great many of Lorillard's brands, such as Climax Plug Tobacco, Murad Cigarettes, Moguls, Helmars, Egyptian Deities, Sensation Tobacco and Union Leader Tobacco.

I sell Beech-Nut Chewing Gum, which is a very good seller, and which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I do not think that either the Scrap Tobacco or the Cigarette packages look at all like a gum package and I think that anyone who would accept the Beech-Nut Scrap Tobacco package or the Beech-Nut Cigarette package for the Beech-Nut Chewing Gum package must be crazy. 3265

I regard tobacco and gum as entirely unrelated classes of products. 3266

I sell Star Tobacco and Star Razor Blades, made by different companies; Velvet Pencils and Velvet Tobacco, made by different companies; Chesterfield Pipes and Chesterfield Cigarettes made by different companies.

It is Stipulated that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination. 3267

I have handled tobacco for many years and know the different brands. I buy considerable quantities from the Lorillard Co. I have a busy store. I am kept busy waiting on my trade and have not much opportunity to listen to what customers are saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing

3268 Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3269 IT IS STIPULATED by and between the parties, through their respective counsel, that if J. ELMER FREESE were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is J. ELMER FREESE. I am of legal age and am a retail tobacco merchant and have for the past sixteen years been a retail tobacco merchant. I now do business at the corner of 17th and Market Sts., Wheeling, W. Va. Besides tobacco I sell stationery,
3270 candy, books, etc.

I have sold Beech-Nut Scrap Tobacco for about seven years. It is my best selling scrap tobacco. I have always known it to be manufactured by the Lorillard Tobacco Co., which company I know to be one of the most important of the tobacco companies. I handle a great many of their brands, but I have never sold the Beech-Nut Cigarettes.

I sell Beech-Nut Chewing Gum, which is a good seller and which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company. 3271

I do not think that the Scrap Tobacco package looks at all like a gum package and I think that anyone who would accept the Beech-Nut Scrap Tobacco in place of the Beech-Nut Gum must be crazy.

I sell Velvet Pencils, Velvet Tobacco, made by different companies; Star Tobacco, Star Fountain Pens, and Star Pen Clips, all made by different companies.

3272

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have been in the retail tobacco business for many years. I have for years been buying the products put out by the Lorillard Co. I am kept pretty busy waiting on customers in my store and have not a great deal of opportunity to listen to what customers are saying. A customer hardly ever asks who makes the cigarette or tobacco he is buying. 3273

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

3274 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if THOMAS P. HAYES were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3275 *Direct Examination.*

My name is THOMAS P. HAYES. I am of legal age and am the manager of the Jas. B. McKeen Cigar Co. My headquarters are at 1209 Market St., Wheeling, W. Va., where one of the cigar stores of the McKee Cigar Co. is located. Besides this store my company owns cigar stands at the Windsor Hotel, Wheeling, W. Va., Pt. Cumberland Hotel, Cumberland, Md., Waldo Hotel, Clarksburg, W. Va., and at the Frederick Hotel. Huntington, W. Va. I spend most of my time in Wheeling and am in close contact with what goes on in
3276 the store at 1209 Market St., and at the cigar stand in the Windsor Hotel, Wheeling. I have held my present position for the past eight years. I have bought and sold Beech-Nut Scrap Tobacco since 1915, and Beech-Nut Cigarettes since they first appeared on the market about two years ago. I know both of these articles to be manufactured by the Lorillard Co. and I have long known that company to be one of the oldest and largest of the tobacco companies. I handle a great many of Lorillard's brands, the leaders among which at present are Beech-Nut Scrap Tobacco, Climax Plug Tobacco,

Union Leader Smoking Tobacco, Murad Cigarettes, 3277
Helmars, Moguls, Egyptian Dieties, etc.

I sell Beech-Nut Chewing Gum and Beech-Nut Mints and I know that these articles are put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers, clerks, or others to the effect, or which led me to believe that they thought the Beech-Nut Cigarettes or the Beech-Nut Scrap Tobacco to be products of the Beech-Nut Packing Company. I do not think that the Beech-Nut Gum package put out by the Beech-Nut Packing Company looks like either a scrap tobacco package or a cigarette package. I know 3278
that Lorillard's name is written on the front of both the Scrap Tobacco and the Cigarette packages.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from gum or candy. I have never known of a candy or gum concern that manufactured any tobacco products.

Cross Examination.

I have been in the retail cigar business for many years and for a long time have handled many of the brands put out by the P. Lorillard Co. I buy consider- 3279
able quantities of them. I have for years known the Lorillard salesmen who have been in this district from time to time. It keeps me busy running our five stores. I divide my time between them. I have not much time to listen to what customers are saying. A customer hardly ever asks who makes the cigarettes or tobacco he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that

3280 makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

IT IS STIPULATED by and between the parties, through their respective counsel, that if J. F. REINACKER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

3281 My name is J. F. REINACKER. I am of legal age and am a retail tobacco merchant, doing business at 1226 Market St., Wheeling, W. Va. In addition to tobacco, I handle such articles as candy, sodas, razor blades, pencils, etc.

I have sold Beech-Nut Scrap Tobacco for about five years and Beech-Nut Cigarettes since they appeared on this market about two years ago. I know that both of these products are manufactured by the Lorillard Tobacco Co., and I have noticed Lorillard's name written on the front of both packages.

3282 I sell Beech-Nut Chewing Gum, which is a good seller, and which I know to be manufactured by the Beech-Nut Packing Company.

I do not think that either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarette packages look like a chewing gum package and I think that it would take a crazy man to accept either the Beech-Nut scrap tobacco or the Beech-Nut cigarette package in place of the Beech-Nut Chewing Gum package.

I have never heard more than three or four remarks, inquiries or comments among my customers or others, to the effect, or which led me to believe that they thought

the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. I told the three or four persons who did inquire of me that Lorillard made the tobacco and cigarette and that the Beech-Nut Packing Company made the gum. All of these instances occurred shortly after the cigarettes appeared on the market. 3283

I regard tobacco and gum as entirely unrelated classes of merchandise. I have never heard of a gum concern that put out any tobacco products.

I sell Chesterfield Pipes and Chesterfield Cigarettes, made by different companies.

3284

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and know the different brands. I am kept pretty busy in my store. I cannot remember any more instances than those I have mentioned of people inquiring or discussing whether the Beech-Nut Cigarettes and Scrap Tobacco were made by the Beech-Nut Packing Company. I cannot remember the names of these people or any more of the circumstances. I have made no effort to remember such occurences and have had no reason to do so. 3285

Re-direct Examination.

If I had heard such remarks, inquiries or comments in appreciably greater number than the three or four that I have mentioned, I believe that fact would have been impressed on my mind, and that I would now remember it.

3286 IT IS STIPULATED by and between the parties, through their respective counsel, that if E. B. POTTS were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is E. B. POTTS. I am of legal age and am a grocer doing business at 10th and Main Sts., Wheeling, W. Va. I employ three clerks besides myself and my store is a rather large one on the outskirts of the
3287 business section of Wheeling.

I have sold Beech-Nut Scrap Tobacco for the past six or seven years. I have always known it to be manufactured by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of the package. Beech-Nut Scrap Tobacco is a good seller with me.

I have sold Beech-Nut Chewing Gum and Beech-Nut Peanut Butter and I know that both of these articles are put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut
3288 Scrap Tobacco to be a product of the Beech-Nut Packing Company. I do not think that Beech-Nut Gum or Beech-Nut Peanut Butter looks like a scrap tobacco package, and I think that anyone who would accept Beech-Nut Scrap Tobacco in place of Beech-Nut Gum must be crazy. I regard tobacco and food products as entirely separate classes of merchandise and I have never known of a food products or gum company that made any tobacco products.

I sell Climax Tobacco, Climax Coffee and Climax Wall Paper Cleaner, all manufactured by different companies; Argo Starch and Argo Salmon, made by different com-

panies; Jersey Matches and Jersey Flour, made by different companies; Mothers Oats and Mothers Vanilla, made by different companies; Uneeda Matches and Uneeda Biscuits, made by different companies; Camel Cigarettes and Camel Dates, manufactured by different companies. 3289

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination. 3290

I have handled tobacco for a good many years and know the different brands. I wait on customers in all parts of my store and have not paid particular attention to what people are saying about the tobacco.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 3291

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

3292

IT IS STIPULATED by and between the parties, through their respective counsel, that if W. J. KAISER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. J. KAISER. I am of legal age and am a grocer doing business at 1001 Main St., Wheeling, W. Va. I employ two clerks besides myself. My store is quite a large one, measuring about 50 x 50'. I have sold Beech-Nut Scrap Tobacco for several years and I
3293 know it to be made by the Lorillard Tobacco Co. I know that Lorillard's name is written on the front of the package.

I sell Beech-Nut Chewing Gum, Beech-Nut Peanut Butter and Beech-Nut Spaghetti. I know that these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco to be a product of the Beech-Nut Packing Company. I do not think that any of the products of the Beech-Nut Packing Company that I handle look like a
3294 scrap tobacco package, and I would think that anyone who would accept Beech-Nut Scrap Tobacco in place of any of them must be crazy.

I regard tobacco and gum as entirely unrelated classes of products and I have never known of a food products or gum concern that manufactured any tobacco.

I sell Argo Salmon and Argo Starch, made by different companies; Uneeda Biscuits and Uneeda Matches, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods

sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for some years and am familiar with the brands that sell in this part of the country. I wait on customers in all parts of my store. I have not paid particular attention to what is being said about tobacco.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco, or as to whether it is made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if E. SAYER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is E. SAYER. I am of legal age and am the manager of the Piggly Wiggly grocery store on Market St., Wheeling, W. Va. This is a large store where about 400 customers a day are served.

3298 I have bought and sold Beech-Nut Scrap Tobacco for the past six or seven years and I have always known it to be manufactured by the Lorillard Tobacco Co. I have sold Beech-Nut Cigarettes since they appeared on this market and have always known that this product was also made by the Lorillard Co. I know that Lorillard's name is written on the front of both packages. The Beech-Nut Scrap Tobacco is a good seller, but Beech-Nut Cigarettes do not sell well with me. I handle a number of the products of the Beech-Nut Packing Company, among them, Beech-Nut Chewing Gum, Mints, Peanut Butter and Beech-Nut
3299 Bacon. I do a good business in all of these articles.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company. None of the packages put out by the Beech-Nut Packing Company that I handle looks to me like a scrap tobacco package or a cigarette package. I regard food products and candies and gum as entirely separate lines of merchandise from tobacco or cigarettes and I have never known of a food or candy concern that manufac-
3300 tured any tobacco products.

I sell White House Coffee, White House Vinegar and White House Margerine, all made by different companies; Uneeda Matches and Uneeda Biscuits, made by different companies; Gold Medal Matches and Gold Medal Flour, made by different companies; Franco-American Coffee and Franco-American Spaghetti, made by different companies; Log Cabin Syrup and Log Cabin Kisses, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different

goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for a good many years and have bought considerable quantities from the Lorillard Co. I wait on customers in all parts of my grocery store. I have not paid particular attention to what is going on in the tobacco section or what people are saying there.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes or as to whether they are made by the some company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

1911

3304 IT IS STIPULATED by and between the parties, through their respective counsel, that if P. P. NAUFEL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is P. P. NAUFEL. I am of legal age and have been in the retail tobacco and confection business for the past seven years. I own and manage three retail candy and tobacco stores, all located in the business section of Wheeling, W. Va. I spend most of my time
3305 in one of these stores, which is 1608 Market St., Wheeling, W. Va., just across the street from the B. & O. Railway station. My stores average about 300 customers a day. In the store at 1608 Market St. I employ one clerk and spend most of my time waiting on the trade along with him.

I have sold Beech-Nut Scrap Tobacco ever since I have been in this business, and it is a good seller. I have sold Beech-Nut Cigarettes ever since they appeared on this market, about two years ago. These cigarettes have not sold well with me. I know that both of these products are made by the Lorillard
3306 Tobacco Co. I know that Lorillard's name is written on the front of both of these packages.

I sell Beech-Nut Chewing Gum and Beech-Nut Mints, which I know to be products of the Beech-Nut Packing Company. I do not think that either the Beech-Nut Gum or Mint package looks like either a scrap tobacco package or a cigarette package and I would think that anyone who would accept Beech-Nut Scrap Tobacco or Cigarettes in place of Beech-Nut Gum or Mints must be crazy.

I have never heard any remarks, inquiries or comments among my customers or others to the effect,

or which led me to believe, that they thought the Beech- 3307
Nut Scrap Tobacco or the Beech-Nut Ciagrettes to be the product of the Beech-Nut Packing Company.

I regard candy and gum as entirely different classes of merchandise from cigarettes and tobacco. I have never heard of a candy or gum concern that manufactured any tobacco products.

I sell Sunshine Cigarettes and Sunshine Biscuits, made by different companies

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of 3308
same, on the ground that the same is irrelevant and immaterial.

Cross Examination.

I have handled tobacco for years and have bought considerable quantities of the brands put out by the Lorillard Co. It takes all my time looking after my three stores. I have not had a great deal of opportunity to listen to what customers are saying. A customer hardly ever asks who makes the cigarette or tobacco he is buying.

I have made no effort to remember any inquiries, 3309
comments or remarks as to who makes the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes, or as to whether they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any.

310 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would have been impressed on my memory.

IT IS STIPULATED by and between the parties, through their respective counsel, that if L. M. DORSEY were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

311 *Direct Examination.*

My name is L. M. DORSEY. I am of legal age and am a druggist. I am the manager of the Peerless Drug Co. at 1134 Market St., Wheeling, W. Va. My store is a large one and I carry in addition to drugs such lines as stationery, toilet articles, perfumes, candy, and tobacco. I employ three clerks besides myself in this store.

I have handled Beech-Nut Cigarettes since they appeared on this market about a year and a half ago. I know that this cigarette is made by the Lorillard To-
312 bacco Company. I know that Lorillard's name is written on the front of the package.

I sell Beech-Nut Chewing gum and Beech-Nut mints, and I know that these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nuts Cigarettes to be a product of the Beech-Nut Packing Company. I do not think that the Beech-Nut Cigarette package looks like a gum package and I do not see how anyone could possibly accept Beech-Nut Cig-

arettes in place of Beech-Nut Gum. I regard cigarettes and chewing gum as entirely separate classes of products and I have never heard of a gum concern that manufactured any cigarettes. 3313

I sell Ideal Brushes and Ideal pens, made by different companies; Star Shaving Brushes and Star Batteries, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is irrelevant and immaterial. 3314

Cross Examination.

I wait on customers in all parts of my drug store. I have not paid much attention to what was going on at the tobacco counter or what people were saying about cigarettes. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Cigarettes, or as to whetther they are made by the same company that makes the Beech-Nut Gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I do not remember any. 3315

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, or such would would have been impressed on my memory.

3316

IN THE UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

BEECH-NUT PACKING COMPANY, Plaintiff,
vs.
P. LORILLARD COMPANY, Defendant.
In Equity No. 3056.

State of Illinois, } ss.:
County of Cook. }

3317

I, LURLINE BULLWINKEL, a notary public within and for the County of Cook and State of Illinois, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing stipulated depositions of:

Carl A. Paulsen	M. S. Winerlack
Frank Goldstein	O. H. Olsen
L. S. Jones	A. Thompson
Charlie Friedman	A. Christianson
D. H. Kropp	C. Biasetti
3318 D. A. Rogoff	J. W. Corey
A. Henderickx	E. S. Gulyear
Morris Gold	M. E. Parthemas
M. W. Masor	John M. Monteath
A. W. Schreibel	L. J. Wilson
C. H. Kappmeyer	Fred Rester
Wm. T. Vanvactor	J. R. Shedd
Harry Bernard	Sam Carnaggio
Jake Kurland	M. L. Moore
C. P. Burdick	S. A. Sabbagha
R. A. Carter	R. L. Burnett
J. M. McGowan	A. B. Tomlinson

Norman A. Lynch	J. F. Drake	3319
James A. Henderson	J. J. Bates	
T. A. Walker	R. L. Waldrop	
H. C. Chandler	C. W. Ridgway	
John Gross	P. R. Jameson	
D. W. Holbrook	John D. Ashmore	
Dean S. House	J. O. Sloman	
C. W. Kirby	T. J. Sayle	
H. L. Grant	F. C. Calder	
I H. Rider	Roy McDonald	
Allison James	W. E. Douglas	
F. A. Smithdeal	A. R. Smith	
E. W. Hanron	F. W. Geiss	3320
E. I. Fater	J. Blaufield	
C. F. Crawford	E. W. Spears	
Geo. H. Bell	L. D. Armstead	
M. O. Willis	C. E. McCarthy	
E. H. Higgins	R. V. Harp	
W. H. Martin	P. J. Rosswog	
F. Rogers	M. Borenstein	
Byrl Bullard	A. J. Fleischauer	
L. M. Lavin	A. Gorenstein	
Emmett Howard	Henry Rivlin	
J. E. Craven	Chas. F. Smith	
L. R. Bramblett	J. E. Detwiler	3321
Louis Evers	Louis Huck	
F. Odell	A. Petty	
H. A. Taylor	A. Kidner	
Charlie Bradshaw	Jos. H. Rosswog	
E. R. Turner	M. J. Farrell	
Wm. H. J. Meyer	Wm. C. Dicke	
W. P. Schaefer	S. Samuels	
J. G. Block	Max Seltzman	
H. G. Saam	A. W. Meyers	
J. E. Cobb	M. J. Murray	
H. R. Petty	I. L. Miller	
A. De King	Julius Weiss	

3322	W. B. Zulwood	L. C. Lambright
	Bertha Rosenfield	Frank Annendola
	J. L. Shinfessel	J. Gilbert
	Wm. Haler	Thomas P. Hayes
	Geo. Bashus	J. F. Reinacker
	Abe Bibenstein	E. B. Potts
	Morris Weintraub	W. J. Kaiser
	H. E. Vensel	E. Sayer
	Aleck Bolton	P. P. Naufel
	J. Elmer Freese	L. M. Dorsey

were taken on behalf of the defendant, P. Lorillard Company, pursuant to notice and by agreement of
3323 counsel before me at 38 South Dearborn Street, Chicago, Illinois, on Friday, February 16th, 1923; that said stipulated depositions of said witnesses were taken down in short-hand by me at the joint dictation of the counsel of the parties hereto, and thereafter reduced to typewriting by me; that the plaintiff, Beech-Nut Packing Company, was represented by its counsel, H. McClure Johnson, and that the defendant, P. Lorillard Company, was represented by its counsel Richard B. Cavanagh and Thomas L. Preston; that the aforesaid counsel for the respective parties agreed to stipulate the said testimony of the said witnesses; that the
3324 counsel of both parties read over and approved and agreed to the stipulated testimony after it was written out.

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

Witness my hand and seal as such notary public and Special Examiner at Chicago, Illinois, this 14th day of March, A. D., 1923.

LURLINE BULLWINKEL,
Notary Public.

My commission expires May 22nd, 1923.

(Seal)

3325

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,
vs.
P. Lorillard Co.,
Defendant.
} In Equity No. 3056.

Testimony taken on behalf of the P. Lorillard Co., Defendant, at Hartford, Connecticut, this 6th day of August, 1923, pursuant to agreement and before Herbert J. Krause, Notary Public, in and for the state of Connecticut, acting as Examiner by consent, formal notice of the production of these witnesses being waived;

3326

The following counsel being present:

CHARLES C. BULKLEY, ESQ., and H. MCCLURE JOHNSON, ESQ., on behalf of the plaintiff; and

RICHARD B. CAVANAGH, ESQ., and THOMAS L. PRESTON, ESQ., on behalf of the defendant.

3327

WILLIAM J. DOLAN, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Preston, as follows:

Q. 1. Will you please state your name, age, residence and occupation?

A. William J. Dolan, age 60, 27 Wethersfield Avenue, Hartford, Connecticut, occupation cigar dealer and cigar manufacturer.

328 Q. 2. How long have you been in the tobacco business?

A. Since 1876.

Q. 3. Have you been in the retail tobacco business all that time?

A. No, I have been in the wholesale tobacco business. That is, a wholesale cigar manufacturer for myself since 1903.

Q. 4. How long have you been in the retail part of the business?

A. I have been here eight and one-half years.

Q. 5. You have been eight and one-half years at this
329 location?

A. It will be nine years next December.

Q. 6. Mr. Dolan, do you sell Beech-Nut Scrap tobacco like the package I now show you? (Mr. Preston showing witness package of Beech Nut Scrap Tobacco).

A. I always sell it.

Q. 7. Can you say how long, approximately, you have been handling that product?

A. Since I have been here in the business; since there has been any call for Beech-Nut Scrap; since it was first put on the market, whenever that was.

330 Q. 8. Do you sell Beech-Nut cigarettes like this package I show you? (Mr. Preston showing witness package of Beech-Nut cigarettes.)

A. Yes, when I can get them.

Q. 9. Do you know what company manufactures Beech-Nut Scrap Tobacco and Beech-Nut cigarettes?

A. Yes, sure, the P. Lorillard Co.

Q. 10. Do you handle Beech-Nut Mints and Beech-Nut gum?

A. Yes.

Q. 11. Do you know what company manufactures those products?

A. Yes, the Beech-Nut Packing Company. 3331

Q. 12. Were you ever under the impression that Beech-Nut cigarettes or Beech-Nut Scrap tobacco were made by the Beech-Nut Packing Company?

A. No, never.

Q. 13. Did you ever hear any comments, inquiries or remarks from your customers or others which led you to believe, or to the effect that Beech-Nut Scrap tobacco and Beech-Nut cigarettes were made by the Beech-Nut Packing Company?

A. No.

Q. 14. Do you regard confections and gum as in any way related to tobacco products or do you regard them 3332
as an entirely separate class of products?

A. A side line I should call it. I keep it for accommodation. If a man smokes, usually he wants to chew some gum so I sell Beech-Nut gum.

Q. 15. Did you ever hear of a food products company that manufactured any tobacco products?

A. Not to my knowledge.

Q. 16. Did any Lorillard salesman who ever sold any Beech-Nut tobacco products to you ever make any statements that left you under the impression that there was any connection between the Beech-Nut Packing Company and the P. Lorillard Co.? 3333

A. No, never.

Q. 17. Did you ever see a package put up by the Beech-Nut Packing Company that looked like either a Beech-Nut cigarette package or a Beech-Nut Scrap Tobacco package?

A. No.

Q. 18. Mr. Dolan, would you just name off a few of the articles that you carry in your store in addition to tobacco and confections?

A. Why, yes, books, razor blades, fruit punch—

334 —grape, orange—and chewing gum and pipes, tricks and novelties, and dice.

Mr. Preston: I think that is all. Mr. Johnson would like to ask you a few questions.

(Direct Examination closed).

Cross Examination.

By Mr. Johnson:

X-Q. 1. What is the street address of your tobacco
335 store?

A. 22 Park Street.

X-Q. 2. Hartford, Connecticut?

A. Yes.

X-Q. 3. Have you a factory in connection with your business?

A. A cigar factory, yes.

X-Q. 14. Where is that?

A. Right in the rear.

X-Q. 5. About what proportion of your business is retail business?

A. All of it, I don't do any wholsale business.

336 K-Q. 6. What do you manufacture?

A. Cigars.

X-Q. 7. But you retail a large and various line of different kinds of things?

A. Yes, I manufacture different kinds of cigars. I quit going out soliciting trade for wholesale after Prohibition, the last three years or so.

X-Q. 7. Just roughly what is the size of the retail part of your shop without the factory; approximately the number of feet?

A. I should say it was about 15 feet by 10 feet.

X-Q. 8. How many employes do you have in the front of your shop where you sell to your customers? 3337

A. Two.

X-Q. 9. One beside yourself?

A. Yes.

X-Q. 10. How many are on duty at a time.

A. Sometimes two and sometimes one.

X-Q. 11. Are you in the business section of the city?

A. I think so. I think it is one of the busiest sections of the city.

X-Q. 12. About how many customers a day do you take care of?

A. I couldn't tell you. I have never kept track of that. I know my average receipts for the last year here were in the neighbourhood of $25,000. 3338

X-Q. 13. Could you make a pretty close approximation of the number of customers you have per day?

A. I couldn't attempt to, I couldn't attempt to. I could only tell you about the cash receipts. I have got detail enough without getting the number of customers.

X-Q. 14. Are you kept pretty busy waiting on customers during certain parts of the day?

A. Yes, between six and seven in the morning because this is a transfer point—between six and seven in the morning and between five and six in the afternoon the men are going to and coming from work, and I am busy waiting on customers and making change in the store. A man will get off a car and come in and he wants something quick so that he can get his next car, and I have got to get busy and do it quick. 3339

X-Q. 15. Do you do most of your business at those two rush hours of the day?

A. I do a certain business right through the day, transient business, and, of course, there isn't so much of that.

X-Q. 16. Have you much time to talk to customers?

A. "How do you do?"; "It is a nice day"; "How

3340 do you like the weather." If one person says: "It is hot" I say: "Yes," and if he says: "It is cold" I say the same thing. I haven't time for anything else.

X-Q. 17. Does a customer, as a rule, ask you who makes an article of tobacco or cigarettes that he is buying?

A. They don't care as long as the cigarettes suit them. They don't know if Liggett & Myers make Lucky Strikes or who makes Camels.

X-Q. 18. Would you say it is the brand of the cigarette or the tobacco that sells it?

A. I should say so, yes. If a man gets used to a
3341 kind, he calls for it.

X-Q. 19. Did I understand you to say on your direct examination that you have been in the tobacco business for something like forty-five years?

A. Since 1876 I have been in the cigar business. I started in it as a kid and I am a kid yet.

X-Q. 20. How long have you handled tobacco and cigarettes?

A. At odd times I have handled it. Steadily since I have been here, of course.

X-Q. 21. About how long is that?

A. Eight years—nine years next December the 12th.
3342 Then I was in business before further down on Maple Avenue for about two years where I had retail handling a year and a half or so, and then I have handled tobacco, of course, as a boy. In 1876 I worked in a cigar store just like this.

X-Q. 22. Have any people ever asked you—have either customers or anyone else ever asked you who made Beech-Nut Scrap Tobacco?

A. Not to my knowledge.

X-Q. 23. Or who made the Beech-Nut cigarettes?

A. No.

X-Q. 24. Has any one made any comment or inquiry as to whether Beech-Nut Scrap Tobacco or Beech-Nut

cigarettes were made by the same people that make the Beech-Nut gum and Peanut Butter, and so forth? 3343

A. No.

X-Q. 24. Have you made any attempt to remember any such comments or inquiries?

A. I never knew of anybody to ask the question. They come in and ask for Beech-Nut cigarettes and Beech-Nut Gum and Beech-Nut tobacco.

X-Q. 25. Did any one ask you to remember any such inquiries or comments?

A. No.

X-Q. 26. But you have been pretty busy waiting on the counter in your store, haven't you, during those hours. Otherwise it is just an in and out trade? 3344

A. Yes.

X-Q. 27. When you say you haven't heard any such inquiries or comments you mean, don't you, that you don't remember having heard any?

A. I never heard any to my knowledge.

X-Q. 28. How long have you been buying Lorillard tobacco products?

A. Ever since I have been in business. I sold Lorillard tobacco products when I was a kid.

X-Q. 29. Do you know the Lorillard salesmen in Hartford? 3345

A. Yes, sure I know them by hearsay.

X-Q. 30. How long have you known Mr. Hallisey?

A. Since he has been travelling for Lorlilard. He took Danny Shea's place, I believe.

X-Q. 31. Have you known the Lorillard salesmen for a good many years here?

A. Since I have been here. Of course I have been buying tobacco from them for eight or pretty nearly nine years.

Mr. Johnson: That is all.

(Cross Examination closed.)

3346 *Re-direct Examination.*

By Mr. Preston:

R-D Q. 1. Mr. Dolan, will you state whether or not, if you had heard any considerable number of remarks, inquiries or comments from your customers which indicated any confusion on their part between the Beech-Nut Packing Company and the P. Lorillard Co., you believe you would have remembered them or they would have been impressed on your mind—if you had heard a great many?

3347 A. If I had heard a great many, sure it would have been impressed on my mind. I don't remember having heard them at all.

R-D Q. 2. Do you sell Star tobacco?

A. Yes.

R-D. Q. 3. Do you sell Star Shaving Brushes?

A. Yes.

Mr. Johnson: The last two questions objected to as incompetent, immaterial and irrelevant.

R-D Q. 4. Will you state whether or not Star Shaving Brushes and Star Tobacco are made by the same company?

3348

A. I don't think so.

R-D Q. 5. Do you sell Saratoga Chips here too?

A. If a man comes in and asks for them, I know very well he isn't after potatoes. I give him what I have, Saratoga chips.

R-D Q. 6. Saratoga Chips is a tobacco brand?

A. Sure, I got it here. They are made by the United States Tobacco Co.

Mr. Johnson: This line of questioning is objected to as incompetent, immaterial and irrelevant. 3349

(Re-direct Examination closed).

(Deposition closed).

(Signature of witness waived.)

WILLIAM H. NORTON, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh, as follows: 3350

Q. 1. Please state your name, age, residence and occupation?

A. William H. Norton, 37, Norwich, Connecticut, salesman.

Q. 2. Salesman for what concern?

A. The P. Lorillard Co.

Q. 3. How long have you been connected with the P. Lorillard Co.?

A. It will be two years the 29th of this month.

Q. 4. What line of goods do you sell for P. Lorillard Co.? 3351

A. All their lines.

Q. 5. What are they?

A. B. L. tobacco, chewing tobacco, both dark and light; Mechanics' Delight, plug; Climax, plug; Red Cross, plug; and B. L. Cut Plug in packages; Union Leader, package; Union Leader, tins; Sensation, package; Beech-Nut Chewing Tobacco.

Q. 6. What cigarette brands do you sell?

A. Helmars, Murads, Moguls, Deities, and Beech-Nut.

Q. 7. What territory do you cover?

352 A. The counties of Tolland, New London and that other one north of New London—I can't think of the name of it—including New London, Willimantic, Norwhich, Danielson, Putnam and other towns within that county.

Q. 8. You work in Connecticut?

A. I work in Connecticut, not outside of it, all the State of Connecticut.

Q. 9. You have mentioned Beech-Nut Chewing tobacco and Beech-Nut cigarettes. How long have you been selling these Beech-Nut brands for the Lorillard Co.?

353 A. I started out the first four months—my first four months was entirely on Beech-Nut cigarettes. Commencing January 2nd, 1922, I have been selling all these other brands I have mentioned.

Q. 10. Did I understand you to say you have sold both the Beech-Nut Chewing tobacco or Scrap, and the Beech-Nut cigarettes in your territory?

A. Yes.

Q. 11. And you are still selling these brands?

A. Yes, sir.

Q. 12. Will you just tell us, in your own way, what practice you followed or what selling procedure or sell-
354 ing talk you used in selling the Beech-Nut brands and the other brands you have mentioned?

A. In entering a store, I always let them know who I represented, P. Lorillard Co., Inc., and looked at the shelves to see what brands they carry of ours and what brands I can put in that they haven't got, and these brands are the brands I have just mentioned here that I am selling and carry in my car, ready for delivery.

Q. 13. You say you carry them in your car, ready for delivery?

A. Yes, most of them.

Q. 14. Do you sell to the wholesalers?

A. No, the retailers. I buy from the wholesalers 3355
for cash and sell to the retailers for cash.

Q. 15. I don't know if I exactly follow your procedure in that respect. Do you call on the retail trade alone?

A. All retail, no wholesale.

Q. 16. When you call on a retailer to sell a brand, say of Beech-Nut Scrap tobacco, and he gives you an order, what do you do?

A. I go out to the team and deliver the tobacco to him and give him a receipt of the order on a P. Lorillard blank, and I sign my name on it, at the bottom of the receipt. That is a receipt for his cash less the dis- 3356
count.

Q. 17. Can you produce one of those blank receipts?

A. I have got one here now that I can give you that I am going to deliver now to a dealer down in New Haven for goods I have sold him. (Witness produced yellow paper slip from his pocket and handed it to Mr. Cavanagh.)

Q. 18. Whose name appears at the top of that receipt?

A. P. Lorillard Co., Inc., New York. That is at 119 West 40th Street.

Q.19. I understand that in your practice you always 3357
give a customer, a retailer, one of these receipts when he makes a purchase?

A. Positively. We have to send a copy of the sale to New York. We send the tissue paper copy and keep the white receipt we make out ourselves, as a record for the business of the day, which we have to report in on a big report book and send it in every night to New York, together with the tissue sheet, showing our signature on it and showing that we have made that sale, so as to make that matter clear.

3358 Q. 20. How about the customer. The customer gets one slip?

A. Yes, the yellow slip, and we keep the white slip.

Q. 21. And the third, the tissue sheet, you send to the New York office?

A. Yes.

Q. 22. In your visits to the trade, and bearing in mind particularly the Beech-Nut brand, both Scrap Tobacco and cigarettes, have you ever heard of any comments, inquiries or questions which would lead you to believe that the trade or members of it, thought that this Beech-Nut tobacco was made by the Beech-Nut
3359 Packing Company, the same people who make the gum and food products?

A. Never.

Q. 23. I understand you are in this territory, introducing the Beech-Nut cigarette?

A. Yes, sampling and selling and advertising.

Q. 24. What kind of advertising, what do you mean by advertising?

A. Posters with a picture of the box sticking out that we tacked up on buildings, and cards; some about three feet long and about nine inches wide, and some there and a half feet long and three and a half feet
3360 wide, and metal signs, yellow metal signs. We would put them on the windows of a store or in the stores or on the brick outside; wherever we could.

Q. 25. Wherever you were selling the goods?

A. Wherever I was selling the goods.

Q. 26. So far as you know, the name of what company appeared on the signs?

A. P. Lorillard Co., Inc.

Q. 27. I understand you started with P. Lorillard Co. about what date?

A. August 29th, it will be two years the 29th of this month.

Q. 28. 1921? 3361

A. Yes.

Q. 29. Under whose supervision were you and who was your district manager then?

A. Mr. William Roney.

Q. 30. Where was he located?

A. Boston. He is now the New England manager of the company.

Q. 31. Did you receive any instructions from Mr. Roney or any one your superior at that time as to how to introduce the Beech-Nut cigarette?

A. I was first sent to Worcester under Mr. F. E. Roster. He was the crew manager and that is the line of talk I 3362
was given by him, sometimes once a week and sometimes two or three times a week at the hotel where we were stopping and where we were sent down into the cellar every morning and given this talk together, on advertising. He instructed us, when we went into a place, to say we represented the P. Lorillard Co. and to represent the brand we carried because at that time we could take orders for any kind we wanted to, but we were introducing the Beech-Nut cigarette.

Q. 32. So you really were known as the missionary or introducer?

A. First I was sent out by Mr. Roster and in- 3363
structed to say that we represented the P. Lorillard Co. and that we were 161 or 162 years in business, and that we were selling and sampling and advertising Beech-Nut cigarettes, and we would have a package in our hand. He instructed me in that way, and I was three days with him, and I used that system for four months.

Q. 33. You never represented your products as made by the Beech-Nut Packing Company, did you?

3364 A. Never. I always said I represented the P. Lorillard Co. of New York, the cigarette manufacturers.

Mr. Cavanagh: I think that is all.

(Direct Examination Closed.)

Cross Examination.

By Mr. Bulkley:

X-Q. 1. I believe you said that Mr. Roney instructed you to exercise care in representing yourself to be a re-
3365 presentative of P. Lorillard Co., is that right?

A. Mr. Roney didn't.

X-Q. 2. Who was it?

A. I said Mr. Roster. Mr. Roney sent me out under Mr. Roster. He was the crew manager.

X-Q. 3. What did he say to you, if you remember, in substance, in connection with it?

A. He directed me to call at the store as a representative of P. Lorillard, Inc., advertising, sampling and selling the Beech-Nut cigarette, and at the same time mention our brands of tobacco, such as B. L. We could take orders for any of that stuff but only
3366 orders through the jobber, and the only thing we carried was the cigarette in our pack and that was to be opened up to show to the trade to let them see the cigarettes.

X-Q 4. Did he tell you, in connection with the sale of the Lorillard products of the Beech-Nut brand that you should exercise care to see to it that you always let the purchaser know that you represented the P. Lorillard Co.?

A. Yes, sir, positively.

X-Q. 5. Did he give you that caution more than once?

A. Sometimes three times a week. Not to me alone 3367
but to eighteen of us standing together.

X-Q. 6. Did you go together, you salesmen?

A. We would start out together. If we came to Hartford there would be eighteen of us together, that is, at the same hotel, but then we would get different districts to cover and then we would be separated in branches, three fellows going to a town like Manchester, three to Glastonbury, and so forth, and then we would be separated again and sent to different places, and then we would come to the next big city and be all together again, like Bridgeport or New Haven, and the same thing done, but we would always get our instruc- 3368
tions from this one man before starting out.

X-Q. 7. That is, Mr. Roster?

A. Mr. Roster, and he would work with us. He would work with me one day, perhaps he would be with me four days, but he would be with each fellow one day to see how he went and acted.

X-Q. 8. Did you ever hear of any questions being raised with reference to the use of the words "Beech-Nut" in connection with the sale of the products of the P. Lorillard Co. at any time?

A. You mean in the store?

X-Q. 9. Generally with reference to the question 3369
having been elicited with reference to the use of the words: "Beech-Nut"?

A. No, sir.

X-Q. 10. Mr. Roster never told you anything about that, did he?

A. No, sir.

X-Q. 11. But he was quite careful, I understand you to say, to tell you always, when you sold this Beech-Nut tobacco, to represent yourself as selling in behalf of the P. Lorillard Co.?

A. That is, the Beech-Nut cigarette, not the tobacco.

3370 X-Q. 12. Did he ever tell you to be careful in the sale of the Beech-Nut tobacco; to represent yourself as being a representative of the P. Lorillard Co.?

A. I was only working on the cigarettes so I could only act on *the cigarettes.*

X-Q. 13. You never sold any Beech-Nut tobacco?

A. I sold plenty of it but not at that time. Since January, 1922, I sold tons of it.

X-Q. 14. In connection with the sale of Beech-Nut tobacco manufactured by the P. Lorillard Co., did anyone your superior give you instructions with reference to the exercise of care in always representing yourself
3371 as being a representative of the P. Lorillard Co.?

A. No, I got no instructions then, but I used the same methods only in more brands than I am selling now, and in my district they always know me because my car has the Lorillard Co.'s name on it. It has "B. L." on one side, "Union Leader" on the other, and "Climax" on the rear.

X-Q. 15. Now then, I understand that although your superior did instruct you to be careful to represent to every one that you were a representative of the P. Lorillard Co. in the sale of the cigarettes, you never did receive any such instructions in connection with the
3372 sale of the tobacco at any time, is that right?

A. Not in this State. I came to this State under another manager and was sent from Boston as a man capable of going through the work here, and I used the same methods in working here as I did in Boston under the Beech-Nut crew.

X-Q. 16. That doesn't quite answer my question. It was simply as to whether or not you had been cautioned in the sale of the tobacco—Beech-Nut tobacco—never to represent yourself to be a representative of the Beech-Nut Company?

A. My first words were that I represented the Loril-

lard Co., Inc., New York. I never mentioned the Beech- 3373
Nut Company.

X-Q. 17. That is not quite the point as yet. I simply ask whether at any time you were instructed to exercise care in representing to every one that you are a representative of the P. Lorillard Co. in the sale of the Beech-Nut tobaccos. Were you ever so instructed by any of your superiors at any time?

A. I was instructed, as I testified, in Boston, time and again, to be sure and say that I represented the P. Lorillard Co., New York.

X-Q. 18. And that applied either to the sale of the tobacco or to the sale of the cigarettes? 3374

A. I was then selling cigarettes.

Mr. Bulkley: That is all.

Cross Examination (Cont'd.)

By Mr. Johnson:

X-Q. 19. How long have you been in the tobacco business altogether?

A. Two years the 29th of this month, the 29th of August.

X-Q. 20. You have been with the Lorillard Co. all 3375
your years of active experience?

A. Yes.

X-Q. 21. You haven't been with the Lorillard Co. previous to that in any other state?

A. No.

X-Q. 22. When was the Beech-Nut Scrap Tobacco put on in this Connecticut territory?

A. Long before I came here. I don't know how long. I came to Connecticut—just working in the State of Connecticut—I came here to work January 2nd, 1922.

3376 X-Q. 23. Where were you before that?

A. Going all through Massachusetts with a crew with the Beech-Nut cigarettes.

X-Q. 24. Working out of where?

A. Out of Boston. Boston is the home office and I travelled Massachusetts, Rhode Island and Connecticut.

X-Q. 25. When was the introductory campaign started on the Beech-Nut cigarette in this territory?

A. When was it started?

X-Q. 26. Yes?

A. It was before I went to work. I went to work in August. I don't know just when it started.

3377 X-Q. 27. In August of what year?

A. 1921.

X-Q. 28. Was the introductory campaign on the Beech-Nut cigarette in progress when you entered the employ of the P. Lorillard Co.?

A. Yes, sir.

X-Q. 29. How long did it continue after you came with them?

A. Until December 22nd, I think, of that year when we went on our vacations.

X-Q. 30. December 22nd, 1921?

A. Either the 21st or 22nd. Our vacation was less
3378 than a week before Christmas and the full week until the day after New Year's.

X-Q. 31. Did you work on the introductory campaign of the Beech-Nut cigarette from that time under the employ of the company—from the end of August until December 22nd, 1921?

A. Yes, sir.

X-Q. 32. How many men worked with you during that introductory campaign on Beech-Nut cigarettes?

A. From eighteen to twenty-one. Sometimes the crew was eighteen or nineteen or twenty or twenty-one. Never over twenty-one.

X-Q. 33. Did you know any of those men? 3379

A. Every one of them. I got acquainted with them working with them.

X-Q. 34. Were any of them new in the tobacco business the same as you were?

A. That I couldn't tell. Some of them were but I couldn't speak for all of them.

X-Q. 35. Some of them were new men and not familiar with the selling of tobacco at that time?

A. I couldn't tell anything about that. I don't know if they had sold tobacco or anything else. I simply know my own business.

X-Q. 36. Was this a special crew hired for this introductory campaign on Beech-Nut cigarettes? 3380

A. That I couldn't tell you. I myself tried for the job and was hired by Mr. Roney, and he sent me out on his crew. There was other work to be done but he put me on his crew.

X-Q. 37. Then all of these eighteen to twenty-one men you referred to concentrated on the sale of Beech-Nut cigarettes during that time from August to December of 1922—I mean 1921?

A. Yes

X-Q. 38. Did the membership of that crew change while you were with it? 3381

A. Sometimes a fellow got through with the company and sometimes some one else was hired.

X-Q. 39. Do you know of any of them being discharged because they were unsatisfactory?

A. That I couldn't tell you. They would not have let me know.

X-Q. 40. Some of them would disappear now and then and new men would appear?

A. In a couple of cases; I guess two or three. Not over three.

X-Q. 41. Did you hear any talk about any of them

3382 being cautioned as to their method of selling Beech-Nut cigarettes?

A. Every one of them. We would get it when we were all together in a hotel. For instance, while in a hotel in Bridgeport the head man had the fellows downstairs with samples of advertising sent from Boston and he would give us our instructions and advertising and sent us out to different districts to work and then we would come back at night and report.

X-Q. 42. At any of those times when you were receiving instructions from Mr. Roster, did he ever tell you there was any special reason for your being careful
3383 in your methods of selling Beech-Nut cigarettes?

A. No, no.

X-Q. 43. Did you ever receive any letters from your superiors in the P. Lorillard Co.—letter or circular—calling your attention to the fact that they wanted you to be careful to avoid having it appear that the Beech-Nut cigarettes were put out by any other company than your own?

A. No.

X-Q. 44. You never received any such letter or circular?

A. I received, just as I said, the instructions from
3384 this crew manager.

X-Q. 45. That was by word of mouth?

A. That was by word of mouth. We got those orders three times a week; every week we got those same instructions.

X-Q. 46. But you never received any written instructions to that effect?

A. No. Mr. Roster would work with me a day and he would stop and talk to me as I have already said.

X-Q. 47. Were there any competitions in that introductory campaign on Beech-Nut cigarettes to see what member of your crew would sell the most?

A. No, no competition. 3385

X-Q. 48. Or any bonuses offered for the largest sale of Beech-Nut cigarettes?

A. We got a bonus for the sales over the six months previous. If they were better we would get a certain percentage of it—if the sales increased.

X-Q. 49. You got a bonus on the increased sales?

A. We got a bonus on the increased sales.

X-Q. 50. Did you receive any written announcement of such a bonus?

A. Yes.

X-Q. 51. Was there any caution in connection with those offers as to the way you should put forward the 3386
Beech-Nut cigarettes?

A. No, sir.

X-Q. 52. Have you ever taken part in any other introductory campaign on tobacco or cigarettes?

A. Yes, sir.

X-Q. 53. What were they?

A. Comet tobacco. That was six months ago. I introduced it all through my district, putting it in seven out of ten stores introductory.

X-Q. 54. How did the first sales of Comet compare with the introductory sale of the Beech-Nut cigarettes?

A. Well, not so good. I might add that at the time 3387
of our campaign, when we started the cigarettes, we were offering the cigarettes 20 for 15 cents in competition with cigarettes like Camels or Lucky Strikes, 20 for 20 cents. Comet was 10 cents a package and all other packages were 10 cents so we didn't have a chance to introduce so much of the tobacco in my opinion.

X-Q. 55. Does the P. Lorillard Co. have its name on all of its products that you have sold?

A. As far as I know—I beg your pardon, not all of them. The Turkish cigarettes have "S. Anargyros" on them. We produce the brand.

3388 X-Q. 56. What are the names of some of those brands that bear that name. Just name them to me?

A. Moguls, Murads, Helmars, Egyptian Dieties, Anargyros Brush Ends—it is a hand made cigarette. There are others I am not familiar with that are sold, high priced cigarettes.

(Answer read by the stenographer at the request of Mr. Bulkley.)

X-Q. 57. Then the P. Lorillard Co. does not feature its name on those brands of cigarettes, is that right?

3389 A. Yes. I don't think it can. I don't know much about it but I think that is the agreement. That name was to be on all the brands of Turkish and Egyptian cigarettes.

X-Q. 58. Are those brands you have named an important group of the Lorillard Products?

A. Very important.

X-Q. 59. Do they have large sales?

A. Very large.

X-Q. 60. In your experience, Mr. Norton, in selling tobacco and cigarettes, would you say that it is the brand name that sells the article?

3390 A. Well, which article?

X-Q. 61. Does the consumer ask for a certain brand of cigarettes or tobacco?

A. Well, I have gone by a store with my car, driving fairly fast, and have been hollered at to stop and I came back and had them ask me if I had a couple dozen packages of Beech-Nut Chewing Tobacco in my car and I said: "Yes" and opened it up—I always carry two gross of it with me, and I opened it up and delivered it, and gave them such a receipt as I showed you.

X-Q. 62. Do you know personally a great many of your customers—dealers?

A. I do now. They were all new to me when I took 3391
that district.

X-Q. 63. When a man would stop you that way, he would know you were the Lorillard man that was selling those things?

A. Yes, by the car, he could tell by the car. They all know—the dealers all know our brands; especially in the district I work in our brands are leading sellers over all. That is, Beech-Nut Chewing, Union Leader, B. L. in the package, Sensation, Mechanics' Delight. Those are all leaders up that way.

X-Q. 64. Have you ever made it a practice to speak of your Beech-Nut line of tobaccos and cigarettes? 3392

A. A practice?

X-Q. 65. Yes.

A. Very much, very much. I have introduced the Beech-Nut tobacco in many places in my district where I sell.

X-Q. 66. You often speak of the Beech-Nut cigarettes and tobacco as your Beech-Nut line?

A. Positively. I start in first and say I am a representative of the P. Lorillard Co., New York. I carry a book of pictures of all of these articles and I open the book and show the man. I have got the book in my bag at the hotel. That is simply to show and every one of 3393
them has "P. Lorillard Co." on it.

X-Q. 67. Did you ever place Beech-Nut cigarettes or Beech-Nut Scrap Tobacco advertising or packages in windows of dealers where you were placing the goods?

A. Hundreds of them. I spent two whole months under the direction of our district manager just on window displays.

X-Q. 68. Did you ever place any in the same window with advertising of the Beech-Nut Packing Company products, such as chewing gum?

3394 A. I wouldn't, as a rule, place any in the window unless I got the entire window.

X-Q. 68. Did you ever place any alongside of a window containing Beech-Nut chewing gum or Beech-Nut Mints or any other of the Beech-Nut Packing Company products?

A. No, no. I made a strong specialty of saloons and generally got empty windows. You could get them easy.

X-Q. 69. Were you ever cautioned by your superiors to be careful not to place any of your Beech-Nut cigarette or Scrap Tobacco advertising, or packages, in
3395 windows alongside the products of the Beech-Nut Packing Company?

A. No, we were instructed not to put our advertising in the window if another tobacco company had a display there; either to get a window for our sole product or not at all.

X-Q. 70. Would you frequently sell these Beech-Nut cigarettes and scrap tobacco to a dealer who was also handling Beech-Nut Packing Company products, such as chewing gum, hard candies, peanut butter, and so forth?

A. I never paid any attention to notice that.

3396 X-Q. 71. In your district wouldn't you sell frequently to small general stores?

A. Oh yes.

X-Q. 72. And confectionery stores?

A. Yes.

X-Q. 73. Did you ever notice Beech-Nut Mints, chewing gum, and such, in the same store where you were making your sales?

A. I seen the gum in lots of stores but I don't even know now what Beech-Nut Mint means. I have bought the gum.

X-Q. 74. Referring to the order slip which you have described in your direct examination, one of which you

handed as a receipt to the customer, one of which you send to the jobber as you have described— 3397

A. I beg your pardon, I don't send one to the jobber.

X-Q. 75. Whatever your method was that you have described, have you seen similar order blanks and receipts for orders used by jobbers, with the jobber's name at the top?

A. No. They don't leave a slip with the retailer. They simply take the man's order because they can take it for all kinds of tobacco of different companies and they then bring that back to their concern.

X-Q. 76. Isn't it true that the jobber's salesmen use order slips of the general character similar to these of the Lorillard Co's,with the jobbers' name at the top? 3398

A. Yes, with the jobber's name at the top.

Mr. Johnson: That is all.

(Cross Examination Closed.)

Re-direct Examination.

By Mr. Cavanagh:

R-D Q. 1. This Comet tobacco you have referred to, what kind of a tobacco is that?

A. Cut plug. 3399

R-D Q. 2. What is it used for, how is it used?

A. Smoking. It is a plug cut in the package.

R-D Q. 3. But it is not a cigarette?

A. No, it is a tobacco, the same as our Union Leader and B. L. Tobacco.

R-D Q. 4. Would you hand me that box of cigarettes? (Witness handed Mr. Cavanagh package of Murad cigarettes) Would you look on that package of Murad cigarettes and see if Lorillard's name is on there?

A. Yes, "Capital stock owned by P. Lorillard Co."

3400 R-D Q. 5. That is one of the Anargyros brands?

A. Yes.

R-D Q. 6. This bonus to which you referred in your cross examination, did that usually apply to all goods you sold during that period?

A. Just Beech-Nut cigarettes.

R-D Q. 7. For what period was that?

A. Well, I don't know. I came in August and it ended in December. I don't know how long it was on but I was notified of it and got my little share the following March, but it was a percentage, as I understand it now. I can't remember it exactly.

3401 R-D Q. 8. Was that during the campaign?

A. Yes, just on Beech-Nut cigarettes.

R-D Q. 9. These instructions which you say you received at various times from the district manager or your superior, Mr. Roster, did those instructions apply to the other tobaccos too as well as the Beech-Nut?

A. Certainly. He advised us to always mention our brands, to always mention the Lorillard brand. I would take orders sometimes starting with Beech-Nut cigarettes and also include Helmars and Murads and Moguls through the jobber.

3402 Mr. Cavanagh: I think that is all.

(Re-direct Examination Closed.)

Re-cross Examination.

By Mr. Johnson:

R-X Q. 1. Referring to the box of Murad cigarettes which you have in your hand and from which you have just read the words: "Capital stock owned by P. Lorillard Co.", will you please tell me the relative size of the name "S. Anargyros" and the words you read: "Capital stock owned by P. Lorillard Co." on that box?

A. I should think that the words: "Capital stock owned by P. Lorillard Co." were about one-fourth the size of the word: "S. Anargyros." 3403

R-X Q. 2. Which name would you say was featured on that box?

A. S. Anargyros.

R-X Q. 3. Did you ever notice those words: "Capital stock owned by P. Lorillard Co." before on a Murad box?

A. No, I didn't.

R-X Q. 4. Have you sold Murads?

A. Yes, I have sold Murads.

R-X Q. 5. Have you sold many of them? 3404

A. Well, not many of Murads. In a place like this they go better but in my district there isn't much call for them. I never carry Murads in my car.

R-X Q. 6. Do you carry some of the other Anargyros brands?

A. Helmars.

R-X. Q. 7. Are those words on the Helmar box?

A. I couldn't tell you.

R-X Q. 8. You never noticed?

A. No, I never noticed.

R-X Q. 9. Have you sold many of the Helmar cigarettes? 3405

A. Quite a few.

R-X Q. 10. A great many thousands?

A. Well, yes.

R-X Q. 11. Through what period of time, approximately?

A. A year and a half, or a year and eight months.

Mr. Johnson: That is all.

Mr. Cavanagh: That is all.

(Re-cross Examination closed.)

(Deposition closed.)

(Signature of witness waived.)

3406

JOHN RACOW, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh, as follows:

Q. 1. What is your name, age, residence and occupation?

A. John Racow, will be 28 next month, residence 29 Sylvan Avenue, New Haven, Connecticut, salesman for the P. Lorillard Co.

Q. 2. How long have you been a salesman for the P.
3407 Lorillard Co.?

A. Just a trifle over three years.

Q. 3. What kind of goods do you sell for P. Lorillard Co.?

A. Tobacco and cigarettes.

Q. 4. Will you name some of the brands that you sell?

A. Level Head, smoking and chewing; Mechanics' Delight, smoking and chewing; Eureka, chewing; Old Fashioned, chewing; Climax, chewing; Red Cross, chewing; B. L., chewing; Murad cigarettes; Helmar cigarettes; Egyptian Dieties cigarettes; Turkish Trophies,
3408 cigarettes; Beech-Nut cigarettes; Beech-Nut chewing tobacco; Sensation, smoking; Union Leader, smoking; B. L., smoking; Just Suits, smoking; Climax, chewing.

Q. 5. What territory do you cover?

A. The state of Connecticut, the head of New Haven County. Then we work in crew work around the State.

Q. 6. How long have you been working in the State of Connecticut territory?

A. In the State of Connecticut for P. Lorillard?

Q. 7. For P. Lorillard Co.?

A. Just a trifle over thre years.

Q. 8. You have referred to Beech-Nut chewing

tobacco and Beech-Nut cigarettes. How long have you been selling these brands? 3409

A. The Beech-Nut cigarettes I have been selling since around February or March, 1921, when they first came on the market. Beech-Nut chewing tobacco I have been selling since I have been in the employ of the P. Lorillard Co.

Q. 9. Is the Beech-Nut chewing tobacco known as a scrap tobacco too?

A. It is.

Q. 10. Were you on any of the missionary or introducing crews that put the Beech-Nut cigarette in this territory? 3410

A. I was. I was on the tobacco crew in this State when the Beech-Nut cigarette first came out. I started in New Haven County, in the town of New Haven.

Q. 11. When was that?

A. Either February or March of 1921.

Q. 12. What practice or procedure did you follow in introducing the Beech-Nut cigarette to the trade. Just tell us in your own words.

A. I would go into a store and introduce myself as Mr. Racow, representing the P. Lorillard Tobacco Co. and in quite a few of the stores they knew I sold tobacco. I would come in and shake hands with them and I would say: "I have got something good now. We are putting out a new cigarette, the Beech-Nut cigarette." I told that to people I knew and some I didn't know. 3411

Q. 13. Did anybody give you instructions to so present this brand or follow this procedure?

A. Mr. I. J. Perlowski, who was then the district manager. He told me the exact words I have just spoken of.

Q. 14. Was he your superior?

A. He was my superior. I took orders from him.

3412 Q. 15. Were there any other persons working on this crew at the same time, introducing this brand?

A Not at the same time. They had a different county. I was introducing the cigarettes right around New Haven.

Q. 16. In introducing the Beech-Nut cigarette to the trade, did you visit both the wholesale and retail trade or which one?

A. The retail trade.

Q. 17. Did you put up any advertising matter in connection with it. Just describe that?

A. I would go in a store and they would give me
3413 permission to put up a poster and I would put it up so that they could see it.

Q. 18. Where did you get this advertising?

A. From our warehouse in the morning before I left.

Q. 19. And if a customer gave you an order for Beech-Nut cigarettes, what would you do. Just describe the procedure you followed in having that order executed?

A. If I was selling for cash, I would sell it to him off the car; and make out the receipt slip "Paid" and give him a receipt. If not, I would make out an order, have them sign it, leave them a duplicate and bring a
3414 duplicate into the office.

Q. 20. If you sold him off the car and took cash for it, just state what the procedure was so far as the receipts went?

A. I turned in a slip to my superior officer of the cash sale.

Q. 21. Would you leave anything with the customers?

A. I would leave a duplicate with the customer as I told you before.

Q. 22. Do you know if that receipt had any name on it to indicate where it came from?

A. On every receipt there is P. Lorillard's name, 3415
right in our order book, and it would have my name down at the bottom, paid.

Q. 23. At the same time you introduced the Beech-Nut cigarette, were you selling any other brand of Lorillard's?

A. I was. I was selling all the Lorillard tobacco and cigarettes too.

Q. 24. So that you weren't working on the Beech-Nut cigarettes alone?

A. We were featuring Beech-Nut cigarettes. It was one of our leaders. We have always got three leaders.

Q. 25. But you also took orders for the other Lorillard tobaccos too? 3416

A. Yes, I took orders for the other Lorillard tobacco too.

Q. 26. In your visits to the trade, did you ever hear any comments, inquiries or remarks that would lead you to believe that people thought that Beech-Nut cigarettes were made by the same people that made the chewing gum and food products?

A. In my businss not one of them. The fellows I spoke to were tobacco dealers and none of them ever questioned me or asked me who made them, but if they had I would have told them that they were made by the 3417
P. Lorillard Co. and that I understood P. Lorillard manufactured them.

Q. 27. In this introductory campaign did you exhibit any samples to the public or what did you do in that respect?

A. We did. We sampled the cigarettes to different people. We would stand in a store and see a man smoking a cigarette. We would go up to him and talk to him and tell him we were representing P. Lorillard Co. and they were putting out a new cigarette and

3418 would like to have them try it, and we would give him some.

Mr. Cavanagh: I think that is all.
(Direct Examination closed.)

Cross Examination.

By Mr. Johnson:

X-Q. 1. How long have you been in the tobacco business altogether?

A. Altogether about five years.

3419 X-Q. 2. How much of that time have you been with the P. Lorillard Co.?

A. A trifle over three years.

X-Q. 3. Who were you with before that?

A. Larus & Brother, Richmond, Virginia.

X-Q. 4. Where?

A. Richmond, Virginia, was the home office.

X-Q. 5. What territory did you cover for that company?

A. Connecticut.

X-Q. 6. Did I understand you to say that you took 3420 part in the introductory campaign on the Beech-Nut cigarettes?

A. I did.

X-Q. 7. What was the duration of that campaign?

A. What do you mean, duration?

X-Q. 8. When did it begin and when did it end?

A. Well, I have been selling ever since. Since they have started.

X-Q. 9. I mean the special introductory campaign.

A. That I can't just remember.

X-Q. 10. When did you start the featuring of them?

A. We started the featuring of them in February or

March of 1921. I just can't think what time of the 3421
month it was.

X-Q. 11. How long did you continue featuring the Beech-Nut cigarette from that time on?

A. From that time on, right along. That I can't—I just don't know how long.

X-Q. 12. During the time you were introducing Beech-Nut cigarettes, did you, at any time, work with a crew?

A. Not at all.

X-Q. 13. Were there crews featuring Beech-Nut cigarettes in the same territory that you were working in?

A. There were. 3422

X-Q. 14. How many such crews, do you know?

A. One.

X-Q. 15. Who was the head of that?

A. Mr. Roney, I believe.

X-Q. 16. How many were—were you familiar with the men in that crew?

A. Well, I knew a few of them.

X-Q. 17. How many were in that crew?

A. That I just don't know. I never worked with them. I just worked myself.

X-Q. 18. Were most of them old Lorillard men?

A. At that time I didn't know if they were old Lorillard men or not, but they all worked for P. Lorillard at 3423
that time.

X-Q. 19. Were any of them new employees at that time?

A. That I don't know—if they were new or old.

X-Q. 20. Did you visit a great many customers in your territory during that campaign?

A. I visited nearly all of them.

X-Q. 21. What character of stores are they?

A. Any store that keeps tobacco or cigarettes.

X-Q. 22. You mean retail dealers?

3424 A. Yes, retail dealers.

X-Q. 23. Did any of these customers of yours make any comment on the fact that you were putting out a cigarette called Beech-Nut?

A. They knew we were selling cigarettes. I just told them it was a new one we were putting on the market.

X-Q. 24. When did you enter the employ of the Lorillard Co., what month in what year?

A. I don't just remember what month. I can't remember what month. I don't know if it was July.

X-Q. 25. 1920?

3425 A. 1920.

X-Q. 26. And this campaign began in what year?

A. 1921.

X-Q. 27. In February or March?

A. In February or March of 1921.

X-Q. 28. Had you gotten pretty well acquainted with your customers during that time?

A. I knew them pretty well because I had worked around the trade before.

X-Q. 29. By the time this introductory campaign began did most of your customers know you and know you were a Lorillard man?

3426 A. Yes.

X-Q. 30. Did you know of Beech-Nut chewing gum and Beech-Nut Mints and Beech-Nut Peanut Butter and such products of the Beech-Nut Packing Company at that time?

A. I had heard of them.

X-Q. 31. Did any one outside of the dealers—your customers—did you ever hear anyone comment on the fact that you were using the name Beech-Nut for cigarettes?

A. Not at the time; they didn't speak to me.

X-Q. 32. Did you know of such comment being made?

A. None at all. 3427

X-Q. 33. Were any of your customers that you placed Beech-Nut cigarettes with at that time, handling also Beech-Nut Mints and chewing gum?

A. That I don't know because I didn't worry about any other products, only tobacco.

X-Q. 34. Did you sell to small general stores and confectionery stores?

A. Any store that sold tobacco I sold to, small stores or large ones.

X-Q. 35. Didn't you ever see Beech-Nut chewing gum or Beech-Nut Mints or Beech-Nut hard candies in any of these stores? 3428

A. I seen them in the stores.

X-Q. 36. In the same stores you were selling Beech-Nut cigarettes?

A. Yes, but I never took any notice of them; how they had them. I seen them on the case once at a sale.

X-Q. 37. Then you, knowing these dealers—these customers—as well as you did, and with them handling other Beech-Nut products, as you think about it now, do you mean to say you never heard any comment on the fact that the P. Lorillard Co. was using the Beech-Nut name on cigarettes?

A. No, none whatsoever. I knew we were putting 3429 out Beech-Nut chewing tobacco at the time and Beech-Nut cigarettes had the same brand and every package had P. Lorillard's name on it and I would show the dealer that.

X-Q. 38. Did you ever make a practice of referring to Beech-Nut Scrap Tobacco and Beech-Nut cigarettes as your Beech-Nut line?

A. I don't just grasp what you mean.

X-Q. 39. Did you ever refer to Beech-Nut chewing tobacco and Beech-Nut cigarettes as the Beech-Nut line?

3430 A. No Beech-Nut line at all. It is a P. Lorillard line. That is just the name. P. Lorillard don't manufacture nothing in the Beech-Nut line at all. Beech-Nut chewing tobacco and Beech-Nut cigarettes are of P. Lorillard manufacture.

X-Q. 40. What was the name of your chief?

A. At that time?

X-Q. 41. At that time, yes.

A. Mr. I. J. Perlowski.

X-Q. 42. Did he instruct you to be careful not to let it appear that the Beech-Nut cigarettes were the product of any other company but your own?

3431 A. No. All he did was to tell us how to talk to a customer and how to approach him on the Beech-Nut cigarettes.

X-Q. 43. Did he ever instruct you not to let it appear that they were a product of the Beech-Nut Gum people?

A. No.

X-Q. 44. Did you ever receive any written instructions to that effect?

A. No, I don't think so. I don't know. No. I don't think they did. I can't remember that.

X-Q. 45. Did you place any advertising matter of Beech-Nut tobacco or Beech-Nut cigarettes in windows?

3432 A. No.

X-Q. 46. Did you place them in the stores of your customers?

A. Well, I would just stick them on the wall; just posters, that is all.

X-Q. 47. Were you ever cautioned by Mr. Perlowski or any one in the Lorillard Co. not to place those side by side with the Beech-Nut Packing Company's in the same store?

A. I never did it.

X-Q. 48. Did you ever receive any instructions in regard to it or cautioning you not to do it?

A. I don't remember whether I did or not. 3433

X-Q. 49. Have you taken part in any other introductory campaign in any other brands?

A. Yes, I have.

X-Q. 50. What were they?

A. Comet tobacco, a smoking tobacco.

X-Q. 51. Any other?

A. That is about all I can think of.

X-Q. 52. How did it take at the start as compared with the Beech-Nut cigarettes?

A. It took very well at the start.

X-Q. 53. How did it compare at the start with Beech-Nut cigarettes? 3434

A. In quantity I don't know but in distribution just as good. That is what we were after—distribution.

X-Q. 54. Do you know if the P. Lorillard Co. features its name on all its products?

A. Every one.

X-Q. 55. Did you say you handled the Turkish brands of cigarettes?

A. I did; Turkish Trophies, Murads, Helmars, Egyptian Dieties, Moguls.

X-Q. 56. What name appears as the maker on those brands?

A. S. Anargyros, P. Lorillard Co., Successor. 3435

X-Q. 57. Have you got a package of any one of those brands with you? (Witness produces a package of Murad cigarettes from his pocket.)

X-Q. 58. Please read the name of the maker as it appears on that Murad package?

A. S. Anargyros, Capitol stock owned by P. Lorillard Co.

X-Q. 59. What is the relative size of the words: "S. Anargyros" and the words: "Capital stock owned by P. Lorillard Co."?

A. There is a difference in size.

3436 X-Q. 60. What is the larger?

A. S. Anargyros.

X-Q. 61. How much larger?

A. About quarter the size.

X-Q. 62. With the words: "Capital stock owned by P. Lorillard Co." about one-quarter of the size of "S. Anargyros" on that package, would you say that the name of the P. Lorillard Co. was featured on that package as the manufacturer?

A. I would.

X-Q. 63. Yet you say that "S. Anargyros" is four times the size of the other words?

3437 A. It is.

X-Q. 64. Will you give me the package (Witness hands package of Murad cigarettes to Mr. Johnson). I hold the package about six feet from you. Can you read any words on there except "S. Anargyros" in that group that you read?

A. That is a question that is hard to answer because I know just what is on that package.

X-Q. 65. Can you read anything beside "S. Anargyros"?

A. I can read it pretty fair away from here. I can read it a little.

3438 X-Q. 66. A little?

A. Yes.

X-Q. 67. What appears as the name of the maker on the Egyptian Dieties?

A. That I can't just remember now.

X-Q. 68. What appears as the name of the maker on Helmars?

A. Oh, I know there is P. Lorillard on every package and that is the one I work for, P. Lorillard. I know they put the name on every package.

X-Q. 69. You are sure of that?

A. Almost positive.

X-Q. 70. You don't know that the name "P. Lorillard Co." is omitted from some of the packages, such as Helmars? 3439

A. I don't know but I am almost positive.

Mr. Johnson: That is all.
(Cross Examination Closed).

Re-direct Examination.

R-D Q. 1. In the Comet campaign, did you use the same line of introductory talk to the trade that you used in connection with the Beech-Nut cigarettes?

A. The same identical talk. I went to the trade the same way, introducing it the same. 3440

Mr. Cavanagh: That is all.
(Re-direct Examination Closed)
(Deposition closed)
(Signature of Witness waived)

PHILIP GERARDI, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Preston, as follows: 3441

Q. 1. Will you please state your name, age, residence and occupation?

A. Philip Gerardi, 18 years old, 288 Windsor Avenue, Hartford, Conn., general manager here—clerk.

Q. 2. Would you name some of the classes of products that you sell here in your store?

A. Fruits, canned goods—do you want me to give the names?

Q. 3. No, just the general classes. Canned goods—?

A. Fruits, syrups, cigars, papers, pipes, candy.

3442 Q. 4. Mr. Gerardi, do you sell Beech-Nut Scrap tobacco here like the package I show you (Mr. Preston showing the witness package of Beech-Nut Scrap tobacco)?

A. Yes.

Q. 5. Do you sell Beech-Nut cigarettes?

A. Yes.

Q. 6. How long have you sold those products?

A. I have sold those products about four years, and sold these when they come out; Beech-Nut chewing tobacco about four years.

Q. 7. And the Beech-Nut cigarettes?

3443 A. I don't know how long they have been out—ever since they came out.

Q. 8. D you know what company makes those products?

A. P. Lorillard Co.

Q. 9. Do you sell Beech-Nut Peanut Butter here?

A. Yes, we do.

Q. 10. Do you sell Beech-Nut chewing gum?

A. Yes.

Q. 11. Do you know what company manufactures those products?

A. The Beech-Nut Packing Company.

3444 Q. 12. Were you ever under the impression that Beech-Nut chewing tobacco or Beech-Nut cigarettes were made by the same company that makes the Beech-Nut Peanut Butter and the Beech-Nut chewing gum?

A. No.

Q. 13. Did you ever hear any remarks, inquiries or comments among your customers or others to the effect or which led you to believe that they had the impression that Beech-Nut cigarettes were made by the Beech-Nut Packing Company?

A. No.

Q. 14. Mr. Gerardi, will you state whether or not you

regard this tobacco and cigarettes as being in the same or different class of products from food products? 3445

A. Different class.

Q. 15. About how many customers a day do you have in your store here?

A. About—I don't know—about nine hundred or more.

Q. 16. Do you sell Blue Ribbon Mayonnaise?

A. Yes.

Q. 17. Do you sell Blue Ribbon Potato Chips?

A. Yes.

Mr. Johnson: I object to the last two questions and answers as incompetent, immaterial and irrelevant. It is stipulated that this objection will apply to all questions and answers along this same line. 3446

Q. 18. Do you sell Blue Ribbon Fig Brownies?

A. We try to awfully hard.

Q. 19. Do you know, sir, whether Blue Ribbon Potato Chips are put up by the same company that puts up the Blue Ribbon Fig Brownies?

A. No.

Q. 20. You don't know, or is it a different company?

A. That is a different company. They are made by W. A. Walker up in Albany. 3447

Q. 21. Do you handle Blue Ribbon Tobacco?

A. No.

Q. 22. Do you sell Camel cigarettes here?

A. Yes.

Q. 23. Do you sell Kamol Candied Virginia Peanuts?

A. Yes.

Q. 24. Are these products put up by the same company?

3448 A. Not that I know of. It is put up by the Kamols Corporation and the cigarettes are put up by Reynolds.

Mr. Preston: That is all.
(Direct Examination closed.)

Cross Examination.

By Mr. Johnson:

X-Q. 1. Mr. Gerardi, what kind of a store is this?

A. A fruit and tobacco store, and we sell canned goods.

3449 X-Q. 2. Would you call it a grocery and delicatessen store?

A. No, we don't keep delicatessen. I would call it a fruit store and tobacco store.

X-Q. 3. What is the name of this place?

A. P. A. Martocci.

X-Q. 4. And the street address?

A. 1157 Main Street, Hartford, Conn.

X-Q. 5. How many employes are there?

A. One, the owner and I.

X-Q. 6. Are you both on duty much of the time?

A. Most of the time. I am on most all the time.

3450 X-Q. 7. You mean one of you is always on duty?

A. No, two sometimes.

X-Q. 8. Two are usually on duty?

A. Yes.

X-Q. 9. When you first saw this Beech-Nut chewing tobacco, who did you think was putting it out?

A. I didn't know who put it up.

X-Q. 10. Were you handling at that time Beech-Nut Peanut Butter or Beech-Nut Gum or any of the Beech-Nut candies?

A. Just the Beech-Nut gum I had at that time.

X-Q. 11. Did you get the idea, when you saw that

Beech-Nut tobacco package, that it might be put up by 3451
the Beech-Nut Packing Company?

A. I didn't stop to think about that. I just looked at the package.

X-Q. 12. When you first saw the package of Beech-Nut cigarettes, who did you think was putting it out?

A. The Lorillard Tobacco Co. I didn't know if it was Lorillard but I know it was some tobacco company.

X-Q. 13. Were you keeping some of the Beech-Nut Packing Company products at that same time?

A. We had peanut butter.

X-Q. 14. Have you handled many of the Lorillard 3452
tobacco products while you have been in business?

A. Quite a few.

X-Q. 15. What were some of them?

A. Sensation tobacco, B. L., Comet, Climax.

X-Q. 16. How long have you been in this store?

A. About four years.

X-Q. 17. Have you been handling Beech-Nut chewing tobacco all that time?

A. Yes.

X-Q. 18. Have you known the Lorillard salesmen all that time?

A. No. 3453

X-Q. 19. Do you know him now?

A. By sight. He comes in here every so often.

X-Q. 20. Have you known that he is the Lorillard salesman whenever he comes in?

A. Yes.

X-Q. 21. From whom did you buy the Beech-Nut chewing tobacco the first time?

A. It is impossible to tell. I don't know. That is some job.

X-Q. 22. From whom did you buy the Beech-Nut cigarettes the first time?

3454 A. From a jobber or through the salesman.

X-Q. 23. What is the name of the Lorillard salesman that comes into your store?

A. Mr. Hallisey.

X-Q. 24. How long has he been coming in here?

A. About a year.

X-Q. 25. Did you know the Lorillard salesman before him?

A. No.

X-Q. 26. Are you kept pretty busy waiting on customers in the store?

A. Sure, sometimes.

3455 X-Q. 27. Do you have very much time to talk to your customers?

A. Sure.

X-Q. 28. Do you talk to customers as a rule?

A. Yes.

X-Q. 29. When a customer comes in to buy cigarettes or tobacco, does he often ask you who makes it?

A. No.

X-Q. 30. Does he usually ask for his brand?

A. Why, first they did and now all our customers don't ask for that. I know just what they want.

X-Q. 31. When a customer comes in and you don't 3456 know what he wants, as soon as you see him, what does he usually ask you?

A. Some ask me for tobacco and some ask me for just Beech-Nut, and I ask them whether they want Beech-Nut tobacco or Beech-Nut gum. Some say: "Beech-Nut Chewing."

X-Q. 32. Does a customer usually ask for Camels or Lucky Strikes, or whatever the name of the brand is?

A. Yes.

X-Q. 33. Did you ever have a customer ask you for Camels made by the Reynolds Company?

A. No.

X-Q. 34. Did you ever have a customer ask you for any tobacco or cigarette package made by any certain company?

A. Once or twice somebody asked me for American Tobacco Company tobacco. That is all. They didn't tell me what brand they wanted.

X-Q. 35. Would you say that these tobacco and cigarettes sell by the brand. Is it the brand name that sells them?

A. It is according to reputation, I think. No, I don't know about the name. What they go by, that is all people know.

X-Q. 36. What do they ask for, the name of the brand or the maker?

A. The name.

X-Q. 36. Which?

A. The name of the brand.

X-Q. 37. Have you ever heard of any one making any comments or inquiries as to whether the Beech-Nut Scrap Tobacco or the Beech-Nut cigarettes were made by the same company that makes the Beech-Nut Peanut Butter or the chewing gum?

A. No, not that I know of. I don't remember of anybody asking me that.

X-Q. 38. Can you remember one such remark by any one in your presence?

A. I don't recall any.

X-Q. 39. Have you sold much Beech-Nut chewing tobacco?

A. Yes, quite a little.

X-Q. 40. Have you sold many Beech-Nut cigarettes?

A. Not so many. I always have them on hand.

X-Q. 41. You never heard one such remark or comment as to whether they were made by the same people that make the Beech-Nut gum?

A. No.

3460 X-Q. 42. When you say you never heard any such remarks, comments or inquiries, you mean you don't remember?

A. I don't think I ever heard any. I can't recall any.

X-Q. 43. You don't remember?

A. No, I don't remember hearing any.

Mr. Johnson: That is all.

(Cross Examination Closed.)

Re-direct Examination.

3461 By Mr. Preston:

R-D. Q. 1. Do you sell Pall Mall cigarettes?

A. Yes.

R-D Q. 2. Do you sell Pall Mall Candy?

A. Yes, we do.

Mr. Johnson: That is objected to as incompetent, immaterial and irrelevant.

Mr. Preston: That is all.

(Re-direct Examination Closed.)

(Deposition Closed.)

3462 (Signature of witness waived.)

BENJAMIN SALETAN, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Preston, as follows:

Q. 1. Mr. Saletan, will you please state your name, age, occupation and address of your store here?

A. Benjamin Saletan, age 43, running a cigar stand at 361 Main Street, Hartford.

Q. 2. How long have you been in the retail tobacco business? 3463

A. Well, I have been on and off for the last twenty-eight years or so.

Q. 3. Is this stand, which you are now running, in the front of a restaurant?

A. Yes, sir.

Q. 4. About how many customers do you have here a day, sir?

A. I have got about four hundred.

Q. 5. Do you sell Beech-Nut Scrap tobacco like the package I show you? (Mr. Preston showing witness a package of Beech-Nut Scrap Tobacco). 3464

A. Yes, sir.

Q. 6. How long have you handled that product?

A. Well, I have handled this product—I couldn't say exactly but I am handling it for the last four years I know, and they handled it before.

Q. 7. Do you know what company makes that scrap tobacco?

A. Lorillard.

Q. 8. Do you sell Beech-Nut cigarettes like the package I now show you (Mr. Preston showing witness a package of Beech-Nut cigarettes).

A. Yes, sir. 3465

Q. 9. Do you know who makes that?

A. The same company, I believe.

Q. 10. Is the Beech-Nut chewing tobacco a good seller?

A. Yes, sir.

Q. 11. Is it your best selling scrap tobacco?

A. Well, to a certain extent, yes. I sell more of that than I do any of the other brands.

Q. 12. Do you sell Beech-Nut chewing gum like the package I now show you (Mr. Preston showing the witness a package of Beech-Nut chewing gum).

A. Yes, sir.

3466 Q. 13. Do you know what company makes that?

A. I think it is the Beech-Nut Chewing Gum Co. to my knowledge. The Beech-Nut Chewing Gum Company.

Q. 14. Were you ever under the impression that the Beech-Nut chewing gum was made by the same company that makes the Beech-Nut scrap tobacco and the Beech-Nut cigarettes?

A. No, sir. I always considered them as two different products.

Q. 15. Do you regard the tobacco and cigarettes in the same or a different class of products than the chewing gum?

3467 A. Different products. I have seen a lot of Beech-Nut brands of different things, and I say I consider that one don't belong to the other.

Q. 16. Mr. Saletan, have you ever heard any remarks, inquiries or comments among your customers or anybody else to the effect or which led you to believe that they were under the impression that Beech-Nut gum was made by the same company that makes the tobacco and cigarettes?

A. I never heard that as long as I can remember but I tell you what I have heard once. I had a cigar in here called "Veribest" and I have got it now. The only time

3468 I ever heard the remark in a joking way once or twice was something like: "What do you call that brand of meat?". A meat brand. The Veribest meat brand. That is all I ever heard. I don't believe I ever heard that more than twice in all that time.

Q. 17. What is the name of that cigar?

A. The Veribest. That was only said in a joking remark whenever I would hear that.

Q. 18. But you don't remember ever hearing any remarks, confusing the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes with the Beech-Nut gum as something that was put out by the same company?

A. No, I don't remember ever having heard anything like that. 3469

Mr. Preston: That is all.
(Direct Examination closed)

Cross Examination.

By Mr. Johnson:

X-Q. 1. What is the name of this place of business where you are located?

A. This is the City Lunch.

X-Q. 2. What is the street address? 3470

A. 361 Main Street.

X-Q. 3. Is your place of business a cigar stand in the front of the quick lunch counter?

A. No, it is a separate business of my own.

X-Q. 4. But it is in the same room with the dairy lunch?

A. Yes. It isn't exactly a dairy lunch. It is a general lunch room.

X-Q. 5. About how much space does your stand occupy?

A. 4½ feet by 8. Let me see, no. (Pause) It is 4½ feet by 8. That is the measurement. 3471

X-Q. 6. It is in the front of the lunch room?

A. Yes.

X-Q. 7. Are you kept pretty busy waiting on customers during part of the day?

A. No, not so very much.

X-Q. 8. Do you have rush times?

A. Very little.

X-Q. 9. Do you have rush times?

A. Very little.

X-Q. 10. You don't?

A. It is generally a steady influx and it isn't very rushing. There is no time I have any rush.

3472 X-Q. 11. Do you spend much time talking to your customers, who are buying tobacco or cigarettes?

A. Yes, it happens quite often. I talk to them sometimes five or ten or fifteen minutes if anybody is willing to converse.

X-Q. 12. What products of the Beech-Nut Packing Company have you kept beside chewing gum?

A. Besides chewing gum I kept their Life Savers. What do you call it—Mints, something like that.

X-Q. 13. Did you say you had been in the tobacco business for something like twenty-eight years?

A. On and off. I wouldn't say I had always been
3473 in it.

X-Q. 14. During that time have you handled many of the P. Lorillard Co. products?

A. Why, I imagine I have carried them all in their day; whatever they have made.

X-Q. 15. Were you keeping Beech-Nut chewing gum at the time you first put in any of the Beech-Nut Scrap Tobacco or cigarettes?

A. I don't remember keeping Beech-Nut chewing gum in the last four years because I have been off anywheres from four to six years before I went in again to the same line of business. I don't remember
3474 exactly if I had that before then. In the past four years I have never carried it.

X-Q. 16. Haven't you ever heard any one ask any questions about whether the Beech-Nut chewing tobacco or Beech-Nut cigarettes were made by the chewing gum people?

A. Never to my knowledge.

X-Q. 17. When a man comes in to buy tobacco or cigarettes, does he often ask you who makes the article he is buying?

A. Oh seldom, very seldom.

X-Q. 18. Does he often ask you for cigarettes or to- 3475
bacco made by a certain concern?

A. Hardly.

X-Q. 19. What does he usually ask for?

A. He usually asks for the name Camel or Lucky Strike or Veteran or any of the kinds, but they don't specify the manufacturer.

X-Q. 20. Did you ever have a customer ask you for Camels made by the Reynolds Company?

A. No.

X-Q. 21. Or Lucky Strikes made by the American Tobacco Company?

A. No, sir. 3476

X-Q. 22. Then in your experience in the tobacco business, somewhat under twenty-eight years, have you found it is the brand that sells the cigarette or tobacco?

A. The brand is always what sells it, the name of the brand.

X-Q. 23. Have you made any attempt to remember, or make note of any such questions or remarks you have heard as to whether the Beech-Nut chewing tobacco or cigarettes were made by the chewing gum people?

A. I haven't made any note of it but I can always tell if a man is interested if he asks me a question a few times, I can always keep it in my mind. If you ask me 3477
any questions: "Is this this man's make?" or "Is it that man's make?" it is always in my mind. Some people come in and ask those things, but I never marked down those remarks.

X-Q. 24. You haven't made any particular effort to remember any such remarks or questions, have you?

A. No, it never came to my mind to think about those things here. Naturally, if a man will ask you, it is in your mind. It can't be helped, it is human nature.

Mr. Johnson: That is all.

(Cross Examination closed.)

3478 *Re-direct Examination.*

By Mr. Preston:

R-D. Q. 1. Mr. Saletan, do you know who makes the Veribest Cigar that you just showed us?

A. Yes, sir, it is made in Hartford by a man by the name of Louis Bogin.

R-D. Q. 2. Is he a cigar manufacturer?

A. He is a cigar manufacturer on a very small scale.

R-D. Q. 3. Mr. Saletan, I wonder if you would tell us just in your own words what you mean when you say
3479 that it is the brand that sells the cigarette. Can you enlarge on that?

A. The only way I can enlarge on it is when a man says: "Give me a Lorillard product or a Beech-Nut product" or anything like that. "Give me a package of Murads" or "Give me a package of Rosedales" or something else. I don't believe there is one of a thousand who knows even who makes it.

Mr. Preston: That is all.

(Re-direct Examination Closed.)

(Deposition closed.)

3480 (Signature of witness waived.)

JOSEPH A. TEVLIN, a witness called on behalf of the defendant, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. Preston, as follows:

Q. 1. Will you please state your name, age, occupation and business address?

A. Joseph A. Tevlin, age 42, manager of a cigar business at 288 Asylum Street, Hartford, Conn.

Q. 2. How long have you been in the retail tobacco business, Mr. Tevlin? 3481

A. About twelve years.

Q. 3. Have you been here at this location all that time?

A. No, I was manager of the Bannigan Cigar Co. first. Then I was manager for D. D. Austin next door here for five years. Then I worked for Joe Levine down here and come up here seven weeks ago.

Q. 4. They are all retail tobacco establishments?

A. Yes, all retail.

Q. 5. Do you handle at this place Beech-Nut tobacco like the package I now show you? (Mr. Preston showing the witness package of Beech-Nut Scrap Tobacco.) 3482

A. Yes, sir.

Q. 6. How long have you sold that tobacco, Mr. Tevlin, either here or at your former locations?

A. I have sold Beech-Nut tobacco when it first came out. There was a shortage of Red Band tobacco at that time and Beech-Nut got on the market.

Q. 7. Do you know what company puts out Beech-Nut tobacco?

A. Lorillard.

Q. 8. Do you sell Beech-Nut cigarettes like the package I now show you? 3483

A. I do, but I am out of it just now.

Q. 9. How long have you sold those cigarettes?

A. Ever since they have been on the market.

Q. 10. Do you know what company manufactures them?

A. P. Lorillard.

Q. 11. Do you handle Beech-Nut chewing gum?

A. I do, yes, sir.

Q. 12. Do you know what company makes that?

3484 A. The Beech-Nut people, I suppose. The Beech-Nut Packing people, isn't it?

Q. 13. Were you ever under the impression that the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes were made by the same company that makes the Beech-Nut gum?

A. No, sir.

Q. 14. Did you ever hear any inquiries, comments, or remarks among your customers or others which indicated to you that they were under the impression that the Beech-Nut Scrap tobacco and cigarettes were made by the same company that makes the Beech-Nut chewing
3485 gum?

A. No, sir.

Q. 15. Do you regard tobacco and cigarettes as in the same or a separate class of products from chewing gum and confections or food products?

A. Why, it is a separate concern, isn't it?

Q. 16. I don't think you quite understand my question. I wasn't thinking so much of the concern that makes them but I was trying to find out whether you regarded tobacco and cigarettes as in any way related to confections or food products or whether you regarded them as an entirely distinct line?

3486 A. An entirely distinct line, I should think.

Q. 17. Mr. Tevlin, did any Lorillard salesmen ever make any remark to you concerning their Beech-Nut tobacco products, which indicated to you or led you to believe that there was any connection between the Beech-Nut cigarettes and the Beech-Nut tobacco, and the Beech-Nut chewing gum?

A. Not in my experience.

Mr. Preston: That is all.

(Direct Examination Closed.)

Cross Examination. 3487

By Mr. Johnson:

X-Q. 1. What is the name of this place of business?

A. Salvatore Randazzo.

X-Q. 2. Is it a restaurant?

A. Yes.

X-Q. 3. Have you a cigar and tobacco stand at the front of the restaurant, by the front door?

A. Yes.

X-Q. 4. About how much space does your tobacco stand occupy in the front of the restaurant? 3488

A. About ten by twenty feet.

X-Q. 5. About how many customers a day do you have at your tobacco stand?

A. About two hundred. Probably more, Mr. Johnson.

X-Q. 6. Have you handled any other of the Beech-Nut Packing Company's products besides the chewing gum?

A. No.

X-Q. 7. When you first saw the Beech-Nut chewing tobacco, who did you think was putting it out?

A. P. Lorillard. 3489

X-Q. 8. In the twelve years that you say you have been in the retail tobacco business have you sold the P. Lorillard Co's products?

A. Yes, sir.

X-Q. 9. About how long have you been handling their products?

A. Ever since I have been in the business.

X-Q. 10. Have you known the Lorillard salesmen?

A. Not personally, no.

X-Q. 11. Did you know that they were Lorillard salesmen when they came in to your shop, as a rule?

3483490 A. No, they come in and asked me if I wanted Beech-Nut Scrap or cigarettes or tobacco and they would tell me who they represented, you know.

X-Q. 12. Do your customers often ask for a tobacco or a cigarette by the name of the maker?

A. By the name of the maker?

X-Q. 13. Yes?

A. No.

X-Q. 14. What do they usually ask for?

A. Beech-Nut Scrap tobacco, if they want Beech-Nut.

X-Q. 15. If they want Camels or Lucky Strikes what
3483491 do they ask for?

A. Camels.

X-Q. 16. That is the name of the brand?

A. Yes.

X-Q. 17. Would you say that tobacco and cigarettes sell by the name of the brand rather than the maker?

A. If a man wanted Camels he would call for Camels; if he wanted Fatimas he would call for Fatimas; if he wanted Beech-Nut or Meccas or Lucky Strikes he would call for them.

X-Q. 18. Did you ever have a customer come in and
3483492 ask for Camels made by the Reynolds Company?

A. Not exactly by the name. They would come up and ask for Camels.

X-Q. 19. Did you ever have any one come in and ask for Beech-Nut chewing tobacco made by Lorillard?

A. No, they would come up and ask for Beech-Nut Scrap Tobacco.

X-Q. 20. Are you familiar with most of the brands of tobacco and cigarettes?

A. I am.

X-Q. 21. Have you heard any one at any time, in your presence, ask or make any remarks about whether

the Beech-Nut chewing tobacco or Beech-Nut cigarettes were made by the chewing gum people? 3493

A. No, I haven't.

X-Q. 22. Have you made any effort to remember any such remarks or questions?

A. I have never had them ask me that question, Mr. Johnson.

X-Q. 23. I mean through the last four years that you say you have been handling the Beech-Nut Scrap tobacco, have you made any effort during that time, as the days went by, to remember any such comments or questions that might be asked you about who made the Beech-Nut Scrap tobacco or cigarettes? 3494

A. No, no.

X-Q. 24. When you say you didn't hear any such comments or inquiries you mean that you don't remember hearing any?

A. No, I don't remember anybody asking me such a question at all, you know.

Mr. Johnson: That is all.

(Cross Examination Closed.)

Re-direct Examination.

By Mr. Preston: 3495

R-D Q. 1. Mr. Tevlin, if you had heard any considerable number of questions or remarks of that character, do you think you would have remembered them or they would have been impressed on your mind?

A. Well, they wouldn't have been impressed on my mind, I suppose, if they asked me whether the tobacco and everything was under the same head, but nobody ever asked me any question like that.

3496 R-D Q. 2. Well, if you had heard a great many of those remarks, do you think you would have remembered it?

A. I surely would, I surely would.

R-D Q. 3. Is your store here located in the business section of the city?

A. This is considered a business street, Asylum Street.

R-D Q. 4. How far are you from the Preston Market?

A. It must be all of a block, it must be all of a block, one block you might as well say. The Preston
3497 Market is between the other block, and I am pretty near to the corner. The other corner is a block.

Mr. Preston: That is all.
(Re-direct Examination Closed.)

Re-cross Examination.

By Mr. Johnson:

R-X Q. 1. Mr. Tevlin, how has the Beech-Nut Scrap tobacco sold in your experience?

A. Very good, Mr. Johnson.

3498 R-X. Q. 2. How has the Beech-Nut cigarette sold?

A. Very good.

R-X Q. 3. Right from the beginning?

A. Right from the beginning on account of being one of the cheapest cigarettes on the market at that time.

R-X Q. 4. Are you selling many of them now?

A. Not so many now, no. Of course the others, you know, Camels and like that, has fell down on price.

R-X Q. 5. About how many Beech-Nut cigarettes a week have you sold?

A. Well, when they first come out I used to sell 3499
about seven cartons a day.

R-X Q. 6. How many cigarettes would that be?

A. Fourteen hundred; two hundred to each carton.

R-X Q. 7. Did you find that your customers got in the habit of smoking Beech-Nut cigarettes? Did you have any repeat sales?

A. I did, yes, sir.

R-X Q. 8. Did you hear any complaint as to the Beech-Nut cigarettes?

A. No, no. They liked them. I suppose it was a cheap cigarette at the time. They were selling fast while Camels and other stuff, you know, was up to 3500
20 cents a pack, and the consumer got accustomed to that brand, I suppose, and got in the habit of buying them.

Mr. Johnson: That is all.
(Re-cross Examination Closed.)
(Signature of Witness waived.)
(Deposition Closed.)

STIPULATION.

3501

It is Stipulated by and between the parties hereto, through their respective counsel, that if B. T. MILLER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is B. T. MILLER, I am of legal age and I am the manager of a store known as Miller's Soda Shop, located at 177 Windsor Avenue, Hartford, Connecticut. This store is in the locality of Hartford, known as the East Side, and is one block from No. 78 Village Street.

3502 In this store we sell confectionery, soda, tobacco, stationery and periodicals. We handle approximately 500 customers a day, and, as a general rule, there are two clerks on duty here.

I have sold Beech-Nut Scrap Tobacco for the past three or four years and Beech-Nut cigarettes since they appeared on this market. I have always known that both of these products were manufactured by the Lorillard Tobacco Co. I handle Beech-Nut chewing gum and Beech-Nut Mints. I know these articles to be the product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or com-
3503 ments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the products of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct class of product from chewing gum, candies, or food products; and I have never heard of a food product concern that manufactured any tobacco. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a cigarette package or a scrap tobacco package.

3504 *Cross Examination.*

I have known of the Lorillard Tobacco Co. for a good many years. The Lorillard salesmen frequently call at my store. I am familiar with most of the different brands of cigarettes and tobacco.

I am kept pretty busy waiting on customers and haven't much time to listen to what people are saying in the store. The customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether

or not they are made by the same company that makes 3505
the Beech-Nut gum or other Beech-Nut Packing Company products and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3506

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MAX SELTZER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is MAX SELTZER. I am of legal age and I am a grocerymen by trade and do business at 728 Park Street, Hartford, Conn. In addition to groceries 3507
I handle tobacco and confections. I have about 300 customers a day in my store, and, as a rule, I am the only clerk on duty here.

I have sold Beech-Nut Scrap Tobacco for the past three years, and it is my best selling scrap tobacco. I do not handle Beech-Nut cigarettes. I have always known that Beech-Nut Scrap tobacco was manufactured by the P. Lorillard Co. I handle Beech-Nut chewing gum which I know to be a product of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or com-

3508 ments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut Scrap Tobacco was made by the same company that manufactures Beech-Nut chewing gum.

I regard tobacco as an entirely distinct line of merchandise from chewing gum, and I have never heard of a chewing gum or candy concern that manufactured any tobacco. I have never seen a package put out by the Beech-Nut Packing Company which looked like either the Scrap Tobacco package or the cigarette package.

I sell Red Seal Lye and Red Seal Snuff. These two articles are manufactured by different companies.

3509 It is Stipulated that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have known of the Lorillard Tobacco Co. for many years. The Lorillard salesmen frequently call in at my store. My customers do not often ask who makes the cigarette or tobacco which they are buying.

3510 I am kept pretty busy waiting on customers and have not paid much attention to what the customers were saying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination. 3511

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if ARTHUR LENNOX were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 3512

Direct Examination.

My name is ARTHUR LENNOX, I am 45 years of age and I am a druggist by vocation, being the manager of a drug store, located in the residential section of Hartford, Connecticut, at 1136 Albany Avenue. My store is a large one, situated on a corner, and we sell the usual varied line carried by drug stores, including such articles as drugs, toilet articles, stationery, periodicals, candy, soda and tobacco.

I have sold Beech-Nut Scrap tobacco for several years 3513
past and Beech-Nut cigarettes since they appeared on this market. I have always known that these were products manufactured by the P. Lorillard Co. I handle Beech-Nut chewing gum and Beech-Nut mints, which products I know to be manufactured by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were manufactured by

3514 the Beech-Nut Packing Company, except that when the cigarette first appeared on this market I do remember hearing three or four people inquire whether this cigarette was made by the same people who made the Beech-Nut gum.

I regard tobacco and cigarettes as in a very distinct line from chewing gum, candy or other food products, and I have never known of a food product concern that manufactured any tobacco. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

3515

Cross Examination.

I have known of the Lorillard Tobacco Co. for some years. The Lorillard salesmen frequently call at my store. I am pretty familiar with the different brands of tobacco and cigarettes.

I am kept pretty busy waiting on customers and waiting on the counter in all parts of the store. I have not paid much attention to what was being said around the tobacco stand.

I have made no particular effort to remember any in-
3516 quiries, remarks, or comments as to who made the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes, and had no reason to do so. When I say I heard only three or four inquiries or remarks as to whether the Beech-Nut cigarettes were made by the Beech-Nut gum people, I mean I cannot now remember any more than that.

Re-direct Examination.

If I had heard any remarks, inquiries, or comments, indicating confusion on this matter among my customers in considerably greater numbers than the three or four

which I have mentioned, I think that I would have remembered that fact. When those three or four inquiries were addressed to me I told the inquirers that the cigarette was made by the P. Lorillard Co. and that the Beech-Nut Packing Company was the manufacturer of the gum. 3517

I sell Velvet tobacco, Velvet Pencils and Velvet Candy Kisses and Velvet Skin Lotion, and none of these articles are manufactured by the same concern.

IT IS STIPULATED that objection is made by plaintiff's counsel to the witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, immaterial and irrelevant. 3518

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MORRIS STEIN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination. 3519

My name is MORRIS STEIN. I am of legal age and I am the manager of a retail drug store, located at 436 Asylum Street, Hartford, Connecticut. This store is known as the Bushnell Cigar Counter and is situated next door to Preston's Market and is one and one-half blocks from the store run by Joseph De Rago at 82 Spring Street, and is one and one-half blocks from the grocery store run by Solomon T. Kramer, 84 Church Street.

520 I have handled Beech-Nut Scrap Tobacco for the past four years and it is my best selling scrap tobacco. I have sold Beech-Nut cigarettes since they appeared on the market and have always known that both the Beech-Nut Scrap Tobacco and the Beech-Nut cigarettes were manufactured by the P. Lorillard Co. I have been in the tobacco business for a great many years and have long known of the Lorillard Tobacco Co. as one of the oldest and largest of the tobacco concerns.

I sell Beech-Nut chewing gum, Beech-Nut Mints and Beech-Nut Caramels, and I have always known that these articles were put out by the Beech-Nut Packing Com-
521 pany. I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe, that they thought that Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes was the product of the Beech-Nut Packing Company.

I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package, and I regard the product of cigarettes as an entirely distinct line from gum or candies.

Cross Examination.

522 I have handled the Lorillard tobacco products for many years and have known from time to time the Lorillard salesmen who frequently called in my store for orders.

I have about six hundred customers per day. I have one other clerk beside myself, who is usually in the store with me. I have a busy downtown store and haven't much time to talk to customers. The customer hardly ever asks who makes the tobacco or cigarettes he is purchasing.

I have made no effort to remember any inquiries, com-

ments, or remarks as to who makes the Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any. 3523

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if H. CLYMER were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 3524

Direct Examination.

My name is H. CLYMER. I am of legal age and am a retail tobacconist. I am the manager of a store located at 364 Windsor Avenue, Hartford, Connecticut, which store is located in the district known as the East Side, and is one block from No. 78 Village Street. I have been in the retail tobacco business for the past fifteen years.

I have sold Beech-Nut Scrap Tobacco for five years and Beech-Nut cigarettes ever since they came on this market. I know both of these products are manufactured by the Lorillard Tobacco Co. I sell Beech-Nut chewing gum and Beech-Nut Mints, both of which articles I have always known to be the products of the Beech-Nut Packing Company. 3525

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut scrap Tobacco or Beech-Nut cigarettes was the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct

3526 class of merchandise from chewing gum, candy or other food products. I have never seen a package put up by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

I sell Uncle Sam Tobacco and Uncle Sam Playing Cards. These two articles are not manufactured by the same concern.

It is Stipulated that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant
3527 and immaterial.

Cross Examination.

I have handled Lorillard tobacco products for many years and have known the Lorillard salesmen. They frequently come into my store to take orders.

I have a busy store and have not much time to talk to customers or much opportunity to hear what they are saying. A customer seldom asks who makes the tobacco or cigarettes he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut
3528 Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION. 3529

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if B. H. PIERCE were called as a witness on behalf of P. Lorillard Co., Defendant, he would testify as follows:

Direct Examination.

My name is B. H. PIERCE and I am of legal age. I am a clerk in a first class residential drug store, located at 247 Sigourney Street, Hartford, Connecticut. This store is located two blocks from the store run by C. P. Case at 597 Albany Avenue, Hartford, Connecticut. 3530

There are, as a rule, two clerks on duty in this store. I have sold Beech-Nut Scrap Tobacco and Beech-Nut cigarettes in this store for several years, and have always known that both of these products were manufactured by the Lorillard Tobacco Co. We also handle Beech-Nut chewing gum and Beech-Nut Mints, which I know to be products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes was the 3531 product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct class of products from chewing gum and mints, and I have never heard of a candy or food concern, which manufactured any tobacco products, nor have I ever seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

No Lorillard salesmen, in selling any of their products to me, ever made any remarks which indicated to me that there was any connection between the Beech-

3532 Nut cigarettes or the Beech-Nut Scrap Tobacco, and the Beech-Nut Packing Company.

I sell Velvet Tobacco and Velvet Skin Lotion, Spearmint Tooth Paste and Spearmint chewing gum, Diamond Dyes and Diamond Ginger Ale. None of these products are manufactured by the same concern.

IT IS STIPULATED that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

3533 *Cross Examination.*

I am familiar with the Lorillard Tobacco products and know their salesmen. My store is in a thickly populated residential district and I am kept pretty busy. I have not much time to talk to customers or much opportunity to hear what they are saying. A customer hardly ever asks who makes the tobacco or cigarettes he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes, and as to
3534 whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3535

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if I. KAUFMAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is I. KAUFMAN. I am of legal age and am a druggist by occupation. My store is located at 633 Albany Avenue, Hartford, Connecticut, and is located one block from the store run by C. P. Case at 597 3536
Albany Avenue. In addition to drugs we sell soda, candy and tobacco. We serve about five hundred customers a day.

I have sold Beech-Nut Scrap tobacco for the past four years and Beech-Nut cigarettes since they appeared on this market. I know both of these products to be manufactured by the Lorillard Tobacco Co. I also handle Beech-Nut chewing gum and Beech-Nut Candies, and know that these articles are put out by the Beech-Nut Packing Company.

When the Beech-Nut cigarette first appeared on this market I remember that two or three persons asked me 3537
whether the Beech-Nut cigarette was manufactured by the same company that manufactured the Beech-Nut chewing gum. I told them that this was not the case and that the Beech-Nut cigarette was the product of the Lorillard Tobacco Co., whereas the gum was put out by the Beech-Nut Packing Company. These questions made a distinct impression on my mind, and I can positively state that I never heard more than two or three such remarks, and that these were made when the cigarette first came on the market.

3538 I regard tobacco and cigarettes as an entirely unrelated class of products from gum or candies, and I have never heard of a candy or food product concern which manufactured any tobacco. I have never seen a package put out by the Beech-Nut Packing Company that looked like either a scrap tobacco or cigarette package.

Cross Examination.

I have been handling tobacco for some years and am familiar with the different brands. I have handled many of the Lorillard tobacco products and know the Lorillard salesmen who come into my store to take
3539 orders.

I am kept pretty busy waiting on my trade and do not pay a great deal of attention to what customers are saying.

I have made no particular effort to remember any inquiries, remarks or comments as to who made the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes, and had no reason to do so. When I say I only heard two or three inquiries, remarks or comments as to whether the Beech-Nut cigarettes were made by the Beech-Nut gum people, I mean I can not now remember any more than that.

3540

Re-direct Examination.

In my direct examination the two or three remarks which I referred to that I did hear when the Beech-Nut cigarettes first appeared, made a distinct impression on me, and if I had heard a considerably greater number than that I think I would have remembered the fact.

3541

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if the men whose names and addresses here appear, to wit:

C. R. DENSMORE, Druggist, 159 Washington St., Hartford, Conn.,

H. LEIBOWITZ, Druggist, 990 Broad St., Hartford, Conn.,

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as follows:

3542

Direct Examination.

I am of legal age. In addition to drugs I sell in my store a varied line of merchandise, including such articles as stationery, fountain pens, toilet articles, confections, and tobacco.

I have sold Beech-Nut Scrap tobacco for the past five years and Beech-Nut cigarettes since they first came on this market about two years ago. I have always known that both of these products were manufactured by the P. Lorillard Co. I also sell Beech-Nut chewing gum and Beech-Nut Candies, which products I know to 3543
be put out by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which would lead me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum or candy, and I have never heard of a candy or food products concern which manufactured any tobacco products. I

3544 have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

Cross Examination.

I have handled tobacco products for some years and am familiar with the different brands. I am kept pretty busy in my store and have not paid much attention to what people were saying about tobacco or cigarettes. The customer hardly ever asks who makes the tobacco or cigarette he is buying.

3545 I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remembered any.

Re-direct Examination.

3546 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3547

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if the men whose names and addresses here appear, to wit:

E. F. KILLIAN, 627 Park Street, Hartford, Conn.,
T. WHITE, 638 Park Street, Hartford, Conn.,
WILLIAM FOSTER, Connecticut Mutual Building, Main and Pearl Streets, Hartford, Conn.,
GUS STEINMEYER, 31 Pearl Street, Hartford, Conn.,
WILLIAM MOLUMPHY, 697 Main Street, Hartford, Conn.,

3548

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as follows:

Direct Examination.

I am of legal age and am the manager of a retail store where we sell confections and tobacco products. I have sold Beech-Nut Scrap Tobacco for the past five years and Beech-Nut cigarettes since they first came on this market about two years ago.

I have always known that both of these products were manufactured by the P. Lorillard Co., and I have long known of that concern as one of the oldest and largest of the tobacco companies. I also handle Beech-Nut chewing gum and Beech-Nut candies, and I know that these products are put up by the Beech-Nut Packing Company.

3549

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

3550 I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum and candy, and I have never heard of a confection or food products company which manufactured any tobacco products. I have never seen a pakage put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette pakage.

Cross Examination.

I have handled tobacco products for some years and am familiar with the different brands. I am kept pretty
3551 busy in my store and have not paid much attention to what people were saying about tobacco or cigarettes. The customer hardly ever asks who makes the tobacco or cigarettes he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't re-
3552 member any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3553

Testimony taken at New Haven, Connecticut, August 7th, 1923, pursuant to adjournment at Hartford, Connecticut, the parties represented as before.

MAXWELL C. DURHAM, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Preston, as follows,

Q. 1. Mr. Durham, will you please state your name, age, occupation and business address?

A. Maxwell C. Durham, age 37, cigar dealer at 37 Church Street and 129 Church Street, New Haven. 3554

Q. 2. Mr. Durham, do you operate more than one store in New Haven?

A. Yes, two of them.

Q. 3. Are they both retail tobacco stores?

A. Yes.

Q. 4. How long have you been in the retail tobacco business?

A. For myself?

Q. 5. Yes.

A. I have been eighteen years in the business.

Q. 6. Do you wait on customers yourself the greater part of the time? 3555

A. Yes.

Q. 7. About how many customers do you have a day in your store and at your stands altogether, approximately?

A. About twelve to thirteen hundred customers.

Q. 8. Mr. Durham, do you sell Beech-Nut Scrap Tobacco like the package I show you? (Mr. Preston showing the witness package of Beech-Nut Scrap Tobacco.)

A. Yes.

3556 Q. 9. How long have you handled that brand of tobacco?

A. Well, I have been handling it for some time.

Q. 10. Could you say about how many years you have handled it?

A. I should say about between ten and twelve years or so.

Q. 11. Is it a good seller?

A. Yes, a pretty good seller.

Q. 12. Do you know what company manufactures it?

A. Lorillard.

Q. 13. Do you sell Beech-Nut cigarettes like the pack-
3557 age I show you? (Mr. Preston showing the witness a package of Beech-Nut cigarettes.)

A. Yes.

Q. 14. How long have you handled them, Mr. Durham?

A. Ever since they came out.

Q. 15. Do you know what company manufactures them?

A. Yes, Lorillard.

Q. 16. Do you sell Beech-Nut chewing gum like the package I show you? (Mr. Preston showing the witness a package of Beech-Nut chewing gum.)

3558 A. Yes.

Q. 17. Do you know who makes that?

A. Yes, the Beech-Nut Gum Company.

Q. 18. Do you sell Beech-Nut Mints and Candies?

A. Yes.

Q. 19. Do you know what company makes them?

A. Yes, the same people.

Q. 20. Mr. Durham, did any Lorillard salesman ever make any remark to you which indicated to you that they thought that there was any connection between the makers of the Beech-Nut Tobacco and the Beech-Nut cigarette, and the makers of the Beech-Nut chewing gum?

A. No, never.

3559

Q. 21. Did you ever hear any remarks, inquiries, or comments among your customers or others to the effect, or which led you to believe, that they were under the impression that the Beech-Nut chewing gum was made by the same company that makes the Beech-Nut tobacco and Beech-Nut cigarettes?

A. No. I never heard anything like that. Most of the people know that tobacco and cigarettes are made different than candy and gum.

Q. 22. Do you regard toabcco and cigarettes as the same or a distinct and separate line of merchandise from candies or gum?

3560

A. Yes.

Q. 23. Which do you mean?

A. I think tobacco is entirely different than the gum, sure.

Q. 26. Did you ever see a package put out by the makers of Beech-Nut gum which looked like either a Beech-Nut tobacco or Beech-Nut cigarette package?

A. No, I think it is a different label entirely so far as the label is concerned.

Q. 27. So far as the general appearance of the package is concerned, did you ever see a package put out by the makers of Beech-Nut gum that looked, in general, like a package of Beech-Nut tobacco or Beech-Nut cigarettes?

3561

A. No.

Mr. Preston: That is all.

(Direct Examination Closed.)

3562 *Cross Examination.*

By Mr. Johnson:

X-Q. 1. Mr. Durham, where is your tobacco stand located?

A. 129 Church Street.

X-Q. 2. What kind of a building is that in?

A. The Second National Bank Building.

X-Q. 3. Is that one of the larger office buildings in New Haven?

A. Yes.

3563 X-Q. 4. And is your store at the entrance where people pass coming in and out of the building?

A. Yes.

X-Q. 5. You say you have a retail store in addition to the one in the Second National Bank Building?

A. Yes, at 37 Church Street.

X-Q. 6. What is the name of that store?

A. The Durham Cigar Company.

X-Q. 7. How long have you been in the tobacco business altogether?

A. Eighteen years.

X-Q. 8. How much of that time have you been in the

3564 retail trade?

A. Always.

X-Q. 9. In what parts of the country?

A. Right here in New Haven.

X-Q. 10. How long have you had this stand and the store you speak of?

A. This stand I have had since 1916 and the store I have had since the 10th, it will be two years this month, August 10th.

X-Q. 11. How long have you been handling the P. Lorillard Co. products?

A. Always.

X-Q. 12. Always?

3565

A. Since I was in the business.

X-Q. 13. Have you handled a great many of their products?

A. Yes, I have.

X-Q. 14. Can you name a few of their tobaccos and cigarettes that you have handled?

A. Murads, Egyptian Dieties, Helmars, Beech-Nut cigarettes, Beech-Nut Tobacco, and a lot of others I can't think of now.

X-Q. 15. Have you handled large quantities of the Lorillard products before you started to handle the Beech-Nut tobacco and cigarettes?

3566

A. Yes, I always sold them.

X-Q. 16. Have you known the Lorillard salesmen?

A. Yes, I know them by coming in, yes, sure.

X-Q. 17. Do you know the Lorillard salesman here now?

A. Yes.

X-Q. 18. What is his name?

A. Which one?

X-Q. 19. What ones do you know here?

A. There is Mr.——this gentleman here.

X-Q. 20. Do you know his name?

A. Yes, he is a New Haven man. Let's see, I can't think of his name now. What is his name, Rickert? Something like that.

3567

X-Q. 21. Have you known the Lorillard salesmen for some years?

A. Only by coming in. I can't think of the name for you. I know every one of them and who they represent.

X-Q. 22. You know who they represent?

A. Yes.

X-Q. 23. When you first saw a package of the Beech-

568 Nut chewing tobacco, whose product did you think it was?

A. I will have to look it up. Naturally any man that knows the business a good deal can tell easy where it is made.

X-Q. 24. You knew that because you were in the tobacco business?

A. Sure.

X-Q. 25. And because you were familiar with the Lorillard products?

A. Yes, sure.

X-Q. 26. When you first saw the package of Beech-
569 Nut cigarettes, whose product did you think it was?

A. You naturally can't tell until you look at the package. It may be American Tobacco Company or Lorillard or Reynolds Tobacco Company.

X-Q. 27. Were you handling Beech-Nut chewing gum or any of the Beech-Nut hard candies at the time you started to handle either the Beech-Nut chewing tobacco or the Beech-Nut cigarette?

A. Yes, I always handled that.

X-Q. 28. Had you handled much of the chewing gum or candy?

A. Yes, I sell a lot of it.

570 X-Q. 29. Didn't you have any doubt at that time as to whether these Beech-Nut cigarettes or Beech-Nut tobacco might not be made by the makers of the Beech-Nut chewing gum?

A. No, not a man that knows the business like I do. I can tell who makes the gum or tobacco.

X-Q. 30. Mr. Durham, in your experience in the retail trade, do you find that a customer, when he comes in, asks for a tobacco or a cigarette by the name of the maker?

A. No, they ask for the name.

X-Q. 31. Like what? 3571

A. Beech-Nut cigarettes or Beech-Nut tobacco, scrap or Camels.

X-Q. 32. Do they ask for just Camels?

A. Yes, Camels, Lucky Strikes or Chesterfields.

X-Q. 33. They never ask for the maker?

A. They never ask for the maker. I don't believe there is hardly any consumer that knows who makes the stuff as far as that is concerned; as long as they know by the name, that is all they want to know.

X-Q. 34. Then would you say that tobacco and cigarettes sell by the brand name?

A. Yes, by the name. That is all they can think of. 3572
They never tell us who makes the cigarettes. They ask the name—Murads or Chesterfields, Camels or Lucky Strikes, or something like that.

X-Q. 35. Are you kept pretty busy waiting on customers?

A. Most of the time. I take care of most of them.

X-Q. 36. Do you have much time to talk to customers?

A. Oh, occasionally, yes.

X-Q. 37. At the time the Beech-Nut chewing tobacco came out, didn't you hear any remarks or questions by people as to whether it was made by the Beech-Nut 3573
chewing gum people?

A. I don't remember anything like that.

X-Q. 38. And the same thing with regard to the Beech-Nut cigarettes?

A. No, in fact I remember distinctly when the first cigarette came out, it was advertised in the paper and a fellow asked me what is that, a new Lorillard package of Beech-Nut cigarettes?

X-Q. 39. But in most cases, Mr. Durham, you had no way of knowing, did you, who the customers who

3574 were at your stand, thought made the Beech-Nut cigarette?

A. That I can't tell you.

X-Q. 40. You had no way of knowing?

A. I had no way of knowing. I know they would come in and ask for the names and I give it to them. For instance, there has a new cigarette just come out. The customer looks at the name and reads that. He comes and says to me: "Give me a package of Rosedale cigarettes". That is a new one just out.

X-Q. 41. When you say then, that you didn't hear any remarks, inquiries or comments by people as to
3575 whether the Beech-Nut cigarette or Beech-Nut Scrap Tobacco were put out by the same people that made the chewing gum, you mean you don't remember hearing any such remarks?

A. No.

(Cross Examination Closed.)

Re-direct Examination.

By Mr. Preston:

R-D Q. 1. Mr. Durham, did you ever hear of a
3576 chewing gum, candy or food products concern which manufactured any tobacco products?

A. No.

R-D Q. 2. If you had heard any considerable number of remarks among your customers or others which indicated that they thought that the Beech-Nut gum people were making the Beech-Nut cigarettes or Beech-Nut Scrap Tobacco, do you think you would have remembered it?

A. Yes, I would, sure.

R-D Q. 3. When you first saw this package of Beech-Nut scrap tobacco and Beech-Nut cigarettes, did you

or did you not wonder whether it was made by the 3577
Beech-Nut Packing Company, the people who make the Beech-Nut gum?

A. As I said before, any man that knows the business, the minute any new stuff comes out, they can tell usually where it comes from. First of all I look at the stamp, the factory number, and a fellow who knows anything about it, can tell where it comes from. It isn't the consumer. The consumer doesn't ask. The man who knows where they come from is the dealer and it is very easy to tell. In fact, when a customer comes in and brings in a cigarette box without a wrapper on or a box and where there is no name on the box, all I have 3578
to do is to look at the factory number and then I can look that up right after that. I have done it many times.

Mr. Preston: That is all.
(Re-direct Examination Closed)

Re-cross Examination.

By Mr. Johnson:

R-X Q. 1. How has Beech-Nut Scrap tobacco sold with you? 3579

A. Pretty fair. We sell a lot of it.

R-X Q. 2. Did it sell well right at the start when you first began handling it?

A. I just can't remember how it did start, but it went pretty good. But I consider Beech-Nut in the third class with Level Head; especially in New Haven it is a good seller. Beech-Nut is probably a third or fourth class tobacco.

R-X Q. 3. How have the Beech-Nut cigarettes sold with you?

A. Not very big.

3580 R-X Q. 4. Did they sell better at first than they have since?

A. Pretty well, but I don't think they are much of a success in New Haven.

R-X Q. 5. Are you selling many of them now?

A. No, not very many. We buy them only in 1,000 lots where the others we buy in 10,000 lots.

R-X Q. 6. Have you heard any complaints as to the quality of the Beech-Nut cigarettes from users?

A. No, I haven't.

Mr. Johnson: That is all.

3581 (Re-cross Examination Closed)

(Deposition Closed.)

(Signature of witness waived)

BARNETT DICKSTEIN, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Preston, as follows:

Q. 1. Will you please state your name, age, occupation and business address?

3582 A. Barnett Dickstein, age 38, 849 Grand Avenue, New Haven, Connecticut, general store.

Q. 2. How long have you heen in this business, Mr. Dickstein?

A. Well, for the last six years; six and a half years or so.

Q. 3. Would you name some of the kinds of merchandise that you sell?

A. I don't know from where to start.

Q. 4. Just name a few of them, if you please?

A. In the line of groceries, tobacco or candy; it depends on what you are interested in?

Q. 5. Do you sell confectionery articles? 3583

A. Yes, I sell confectionery articles.

Q. 6. Do you sell toys?

A. Yes, I sell toys, tobacco, groceries, ice cream sodas, and beers.

Q. 7. How large is your store, Mr. Dickstein—about?

A. My store is as large inside, I believe, 16 by 60 feet.

Q. 8. About how many customers a day do you have?

A. Well, how many customers? I shouldn't be surprised if we have about a couple of hundred a day.

Q. 9. Do you sell Beech-Nut Scrap tobacco like the package I am showing you? (Mr. Preston shows the 3584 witness a package of Beech-Nut Scrap Tobacco.)

A. Yes, sir, we do sell Beech-Nut Scrap tobacco.

Q. 10. How long have you sold that?

A. Since I am in the tobacco game for the last four years.

Q. 11. Do you know what company makes it?

A. Yes, sir.

Q. 12. What company makes it?

A. Lorillard.

Q. 13. Is it a good seller?

A. Yes, sir, it sells pretty good.

Q. 14. Do you sell Beech-Nut cigarettes like the 3585 package I show you? (Mr. Preston showing the witness a package of Beech-Nut cigarettes.)

A. Yes, sir.

Q. 15. How long have you sold them?

A. I believe Beech-Nut cigarettes I sell about three years.

Q. 16. Do you know what company makes them?

A. The same company as the tobacco.

Q. 17. Do you sell Beech-Nut chewing gum like the package I am showing you (Mr. Preston showing the witness a package of Beech-Nut chewing gum.)

3586 A. Yes.

Q. 18. Do you know who makes that?

A. Yes, the Beech-Nut gum people.

Q. 19. Do you sell Beech-Nut Mints or Beech-Nut Candies?

A. Yes, sir. It didn't sell much so I cut them out.

Q. 20. Do you know what company makes the candies?

A. The candies—I believe it is the same people. Yes, I know it is.

Q. 21. Mr. Dickstein, did any Lorillard salesman ever make any remark to you, which indicated to you
3587 that there was any connection between the makers of the Beech-Nut gum and the cigarette?

A. No, sir.

Q. 22. Did you ever hear any inquiries, comments or remarks among your customers or others to the effect, or which led you to believe that they thought the Beech-Nut chewing gum was manufactured by the same company that makes the Beech-Nut cigarettes or the Beech-Nut scrap tobacco?

A. No, sir.

Q. 23. Do you regard tobacco and cigarettes as the same or a separate and distinct line of merchandise
3588 from gun or candies or food products?

A. I believe it is a separate thing. I tell you it is very seldom anyone who chews Beech-Nut gum or any kind of gum, chews tobacco. There is some young fellows who chew tobacco and use gum but very seldom you find it.

Q. 24. Did you ever hear of a gum or candy or food products concern that made any tobacco products?

A. No.

Q. 25. Did you ever see a package put out by the Beech-Nut Packing Company that looked like either a Beech-Nut Scrap tobacco or a cigarette package?

A. I don't think so, no. I don't think there was any. The only label what is similar to it, is the Beech-Nut Jelly. It isn't much different but it can't come to the comparison of the same label as the Beech-Nut Cigarettes or Beech-Nut tobacco. 3589

Q. 26. I don't think you quite understand my question. Do you think the Beech-Nut gum package looks like either a Beech-Nut cigarette package or a scrap tobacco package?

A. No, it can't be the same, to look the same as the package.

Q. 27. Mr. Dickstein, do you sell Velvet Pencils?

A. Yes, sir, we do. 3590

Q. 28. Do you sell Star Soap?

A. Yes, sir.

Q. 29. Do you sell Star Tobacco?

A. We sell Star tobacco.

Mr. Johnson: I object to this entire line of questions and answers in regard to articles bearing the same name on the ground that it is incompetent, immaterial and irrelevant. It is stipulated that this objection will apply to all questions and answers along this same line.

3591

Q. 30. Do you sell Star Washing Fluid?

A. No.

Q. 31. Do you sell Sunshine Biscuits?

A. Yes.

Q. 32. Do you sell Sunshine cigarettes?

A. Yes.

Q. 33. Are any of these articles I have mentioned manufactured by the same company?

A. No, different companies.

Q. 34. Do you sell Polo canned goods?

A. Yes.

2073

592 Q. 35. Do you sell Polo cigarettes?
A. Yes.
Q. 36. Do you sell Climax Chocolate Dates?
A. Yes. There is a short season on that.
Q. 37. You have sold Climax Chocolate Dates?
A. Yes, I have.
Q. 38. Do you sell Climax Tobacco?
A. Yes.
Q. 39. Do you sell Ever Ready razor blades?
A. Yes.
Q. 40. Do you sell Ever Ready search Lights?
A. Yes, I sell them.
593 Q. 41. Do you sell Apple Tobacco?
A. Yes.
Q. 42. Do you sell Apple Chewing Gum?
A. Yes.
Q. 43. Are any of those articles that I have named manufactured by the same company?
A. No, sir.
Q. 44. Do you sell Blue Ribbon Salad Dressings?
A. Yes, sir.
Q. 45. Do you sell Blue Ribbon Playing Cards?
A. Yes.
Q. 46. Do you sell Blue Ribbon Starch.
594 A. No. Oh yes, I do. There is a Blue Ribbon Starch.
Q. 47. Do you sell Gem razor blades?
A. Yes, sir.
Q. 48. Do you sell Gem nail clippers?
A. Yes, we do.
Q. 49. Mr. Dickstein, are any of those articles that I have named manufactured by the same company?
A. No, they ain't. It is different manufacture.
Q. 50. Mr. Dickstein, do you know it to be a common thing for articles in a different class, made by different companies, to be sold under the same name?

A. What, two articles the same by different companies, is that what you mean? 3595

Q. 51. Articles with the same name of a different class, manufactured by different companies?

A. Well, there is many articles that we sell with the same name.

Q. 52. Are those articles made by different companies?

A. Those articles are made by different companies.

Mr. Preston: That is all.

(Direct Examination Closed)

3596

Cross Examination.

By Mr. Johnson:

X-Q. 1. Do you have a tobacco and cigarette department in your general store?

A. Yes, sir.

X-Q. 2. What is the name of your store?

A. Well, I call it a general store.

X-Q. 3. I mean, what name have you over the front?

A. I have nothing, no name at all on the front.

X-Q. 4. What is the street address?

A. 849 Grand Avenue. That is the only thing I have got on the store. 3597

X-Q. 5. Is it known as the Dickstein Grocery Store?

A. Yes, the Dickstein Grocery Store, yes, sir.

X-Q. 6. Where is your tobacco and cigarette section located inside the store?

A. Up near the front, right in the front.

X-Q. 7. Near the door?

A. Yes.

X-Q. 8. About how much space does it occupy?

A. How much space? Why, I should judge it is about twenty feet; every bit of it.

3598 X-Q. 9. How wide?

A. By five feet wide.

X-Q. 10. How long have you handled tobacco?

A. Well, I handled it since three years, since I built this over. I handle it all the time since I am in the store, that is six years, but you know, like all the groceries, just a little bit, but now I am going to specialize on tobacco.

X-Q. 11. Had you handled tobacco longer than six years ago?

A. No, I wasn't in that line at all.

X-Q. 12. Are you familiar with the different brands
3599 of cigarettes and tobacco?

A. Yes, I am.

X-Q. 13. Have you handled any of the P. Lorillard Co. products?

A. Yes, sir.

X-Q. 14. What are some of them that you have handled. Just name a few?

A. Well, we sold Beech-Nut cigarettes, Beech-Nut Scrap, Level Head tobacco, Union Leader tobacco, Sterling tobacco—no, that is not a Lorillard I don't think—Eureka, Old Fashioned.

X-Q. 15. Will you name some of the cigarettes?

3600 A. Cigarettes, well, that is the only kind they have, Beech-Nut cigarettes. That is all they got.

X-Q. 17. Who makes the Camel cigarettes?

A. Camels—I forget the name. Camel cigarettes—Lorillard makes the Camels. No, Reynolds makes the Camels.

X-Q. 18. Who makes the Fatimas?

A. Fatimas are made by the same people as Chesterfields and others, I forget the names of them.

X-Q. 19. Who makes Lucky Strikes?

A. The same tobacco people.

X-Q. 20. Who makes Egyptian Dieties?

A. Lorillard makes them. 3601

X-Q. 21. Have you handled those brands?

A. Yes.

X-Q. 22. Murads, who makes those?

A. That's right, the Lorillard Co. makes Murads.

X-Q. 23. Have you handled them?

A. Sure. I handled a lot of them. Helmars also, I forget the whole thing.

X-Q. 24. Do you know the Lorillard salesmen?

A. Yes, I do.

X-Q. 25. Do they come into your store frequently?

A. Yes, they come in and take orders.

X-Q. 26. How many employes have you in your 3602 store?

A. Not any.

X-Q. 27. Waiting on customers?

A. Only my nephew helps me out and my wife, of course, comes down once in a while, and my daughter.

X-Q. 28. But usually there are two of you waiting in the whole store—waiting in all different parts of it?

A. Yes.

X-Q. 29. Are you kept pretty busy waiting on customers?

A. Yes, always.

X-Q. 30. Do you have much time to talk to customers 3603 in at the tobacco counter?

A. The way we sell them we throw at them the goods and they go.

X-Q. 31. Have you made any effort to remember any questions or remarks made by people as to whether the Beech-Nut Scrap Tobacco and Beech-Nut cigarettes are made by the same people that make the Beech-Nut chewing gum?

A. No, it never came to that.

X-Q. 32. I mean, have you made any particular effort to remember—have you tried to remember during the

3604 last couple of years whether people were asking such questions?

A. No, I never had it in my mind.

X-Q. 33. Have you heard any such questions?

A. No.

X-Q. 34. When you say you haven't heard any such questions, remarks or comments, you mean you don't remember having heard any?

A. No. It never come to talk about it, it never come to talk about it.

X-Q. 34. You don't remember ever having talked to any one about it?

3605 A. No.

X-Q. 35. Did you handle Beech-Nut chewing gum at the time you first took on Beech-Nut Scrap tobacco?

A. I handled Beech-Nut chewing gum, in fact, before that Beech-Nut Scrap Tobacco because Beech-Nut gum I sold since I have the store.

X-Q. 36. When you first saw a package of Beech-Nut Scrap Tobacco, who did you think made it?

A. Well, the Lorillard.

X-Q. 37. Why was that?

A. Why, because I see the name on the package. I seen the name. It is printed on the package that the
3606 Lorillard people make it. That is the only thing that makes me know. It is printed on the carton and package and every place.

X-Q. 38. In your experience in the tobacco business have you found that customers very often ask who makes the tobacco and cigarette they are buying?

A. Well, on a new cigarette they do, but on an old cigarette never. On a new cigarette—if they see something new, they ask who makes it.

X-Q. 39. Didn't you hear any questions, then, in regard to the Beech-Nut cigarettes when they came out as to who made them?

A. No.

X-Q. 40. When a customer comes in to buy tobacco or cigarettes, what do they usually ask for? 3607

A. If they come in and say they just want cigarettes, we ask them what they want.

X-Q. 41. Then what do they say?

A. They ask for the name.

X-Q. 42. Like what?

A. If they ask for instance they ask for Beech-Nut or Beech-Nut tobacco or Lucky Strikes, Murads, Helmars, Meccas.

X-Q. 43. Did you ever have a customer ask you for Lucky Strikes made by the American Tobacco Company?

A. No. 3608

X-Q. 44. Or Camels made by the Reynolds Company?

A. No, sir, if they ask for Camels, they ask for Camels. If a man comes in and asks for cigarettes, it doesn't concern them and they don't care to know who makes them.

X-Q. 45. They ask for the name of the brand?

A. Yes, they ask for the name of the brand. That is all they do.

X-Q. 46. They call the cigarette or tobacco by the name of the brand, do they?

A. That is how they know it.

X-Q. 47. How has the Beech-Nut Scrap tobacco sold with you? 3609

A. It sells pretty good. Well, I should judge about half a gross a week.

X-Q. 48. How has the Beech-Nut cigarette sold with you?

A. It is slow now because the Camels gave them a knock-out.

X-Q. 49. Did they sell better right at the start?

A. Yes. I always sold them big because, I tell you—not because the cigarette is different, but at that time

3610 the Camels was 15 cents straight and we sold these two for a quarter, but now we sell Camels two for a quarter and they rather take the Camels.

X-Q. 50. Did you ever hear any complaint as to the Beech-Nut cigarettes?

A. No, never.

Mr. Johnson: That is all.

(Cross Examination Closed.)

(Deposition closed.)

(Signature of witness waived.)

3611 PAUL SCHWARTZ, a witness called on behalf of the defendant, being first duly sworn, deposes and says, in answer to interrogatories propounded to him by Mr. Preston, as follows:

Q. 1. Will you please state your name, age, occupation and the address of your store here?

A. Paul Schwartz, age 23, 680 Grand Avenue, New Haven, Conn., a clerk here.

Q. 2. Mr. Schwartz, what is your occupation?

A. I used to be a machinist's helper before.

Q. 3. Now what are you doing?

3612 A. Now; just running the store, that's all.

Q. 4. Do you sell tobacco in your store here?

A. All kinds of tobacco, cigars and cigarettes.

Q. 5. Do you sell periodicals?

A. Yes, all kinds.

Q. 6. Do you sell toilet articles?

A. No toilet articles.

Q. 7. Do you sell razor blades?

A. We sell razor blades.

Q. 8. Do you sell search lights?

A. We sell search lights, shoe polish, ink, stationery.

Q. 9. Do you sell candies? 3613

A. Yes, sir.

Q. 10. Do you sell soda water?

A. We sell soda water.

Q. 11. Mr. Schwartz, do you sell Beech-Nut Scrap tobacco like the package I show you? (Mr. Preston showing the witness a package of Beech-Nut Scrap Tobacco.)

A. Yes.

Q. 12. How long have you sold that?

A. Well, while I am in the store for three years we are selling it right along.

Q. 13. Do you sell Beech-Nut cigarettes like the package I show you? (Mr. Preston showing the witness a package of Beech-Nut cigarettes.) 3614

A. Yes.

Q. 14. How long have you handled that?

A. Three years, the same as the scrap.

Q. 15. Do you know what company manufactures those brands?

A. The Lorillard Co.

Q. 16. Do you sell Beech-Nut chewing gum like the package I show you? (Mr. Preston showing the witness a package of Beech-Nut chewing gum.)

A. Yes, we do. 3615

Q. 17. Do you know what company makes that?

A. That is a different company altogether. I don't know exactly the name of the company. They have no name on the product.

Q. 18. Were you ever under the impression that the Beech-Nut gum and the Beech-Nut cigarettes and Beech-Nut Scrap tobacco were all made by the same company?

A. No, I never was.

Q. 19. Did any Lorillard salesman ever make any remark to you which indicated that there was any con-

nection between the maker of the Beech-Nut gum and the maker of the Beech-Nut cigarettes and scrap tobacco?

A. No salesman made any remarks at all in connection with the Beech-Nut chewing gum or tobacco or cigarettes to me while I am here.

Q. 20. Did you ever hear any remarks, inquiries, or comments among your customers or others to the effect that, or which led you to believe, they were under the impression that Beech-Nut chewing gum was made by the company that makes the Beech-Nut cigarettes or Beech-Nut Scrap tobacco?

A. No.

Q. 21. Did you ever hear of a chewing gum company that manufactured any tobacco products?

A. No, not as I know of. I never heard of the Beech-Nut Tobacco Company making any candy or any kind of gum.

Q. 22. Do you regard tobacco as the same or a distinct and separate line of merchandise from chewing gum or candy?

A. Different altogether.

Q. 23. Mr. Schwartz, do you sell Eureka Chocolates in your store?

A. Eureka Chocolates, yes. Yes, I have the chocolates. They are in a stand there on the other side. On this side is the tobacco stand and there are no confections at all. If anybody wants any tobacco, they come on that side and if they want any candy, it is on this side. We have them separate on either side of the store.

Q. 24. Do you sell Eureka Tobacco?

A. Yes, sir.

Q. 25. Do you sell Star razor blades?

A. Star, yes.

Mr. Johnson: I object to the testimony of this witness along this line in regard to different ar-

ticles by the same name, on the ground that it is in- 3619
competent, immaterial and irrelevant. It is also stipulated that this objection is to apply to all questions and answers along this line without repetition.

Q. 26. Do you sell Star tobacco, Mr. Schwartz?
A. No.
Q. 27. Did you ever sell Star Tobacco here?
A. No Star.
Q. 28. Do you sell Velvet pencils?
A. Yes.
Q. 29. Do you sell Velvet Tobacco?
A. Yes. 3620
Q. 30. Do you sell Apple chewing gum?
A. No Apple chewing gum.
Q. 31. Did you ever sell Apple chewing gum?
A. No.
Q. 32. Do you sell Apple tobacco?
A. Apple Plug chewing tobacco. We have that but no gum.

Mr. Preston: That is all.
(Direct Examination Closed.)

Cross Examination. 3621

By Mr. Johnson:

X-Q. 1. How long have you handled tobacco altogether?
A. Well, we weren't in this territory. We are here for about three years and we handled tobacco three years here, and five years in Cleveland we handled the same kind of a line.
X-Q. 2. What is the name of your store here?
A. H. Weinzimmer.

3622 X-Q. 3. Weinzemmer what. What do you call it?

A. A confectionery store, cigars and cigarettes.

X-Q. 4. A confectionery and tobacco store?

A. Yes, a confectionery and tobacco store.

X-Q. 5. You have been handling tobaccos for some thing like eight years altogether?

A. Yes, eight years altogether.

X-Q. 6. Are you pretty familiar with the different tobacco brands and cigarettes brands?

A. Sure.

X-Q. 7. Have you handled many of the Lorillard products?

3623 A. Yes, almost all the brands they make that would be used in the store.

X-Q. 8. Will you name just a few of them, both cigarettes and tobacco?

A. Level Head, Murads, Helmars, Turkish Trophies, Beech-Nut, Sensation and Comet.

X-Q. 9. Have you sold large quantities of the Lorillard products?

A. Yes, sir, we sell quite a large quantity.

X-Q. 10. Do you know the Lorillard salesman?

A. Sure I know them.

X-Q. 11. Do they come in to your store often?

3624 A. About every other week—twice a week—once a week or sometimes every other week. You know, whenever they are around here they always stop in here.

X-Q. 12. Do you give them pretty good sized orders?

A. Yes, sir.

X-Q. 13. Do you order tobacco and cigarettes from jobbers sometimes?

A. Yes.

X-Q. 14. Frequently?

A. Yes, yes. We order them whenever we run short. Otherwise we have large shipments coming in from

the Lorillard Co. when we have enough for a couple of weeks. If we run short we just run down to the jobber and get them. 3625

X-Q. 15. I show you a package of Beech-Nut chewing gum, which Mr. Preston showed you a few minutes ago and which is identical with one of the Plaintiff's exhibits in this case. I wish you would tell me whether you see the name of the Beech-Nut Packing Company on that package?

A. The Company's name is on here. That is, just the Beech-Nut Packing Company, but there is no name of the concern beside the Beech-Nut Packing Company like the Lorillard has their name on each of the products. 3626

X-Q. 16. Do you handle any other Beech-Nut products beside the chewing gum?

A. Yes, we have Life Savers there, the lime products.

X-Q. 17. You mean Beech-Nut Mints and Fruit Drops?

A. Orange and Lime Drops and Lemon Drops. Fruit products they call them.

X-Q. 18. Aren't they all made by the Beech-Nut Packing Company?

A. Yes. 3627

X-Q. 19. Then that is the name of the company that makes them?

A. Yes, the Beech-Nut Company.

X-Q. 20. So the name of the maker is on that package of chewing gum, isn't it?

A. Yes.

X-Q. 21. Are you kept pretty busy waiting on customers in the store?

A. Yes, sir.

X-Q. 22. Do you have much time to talk to customers at the tobacco stand?

3628 A. Why sure, if I have spare time I talk to them.

X-Q. 23. Do they very often ask you the name of the maker of the tobacco or cigarette they are buying?

A. Not all of them. Not many, but a few times. They hardly ever bother. If they come in they buy what they want and go right ahead.

X-Q. 24. Did anybody ever ask you who made the Beech-Nut Scrap Tobacco?

A. If they ask me I tell them the name is right on there.

X-Q. 25. Did anybody ever ask you?

A. Not many people. They don't come in and ask
3629 any questions. They just come in and get what they want.

X-Q. 26. Maybe a few did ask you who made Beech-Nut Scrap Tobacco?

A. Yes, if they did ask me I just answered them who makes it, that is all.

X-Q. 27. Did anybody ever ask you who makes the Beech-Nut cigarette?

A. Yes, when they first came out they asked me who makes them and I told them that the Lorillard Co. makes them.

X-Q. 28. Did anybody ever ask you if the Beech-Nut
3630 Scrap Tobacco was made by the same people that made the Beech-Nut chewing gum?

A. No.

X-Q. 29. Did any one ever ask you if the Beech-Nut cigarettes were made by the same people who made the Beech-Nut chewing gum?

A. Not while I was here. They never asked me anything about that.

X-Q. 30. Do people usually ask for tobacco or cigarettes by the name of the brands like Camels or Lucky Strikes?

A. Yes, they just say whatever they want; Beech-Nut 3631
cigarettes or Luckys, just the name of the brand.

X-Q. 31. Did you ever have any one ask you for Camels made by the Reynolds Company, like that?

A. No, they always say the name of the cigarette. They don't ask me for Reynolds' Cigarettes. They always say: "Camels", "Lucky Strikes", "Fatimas", or whatever they ask for they ask for the name of the cigarette.

X-Q. 32. When you say you never heard any one ask whether the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were made by the same people who makes this Beech-Nut gum, you mean you don't remember 3632
hearing any one say it?

A. No, I don't remember it. Possibly they did but I couldn't remember if they did. If they did ask me I just tell them what I know about it.

Mr. Johnson: That is all.
(Cross Examination Closed.)

Re-direct Examination.

By Mr. Preston:

R-D. Q. 1. Mr. Schwartz, if many people had asked 3633
you if Beech-Nut cigarettes were made by the same company that makes the Beech-Nut chewing gum, do you think you would have remembered it?

A. Why, I would have remembered who makes them because the name is right on there and I would tell them.

R-D Q. 2. If many people had asked you whether the same company made the gum that make the cigarette, do you think you would have remembered that they had asked you, if you had heard a great many of those questions?

3634 A. I would remember all right if people had asked me the question.

Mr. Preston: That is all.
(Re-direct Examination Closed.)
(Deposition Closed.)
(Signature of Witness waived.)

STIPULATION.

IT IS HEREBY STIPULATED by and between counsel for the respective parties, as follows:

3635 On August 25th, 1921, Plaintiff's Exhibit No. 2 (West Haven Drug Store Display) introduced as plaintiff's exhibit in the deposition of John F. Griffin of New Haven, Connecticut, was taken by Frank Madden, this photograph showing two window panels, designated as Nos. 3 and 4, of the display window of the drug store of William J. Coughlan, at Elm Street and First Avenue, West Haven, Connecticut; the display panel No. 3 showing display advertisements of Beech-Nut chewing gum, while display window No. 4 shows tobacco display advertisements including two display panels of Beech-
3636 Nut cigarettes; that in this plaintiff's exhibit the words "P. Lorillard Co." appear on the upper smaller Beech-Nut cigarette advertising panel while the words "P. Lorillard Co." do not show upon the picture of the Beech-Nut cigarette package on the lower Beech-Nut cigarette panel.

That subsequently, on or about August 30th, 1921, Frank H. Simonds, a commercial photographer, located on Chapel Street, New Haven, Connecticut, at the request of counsel for the defendant, took a picture or photograph of panel No. 4 of this Coughlan window, or the panel showing the tobacco advertisements, the pa-

nels and advertising in this window having been undisturbed and being the same as when plaintiff's photograph was taken, and that, as will appear from this Simonds' photograph of West Haven Drug Store Display in the Coughlan Pharmacy, which is here introduced in evidence as Defendant's Exhibit No. 11, the lower or larger Beech-Nut advertising panel shows the words "P. Lorillard Co." on the photograph of the package of Beech-Nut cigarettes deliniated on the panel, and that, as a matter of fact, this name "P. Lorillard Co." did so appear upon this lower larger Beech-Nut advertising panel at the time plaintiff's exhibit photograph No. 2, above referred to, was taken on August 25th, 1921, although these words do not show on that photograph. 3637 3638

That if Frank H. Simonds, the photographer who took the defendant's exhibit picture on August 30th, 1921, were called as a witness he would testify that he took the picture as aforesaid, that he took such a picture with a special type of photographic plate known as a pan-chromatic plate, which is used in the art by commercial photographers for taking photographs of objects or articles when it is desired to clearly show matter printed in distinguished or different colors, as, for example, black on red, while the plaintiff's photograph, taken by Mr. Madden on behalf of the plaintiff and appearing herein as Plaintiff's exhibit No. 2, was taken with an ordinary photographic film or plate, which does not always contradistinguish the colors, especially as here—black and red—and it is further stipulated that in the following deposition of William J. Coughlan, on behalf of the defendant, the photographs shown to him as pictures of his display window, are those mentioned in this stipulation. 3639

The Coughlan Drug Store window has four panels, which, for convenience, the parties have called as follows:

3640 The westernmost one or that nearest the door, panel No. 1;

A large, more central panel adjoining No. 1 is panel No. 2;

The third and smaller panel next to the large panel and opposite to No. 1, is Panel No. 3;

And the easternmost panel, next to panel No. 3, is Panel No. 4.

WILLIAM J. COUGHLAN, a witness called on behalf of the defendant, being first duly sworn, deposes and says in answer to interrogatories propounded to him
3641 by Mr. Cavanagh, as follows:

Q. 1. What is your name, residence and occupation?

A. William J. Coughlan, Roswell Avenue, Sea Gate, Connecticut. My occupation is that of druggist and I am the proprietor of a drug store located at the corner of Elm Street and First Avenue, West Haven, Connecticut.

Q. 2. Mr. Coughlan, I show you two photographs which are in this case, one being marked "Plaintiff's Exhibit No. 2, West Haven Drug Store Display" and the other "Defendant's Exhibit No. 11", "Simonds'
3642 photograph of West Haven Drug Store Display at the Coughlan Pharmacy." I might state that it has been agreed between the parties that so far as the large lower Beech-Nut cigarette sign shown in the window, is concerned, the words: "P. Lorillard Co." actually appear thereon as shown in the Simonds' photograph. You had your store windows decorated with advertising matter and the like at one time as shown in these photographs, did you not?

A. Yes, I did.

Q. 3. And at about the time these pictures were taken?

A. Yes, at the time they were taken. 3643

Q. 4. I notice that one section of the window contained advertising matter of tobacco products, including the Beech-Nut cigarettes, and the other side contained certain advertising matter, including Beech-Nut chewing gum?

A. Yes.

Q. 5. Will you please relate, in your own words, as to how it happened that the window was so decorated with the gum and the tobacco display was in the other one next to it?

A. Yes. The tobacco salesman came along and noticed we had a small display in that little corner 3644 window there at the east end, Panel No. 4, and he asked me for the privilege of using it for displaying tobaccos and cigarettes made by the P. Lorillard Co. I told him he could have that privilege. About every week or every two weeks he came along and put in a display. Sometimes it was "Between The Acts" and sometimes it happened to be "Flexo Giants" and sometimes it happened to be "Beech-Nuts" so he would make his window display, and we, absolutely unconscious of what he had in that window, had a display of Beech-Nut gum in the window. The Beech-Nut gum originally was on the extreme west side or western panel of the show 3645 window, or No. 1.

Q. 6. That is the one where the gum was first, Panel No. 1?

A. That is where the gum was first, in Panel No. 1.

Q. 7. Go ahead.

A. Friday is window day and the young man asked me what to put in the windows. Being busy on prescription work and other store work at the time, I told him to change things around and put the Beech-Nut gum display on the other end of the large window or Panel No. 3, and change whatever was on Panel No. 3 to Panel No. 1, leaving the center display the same.

3646 Q. 8. What young man was this you speak of?

A. This young man we saw this afternoon.

Q. 9. He was working for you at the time?

A. Yes.

Q. 10. Now, when instructing him to make this change, did you have in mind any connection between the Beech-Nut gum and the Beech-Nut tobacco sign?

A. Absolutely none.

Q. 11. Did you yourself ever form in your mind any connection between the Beech-Nut gum and tobacco products as being made by the same people?

A. Not I myself, no.

3647 Q. 12. Did you ever have any comments, inquiries, or questions asked you by others, such as customers, which would lead you to believe they were made by the same people?

A. Never.

Q. 13. Or that they might have been told they were made by the same people?

A. No.

Q. 14. You have sold both the Beech-Nut gum and the Beech-Nut cigarettes, have you not?

A. Yes.

Q. 15. You have never known any cases where the

3648 parties confused the two products?

A. No.

Q. 16. Did the Lorillard man, who decorated your window first with the tobacco signs, have any part, by suggestion or otherwise, in that change of arrangements so that the Beech-Nut advertisement was put next to the Lorillard advertisement?

A. He had absolutely nothing to do with it.

Mr. Cavanagh: That is all.

(Direct Examination Closed.)

Cross Examination. 3649

By Mr. Bulkley:

X-Q. 1. Had you ever learned anything about the use of the word "Beech-Nut" in connection with products sold by the Beech-Nut Packing Company before you had the products in the window, the Lorillard Company products?

A. That is, so that I would be confused or think that one concern made the other?

X-Q. 2. Not at all. Simply as you have learned of the use of the word "Beech-Nut" by the Beech-Nut Packing Company, to designate the products sold by the Beech-Nut Packing Company? 3650

A. I have been familiar, of course, with the Beech-Nut gum long before the Beech-Nut cigarettes—long before I happened to sell the Beech-Nut cigarettes or the Beech-Nut tobacco in the scrap state, and it was always a marvel to us how the Beech-Nut chewing gum came ahead so fast, so that in that way I was familiar with the two concerns and knew they were entirely different.

Mr. Bulkley: That is all.

Cross Examination (Cont'd). 3651

By Mr. Johnson:

X-Q. 3. Mr. Coughlan, I show you again this photograph, Plaintiff's Exhibit No. 2, and this other photograph, Defendant's Exhibit No. 11. Are these two photographs of parts of your window with the display therein the latter part of August, 1921?

A. Those are displays that were in the window, but just what part of the month I couldn't say.

3652 X-Q. 4. This photograph, Plaintiff's Exhibit No. 2, does this photograph cover the window displays in the panels which you have described as Panels Nos. 3 and 4 of your window, the latter week of August, 1921?

A. That does.

X-Q. 5. And does this photograph, which is Defendant's Exhibit No. 11, cover your window display in Panel No. 4, taken a few days later, than the first photograph?

A. That is the display in the window. I couldn't tell how long after this picture here this one was taken. It may be two, three or four days, it may be a week.

X-Q. 6. The subject matter of the photograph, which
3653 is Defendant's Exhibit No. 11, is the panel No. 4, which is also in Plaintiff's Exhibit No. 2, is it?

A. Yes, the same display with the exception of the printing being off there and on there, which was called to my attention at the time this picure or this photograph was taken.

Mr. Cavanagh: The witness refers to the fact that the printing of the words: "P. Lorillard Co." is not on the package of Beech-Nut cigarettes in the lower Beech-Nut advertisement in the panel of plaintiff's exhibit, while it does appear upon the de-
3654 fendant's exhibit.

X-Q. 7. Was the display, shown in Panel No. 4 in these two photographs, in position in your window at the time you had your clerk, as you have described, put the contents of Panel No. 1 in to Panel No. 3?

A. It was.

X-Q. 8. Have you a busy corner drug store, Mr. Coughlan?

A. Busy as far as customers are concerned or as far as automobiles?

X-Q. 9. Yes?

A. Why, most druggists, in referring to the corner, refer to it as a busy corner. 3655

X-Q. 10. About how many customers a day do you have in here?

A. Between five and six hundred.

X-Q. 11. Is your front window, which we have been referring to, on one of the main thoroughfares of Southern Connecticut?

A. It is. It is on one of the main roads leading from New Haven to New York.

X-Q. 12. Are you kept pretty busy waiting on customers in your store?

A. Yes. 3656

X-Q. 13. Do you have much time to talk with your customers?

A. No.

X-Q. 14. Or listen to what they are saying?

A. No.

X-Q. 15. Does a customer often ask you who makes the cigarette or tobacco he is buying?

A. Very seldom.

X-Q. 16. Have you heard any comments or inquiries from your customers or others as to whether the Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were made by the Beech-Nut gum people? 3657

A. No.

X-Q. 17. When you say that, you mean you don't remember any such comments or remarks?

A. I mean just that. I can never recollect anybody being confused as to the same concern making both articles.

Mr. Johnson: That is all.

3658 *Re-direct Examination.*

By Mr. Cavanagh:

R-D. Q. 1. If you had heard any such questions, you would have remembered them, wouldn't you?

A. Positively. The people seem to be very familiar wth the Beech-Nut gum and the Beech-Nut Packing Company and I think in my experience it has been on the market so long that when they would say Beech-Nut tobacco we know it is made by a different concern.

3659 Mr. Cavanagh: That is all.

(Cross Examination closed.)

(Deposition closed.)

(Signature of witness waived.)

STIPULATION.

It is Stipulated by and between the parties hereto, through their respective counsel, that if R. F. STAHL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

3660 *Direct Examination.*

My name is R. F. STAHL. I am of legal age and a druggist by trade, and do business at the Marx Pharmacy, 35 Kimberly Avenue, New Haven, Connecticut. In addition to drugs I handle such articles as confections, tobacco, stationery and toilet articles.

I have sold Beech-Nut cigarettes since they came on this market and have always known them to be the product of the P. Lorillard Co. I have sold Beech-Nut chewing gum and Beech-Nut Mints for a number of years

past and know that both of these articles are made by the 3667
Beech-Nut Packing Company.

No Lorillard salesman ever made any remarks to me which indicated any connection between the makers of the Beech-Nut cigarette and the producers of Beech-Nut gum or mints.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut cigarette was manufactured by the same company that manufactures the Beech-Nut gum or Mints.

I regard cigarettes as an entirely distinct line of merchandise from gum or candy, and I have never 3668
heard of a confection or food product concern which manufactured any tobacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

My store is located two blocks from the drug store at 615 Howard Avenue, New Haven, where James J. Cashman, Jr., works.

Cross Examination.

I am a clerk at the Marx Pharmacy and wait on cus- 3669
tomers, not only at the tobacco stand but in all parts of the store. My employer also waits on customers but looks particularly after the putting up of prescriptions.

I am kept pretty busy and have not a great deal of time to listen to what people are saying at the tobacco and cigarette stand. I have been handling tobacco products for several years and am familiar with the various brands. I have handled various brands of the Lorillard tobaccos and cigarettes and know the Lorillard salesmen who come into our store to take orders.

664 I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I don't remember any.

Re-direct Examination.

665 If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MISS AGNES R. McKAY were called as a witness on behalf of P. Lorillard Co., defendant, she would testify as follows:

666 *Direct Examination.*

My name is AGNES R. McKAY. I am of legal age and am the manager of the Strand Smoke Shop, located at 239 Elm Street, New Haven. This shop is a small one, measuring about 25 feet by 12 feet. We sell tobacco and confections here and as the store is located among the buildings of Yale University, our customers are principally students. During the school session we have approximately 1,000 customers a day but during the summer months our trade is not nearly so heavy.

I have sold Beech-Nut Scrap tobacco and Beech-Nut

cigarettes here for the past two years, and I have 3667
known all that time that they were both products of the Lorillard Tobacco Co. We also handle Beech-Nut chewing gum and Beech-Nut Mints. I know these products to be made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company, and I have never seen a package put up by the Beech Nut Packing Company that looked like either a scrap tobacco or a cigarette package. 3668

I regard tobacco and cigarettes as a distinct line of merchandise from chewing gum and confections and I have never heard of a food product company that manufactured any tobacco products.

Cross Examination.

My "Smoke Shop" has a high class trade. I do a big business with Yale students during the college year. I frequently have a store full of students, who do a great deal of talking and joking but I am usually so busy here waiting on them that I can't try to listen to 3669
much of what they say. I have been running the store myself since my father's death several years ago.

I have always handled various of the Lorillard products, especially their cigarettes. I have to keep myself informed as to the different brands, and especially the new brands because I cater to a fastidious trade.

I know the Lorillard salesmen who come frequently into my store to take orders. I have seldom heard one of my customers ask who makes the cigarette or tobacco he is buying.

While I have kept the Beech-Nut Scrap Tobacco and Beech-Nut cigarettes, I haven't a great deal of call at

3670 this shop for the scrap tobacco and the Beech-Nut cigarette has not been a big seller as compared to some of the other cheaper brands.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

3671 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if A. WOLINSKY were called as a witness on behalf of P. Lorillard Co., 3672 defendant, he would testify as follows:

Direct Examination.

My name is A. WOLINSKY. I am of legal age and am a grocery by trade, and do business at 1993 Whitney Avenue, Whitneyville, New Haven Connecticut. My store is a fairly large one located in a suburban thinly settled residential neighborhood. I have one clerk to assist me in waiting on my trade.

I sell Beech-Nut Scrap tobacco and Beech-Nut cigarettes, both of which articles I know to be manufactured

by the P. Lorillard Co. The scrap tobacco is a good seller with me but the cigarette is only a fair seller. I handle Beech-Nut chewing gum, Beech-Nut Mints and Beech-Nut Peanut Butter, and I know all of these products are made by the Beech-Nut Packing Company. 3673

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought that Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacoo, and cigarettes as a distinct line of merchandise from gum or food products, and I have never heard of a food products company which manufactured any tobacco products, and have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package. 3674

My store is located on the same street west and about a quarter of a mile away from the drug store at 1235 Whitney Avenue, where Nathan Hammerman works.

I sell Polo Ketchup and Polo cigarettes, Murad Canned corn and Murad cigarettes, Comet Tobacco and Comet Rice. None of these products are manufactured by the same concern. 3675

It is Stipulated that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have handled tobacco for many years and am familiar with the different brands. I have handled many of the Lorillard products and know the Lorillard

6 salesmen who come into my store frequently to take my orders. My customers hardly ever ask who makes the cigarettes or tobacco they are buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

7 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if SAM SUKLOFF, JR., were called as a witness on behalf of P.
8 Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is SAM SUKLOFF, JR., I am of legal age and a retail merchant by trade. I do business at 1012 Chapel Street, New Haven, Connecticut. I sell tobacco products and novelties in my store, and during the school session at Yale University, I serve about a thousand customers a day, many of them students. There are always two clerks on duty here and sometimes three, including myself.

I have sold Beech-Nut Scrap tobacco since 1915 and 3679
Beech-Nut cigarettes since they appeared on this market, something like two years ago. I have always known that both of these products were manufactured by the P. Lorillard Co. I also handle Beech-Nut chewing gum and Beech-Nut Mints, and I know these articles to be the products of the Beech-Nut Packing Company.

Although no one ever asked me whether Beech-Nut Scrap Tobacco was manufactured by the same company that makes Beech-Nut chewing gum, I do remember that when the cigarette was first put on the market a few of my customers did ask me whether there was any connection between the makers of the gum and the makers 3680
of the cigarettes. These instances occurred shortly after I began selling the cigarettes, and since then I have heard no remarks, comments or inquiries among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut cigarette to be manufactured by the same company that makes the Beech-Nut chewing gum. I told those persons who asked me those questions that the cigarettes were made by the P. Lorillard Co., while the gum was manufactured by the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum or confections, 3681
and I have never heard of a confection or food products company which made any tobacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

While I do not have a great demand for scrap tobacco, the Beech-Nut scrap is my best selling scrap tobacco. Although the Beech-Nut cigarette is a slow seller as compared to such leaders as Camels or Lucky Strikes, I have, in the aggregate, sold a great many packages of this brand.

382 *Cross Examination.*

I am the proprietor of the University Smoke Shop at 1012 Chapel Street, New Haven, and cater largely to Yale students. During the college year my place of business is often crowded with students. There is usually considerable conversation and banter going on, and I am too busy waiting on them to be able to listen to much of what is being said.

On account of my particular trade I make it a point to keep myself well informed as to the various brands of tobacco and cigarettes. I have handled many of the
383 Lorillard Co. products and have sold large quantities of them. I know the Lorillard salesmen who come into my store frequently to take orders. The customer almost never asks who makes the cigarette or tobacco he is buying.

I have made no effort to remember any remarks, inquiries or comments as to whether the Beech-Nut Scrap Tobacco and Beech-Nut cigarettes were made by the same people who make the Beech-Nut chewing gum, and other Beech-Nut Packing Company products, and when I say that I have heard only a few such inquiries or comments in regard to the Beech-Nut cigarettes I mean
384 that is all I remember.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory, but I am sure I have not heard any such remarks except shortly after the appearance of the cigarette on this market.

3685

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if C. C. GILLESPIE were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is C. C. GILLESPIE, I am of legal age, a storekeeper by trade, and do business under the name of T. P. Gillespie & Company at 744 Chapel Street, New Haven, Connecticut. In addition to drugs we sell here 3686
such articles as toilet articles, fountain pens, stationery, tobacco and confections.

I have sold Beech-Nut Scrap tobacco for a number of years past and Beech-Nut cigarettes since they appeared on this market, and have always known that both of these products were manufactured by the P. Lorillard Co.; and I have long known that the Lorillard Co. is one of the oldest and largest tobacco concerns. I also sell Beech-Nut chewing gum and Beech-Nut Mints, and I know that these are made by the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct 3687
line of merchandies from the gum or candy, and I have never heard of a gum, confection or food products concern which manufactured any tobacco products, and have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

I sell Apple chewing gum and Apple tobacco, made by different companies; Mavis talcum powder and Mavis candy, made by different companies; Gem nail clippers and Gem razor blades, made by different companies; Ideal bandages, Ideal brushes and Ideal foun-

3688 tain pens, all made by different companies; Ever Ready razor blades and Ever Ready search lights, made by different companies; Velvet pencils and Velvet tobacco made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that same is incompetent, irrelevant and immaterial.

Cross Examination.

3689 We have one of the busiest downtown drug stores in New Haven. I wait on customers in all parts of the store myself and am kept so busy as a rule that I have very little time to listen to what customers are saying about tobacco and cigarettes.

I have handled tobacco products for a great many years and am familiar with the various brands. I have sold large quantities of the P. Lorillard Co. tobacco products and know the Lorillard salesmen who are frequently in my store taking orders. I do not remember a customer ever asking me who made the particular tobacco or cigarette he was buying.

3690 I have made no particular effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any.

Re-direct Examination. 3691

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties, through their respective counsel, that if ISADORE TAGUM were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 3692

Direct Examination.

My name is ISADORE TAGUM. I am of legal age, a retail merchant by trade, and do business at 609 Howard Ave., New Haven, Connecticut. My store is located next door to Biernes Drug Store, 615 Howard Avenue, where James J. Cashman works.

I sell groceries, candies, soda water and tobacco, and we have about two hundred customers a day. I have handled Beech-Nut Scrap tobacco for the past five years, and Beech-Nut cigarettes for about two years, and I know that both of these products are made by the P. Lorillard Co. 3693

I also sell Beech-Nut chewing gum and Beech-Nut mints, which I know to be manufactured by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

3694 I have never seen a package put out by the Beech-Nut Packing Company which looked either like a scrap tobacco or cigarette package, nor have I ever heard of a confection or food products concern that were manufacturing any tobacco products.

I regard tobacco and cigarettes as a distinct line of merchandise from gum or confection.

I sell Harvard ginger ale and Harvard cigars; Velvet pencils and Velvet tobacco, all made by different companies.

IT IS STIPULATED that objection is made by plaintiff's
3695 counsel to the witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have been handling tobacco for some years and am familiar with the different brands. I have handled various of the P. Lorillard Co. products and know their salesmen who come into my store at frequent intervals to take orders. I have one assistant in my store and
3696 wait on customers in all parts of the store myself. I haven't a great deal of time or opportunity to listen to what customers are saying. A customer hardly ever asks me who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I have no reason to do so. When I say

that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any. 3697

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed upon my memory.

STIPULATION.

IT IS STIPULATED by and btween the parties hereto, through their respective counsel, that if HARRY SILVERMAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows: 3698

Direct Examination.

My name is HARRY SILVERMAN. I am of legal age, a retail tobacco merchant by trade, and do business under the name of "Harry's Smoke Shop," located at 94 Church Street, New Haven, Connecticut. In addition to tobacco we carry a small line of chewing gum and confections.

I have sold Beech-Nut scrap tobacco for a number of years past, and Beech-Nut cigarettes for the past two years, and have always known that both of these products were manufactured by the P. Lorillard Co. I also handle Beech-Nut chewing gum and Beech-Nut Mints, which I know to be made by the Beech-Nut Packing Company. 3699

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut

3700 scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as a distinct line of merchandise from candy or gum, and have never heard of a chewing gum or confection concern which made any tobacco product. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

I have dealt a great deal with the P. Lorillard Co. and sold many of their brands, and I know that company to be one of the largest and oldest of the tobacco concerns.

3701 I sell Velvet pencils and Velvet tobacco, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that same is incompetent, irrelevant and immaterial.

Cross Examination.

I have a busy down-town tobacco store. There are usually two of us waiting on customers and sometimes 3702 more. I am kept pretty busy myself and haven't much time or opportunity to talk to customers or listen to what they are saying. I can not remember a customer ever asking me who makes the tobacco or cigarette he is buying. I have, for many years, known the P. Lorillard Co. products and know their salesmen.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Com-

pany products, and I had no reason to do so. When I 3703
say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

3704

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MRS. N. FRANTZ were called as a witness on behalf of P. Lorillard Co., defendant, she would testify as follows:

Direct Examination.

My name is Mrs. N. FRANTZ. I am of legal age, and am a storekeeper doing business at 92 Fourth Ave., West Haven, Connecticut. My husband is the proprietor of this business, but he has other employment and I run the store for him. 3705

This is a general store where we sell groceries, tobacco, toilet articles, stationery, and so forth. My store is located about two blocks from the grocery store at 735 Washington Avenue, which is run by Robert G. Greene.

I have sold Beech-Nut scrap tobacco for several years past, and Beech-Nut cigarettes for the past two years, and have always known that both of there products are made by the P. Lorillard Co. I also sell Beech-Nut chewing gum, Beech-Nut Mints, and have, at times, handled some of the Beech-Nut food products such as Peanut Butter and Tomato Ketchup, and I

know these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as a distinct line of merchandise from confections and food products, and I have never heard of a food products company that manufactured any tobacco. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

Cross Examination.

I wait on customers in all parts of my store, and don't pay much attention to what they are saying about the tobacco and cigarettes. I have handled P. Lorillard Co products for some years, and know the Lorillard salesmen when they come into my store to take orders.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION. 3709

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MEYER LEVINE were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is MEYER LEVINE. I am of legal age, a general storekeeper by occupation and doing business at 393 Campbell Avenue, West Haven, Connecticut. My store is located two blocks from the store at 630 Campbell Avenue where Edward J. Glynn works. 3710

I sell a varied line of merchandise, including stationery, tobacco, confections, playing cards, toilet articles, and so forth. I have handled Beech-Nut Scrap tobacco for the past five years and Beech-Nut cigarettes for the past two years, and I have always known these products to be manufactured by the Lorillard Tobacco Co.

I have handled a great many Lorillard products and know the Lorillard Co. to be one of the oldest and largest of the tobacco concerns. I sell Beech-Nut chewing gum and Beech-Nut Mints, and I know both of these products to be made by the Beech-Nut Packing Company. 3711

I have never heard any inquiries, comments or remarks among my customers or others which led me to believe that they thought the Beech-Nut Scrap tobacco to be manufactured by the same company which makes the Beech-Nut chewing gum and Beech-Nut Mints; but when the cigarette first came on this market several of my customers would ask me whether the new cigarette was made by the same company that made the Beech-Nut gum. I told them that such was not the case and I explained to them who was the maker of each product.

3712 Since shortly after the cigarette was introduced into this market I have heard no such comments or remarks among my customers or elsewhere.

I regard tobacco and cigarettes as a distinct line of merchandise from chewing gum or confections, and have never heard of a food products concern which manufactured any tobacco, nor have I ever seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

Cross Examination.

3713 I have sold large quantities of P. Lorillard Co. tobacco products and know the Lorillard salesmen who come into my store frequently to take orders. I have never paid a great deal of attention to what people in my store were saying about tobacco and cigarettes. I do not remember of any customer ever asking me who made the particular cigarette or tobacco he was purchasing.

I have made no effort to remember any comments, inquiries, or remarks as to whether the Beech-Nut Scrap tobacco or Beech-Nut cigarettes were made by the same people who make the Beech-Nut gum and other Beech-
3714 Nut Packing Company products, and when I say that I have heard several make such remarks or comments as to the Beech-Nut cigarettes, I mean I do not remember any more than that.

Re-direct Examination.

I can only say that I do not remember having heard more than several such comments or remarks. I can further state that if I had heard a substantially greater number of them, it would have been impressed on my memory.

3715

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if JOHN K. STEVENSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is JOHN K. STEVENSON. I am of legal age, a druggist by trade and my store is located near the store at 630 Campbell Avenue, where Edward J. Glynn works. 3716

In addition to drugs I carry in my store a varied line of products, including confection, tobacco products, toilet articles, stationery, periodicals, and so forth. I have sold Beech-Nut scrap tobacco for the past five years and Beech-Nut cigarettes since they first appeared on this market about two years ago. I know both of these products to be manufactured by the P. Lorillard Co. I handle Beech-Nut chewing gum and Beech-Nut mints, and I know that these are products of the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company. 3717

I do not regard tobacco or cigarettes as in any way related to chewing gum or mints, and I have never heard of a gum or confections concern which manufactured any tobacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

3718 I have been handling tobacco products in my store for a good many years and have known of the P. Loirllard Co. all that time, and know it to be one of the largest and oldest of the tobacco companies.

Cross Examination.

I have handled large quantities of P. Lorillard Co. tobacco products and know their salesmen, who come into my store. A customer hardly ever asks the name of the maker of the tobacco or cigarette he is buying.

I am kept pretty busy waiting on customers and
3719 haven't much time or opportunity to talk to them or listen to what they are saying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember.

Re-direct Examination.

3720 If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3721

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if the men whose names and addresses here appear, to wit:

WILLIAM SILVER, Druggist, 519 Campbell Ave., West Haven, Conn.,

TRACE CALDWELL, Druggist, Union Ave. & Main Street, West Haven, Conn.,

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as follows:

3722

Direct Examination.

I am of legal age, druggist by trade, and run a store where, in addition to drugs, such articles as toilet articles, stationery, periodicals, confections and tobacco are sold. I have handled Beech-Nut scrap tobacco for five or six years and the Beech-Nut cigarettes since they appeared on this market two years ago.

I have always known that both of these products were manufactured by the P. Lorillard Co. The Lorillard salesmen who come into my store are either already acquainted with me or tell me when they introduce themselves what company they represent. 3723

I sell Beech-Nut chewing gum and Beech-Nut Mints, and I know that these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

3724 I have never heard of a gum, candy or food products concern which engaged in the tobacco business, and I regard tobacco and cigarettes as an entirely distinct line of merchandise from confections or food products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

Cross Examination.

I have sold large quantities of P. Lorillard Co. tobacco products, and know their salesmen from time to time.
3725 I wait on customers in the various parts of my drug store, and am usually too busy to listen to their conversation. I haven't had much time or opportunity to hear what they were saying about tobacco or cigarettes. I do not remember a customer ever asking who made the cigarettes or tobacco he was buying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say
3726 that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3727

New Haven, Conn.,
August 7, 1923.

Met pursuant to adjournment.
Parties present as before.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if L. WOLFSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination. 3728

My name is L. WOLFSON. I am of legal age, a retail merchant by trade, and do business at 29 River Street, Milford, Connecticut. My store is located less than a block from the store at No. 3 Center Street where C. A. Sattig works. My store is a small but very busy one. I have one clerk here to assist me and we have about seven hundred customers a day.

I sell tobacco, confections, stationery and periodicals. I have sold Beech-Nut Scrap Tobacco for the past five years and Beech-Nut cigarettes for the past two years, and have always known that both of these products 3729 were made by the P. Lorillard Co.

I sell Beech-Nut chewing gum and Beech-Nut candies, and I know these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap Tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

3730 I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum or confections. I have never heard of a candy or food products concern which manufactured any tobacco products.

I sell Velvet Pencils and Velvet tobacco, manufactured by different companies.

IT IS STIPULATED that objection is made by plaintiff's counsel to the witness's testimony in regard to different
3731 goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have a busy store and am too busy most of the time to talk to customers. I haven't had much opportunity to hear what customers were saying around my tobacco and cigarette stand.

I have been handling P. Lorillard Co. tobacco products for many years, and know the Lorillard salesmen
3732 who come into my store at frequent intervals to take orders. I do not remember a customer ever asking me who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I don't remember any.

Re-direct Examination. 3733

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if JOSEPHINE GARBARINO were called as a witness on behalf of P. Lorillard Co., defendant, she would testify as follows: 3734

Direct Examination.

My name is JOSEPHINE GARBARINO. I am of legal age and I am the proprietor and manager of the Milford Fruit Company, which is a grocery store located at Nos. 1 and 2 Daniels Street, Milford, Connecticut. In addition to groceries we handle tobacco products. We serve about two hundred customers a day.

My store is located one block from the grocery store run by Mary W. Gregory and is two blocks from the 3735
store at No. 3 Center Street, where C. A. Sattig works.

I have sold Beech-Nut Scrap tobacco for several years past and Beech-Nut cigarettes for the last two years and have always known that both of these products were made by the P. Lorillard Co. I sell Beech-Nut Peanut Butter, Beech-Nut chewing gum and Beech-Nut Mints. I know all of these products are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or

736 which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard food products and confections as in no way related to tobacco products and I have never heard of a food products concern which put out any tobacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

Cross Examination.

737 I run all the departments of my store and also wait on customers. I haven't much time to talk to customers at the tobacco and cigarette stand, and haven't much opportunity to listen to what they are saying.

I have handled various of the P. Lorillard Co's tobacco products and know the Lorillard salesmen. A customer hardly ever asks who makes the cigarette or tobacco he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company
738 that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3739

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if RESTIVO were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is RESTIVO. I am of legal age, a retail merchant, and do business at No. 13 River Street, Milford, Connecticut. I sell soda water, candy, tobacco and fruit. I have handled Beech-Nut Scrap tobacco and 3740
Beech-Nut cigarettes for several years, and I know both of these products to be manufactured by the P. Lorillard Co. I also sell Beech-Nut chewing gum and Beech-Nut Mints, and I know these products to be made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I know most of the tobacco salesmen who call on me, and when the Lorillard salesmen come here, if I do not 3741
already know them, they introduce themselves to me as representatives of the P. Lorillard Co. None of them ever made any remarks which indicated to me that there was any connection between the makers of the Beech-Nut tobacco products and the makers of the Beech-Nut gum and Mints.

I regard tobacco and cigarettes as a distinct line of merchandise from food products or confections; I have never heard of a food products concern which manufactured any tobacco products and have never seen a package put out by the Beech-Nut Packing Com-

3742 pany which looked like either a scrap tobacco or a cigarette package.

I sell Chesterfield pipes and Chesterfield cigarettes, made by different companies; Diamond Grape Fruit and Diamond Ginger Ale and Diamond Walnuts; all put up by different companies.

It is Stipulated that objection is made by plaintiff's counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

3743

Cross Examination.

I have a small shop but am kept pretty busy looking after and waiting on customers who are looking at the various things that we carry. I have handled P. Lorillard tobacco products for many years, and know the Lorillard salesmen who come into my store. I never knew a customer to ask me who made the tobacco or cigarette he was buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut cigarettes, and as to whether or not they are made by
3744 the same company that makes the Beech-Nut gum or other Beech-Nut packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3745

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if WILLIAM DOLL were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is WILLIAM DOLL. I am of legal age, and the manager of a confectionery store, located on the central square of the town of Milford, Connecticut. My store is a pretty large one. We do a good business and 3746
I am assisted by one clerk.

In addition to confections we handle tobacco products, including Beech-Nut Scrap tobacco and Beech-Nut cigarettes. I have always known that this Beech-Nut tobacco and these Beech-Nut cigarettes were made by the P. Lorillard Co. I handle Beech-Nut chewing gum and a number of the Beech-Nut candies, and I know that all of these are made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut 3747
Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard confections as a distinct line of produce from tobacco and cigarettes; have never heard of a confections concern which made any tobacco products, and have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or cigarette package.

Cross Examination.

I have been handling tobacco for some years and am familiar with the different brands. I have sold large quantities of P. Lorillard Co. tobacco products, and know the Lorillard salesmen who come into my store to take orders.

I have a busy store in the center of Milford and frequently have crowds in our store. I am busy waiting on customers in the different parts of it and have not much time or opportunity to talk with them or hear what they are saying around the tobacco section.

I can not remember of a customer ever asking who makes the tobacco or cigarette he is buying. I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3751

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if W. J. COSTELLO were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. J. COSTELLO, I am of legal age and a retail merchant, now doing business at Morningside, Connecticut. I have been located here in Morningside only about two months, and for several years before I 3752
came here, I did business at No. 40 East Broadway, Milford, Connecticut. My store there was located about fifty yards from the grocery store at No. 11 Cherry Street where Alexander C. Gardner works.

I have sold Beech-Nut Scrap tobacco for the past five or six years and Beech-Nut cigarettes since they appeared on this market about two years ago, and I have always known that these articles were manufactured by the P. Lorillard Co.

I also have handled Beech-Nut chewing gum and Beech-Nut Mints for a number of years past, and have 3753
always known that these articles were manufactured by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I have never heard of a food products, confections or gum concern which manufactured any tobacco products nor have I ever seen a package put out by the Beech-

3754 Nut Packing Company which looks like either a scrap tobacco or a cigarette package.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum, candies or food products.

Cross Examination.

I have been handling tobacco for many years and am pretty familiar with the different brands. I have sold considerable quantities of P. Lorillard Co. products and know the Lorillard salesmen who have been coming into
3755 my various stores from time to time to take orders.

I did a pretty good business in my store in Milford and have continued the same here at Morningside. I am kept pretty busy as a rule, looking after my store, and haven't a great deal of time to talk to customers or listen to what they are saying about tobacco or cigarettes. I cannot remember a customer ever asking me who makes the cigarettes or tobacco he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that
3756 makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3757

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if A. B. WELSH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. B. WELSH, I am of legal age, and am the manager of a company known as Davey Bros., which is a chain grocery store company with headquarters on Water Street, Bridgeport, Connecticut. 3758

The Davey Bros. Company operate sixty-four grocery stores in the State of Connecticut, thirty of these being located in Bridgeport.

I am not engaged in waiting on customers at all but I visit these stores a great deal as in a supervisory capacity and am familiar with conditions in them.

We have sold Beech-Nut Scrap Tobacco in all our stores for the past five or six years, and have been handling Beech-Nut cigarettes since they appeared on this market. I have always known that both of these products were made by the P. Lorillard Co. We also handle Beech-Nut chewing gum, Beech-Nut Mints, and 3759 from time to time some of the Beech-Nut food products such as Peanut Butter or canned products. I know all of these articles to be made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my clerks, customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were manufactured by the same company which makes the Beech-Nut chewing gum or Beech-Nut food products.

3760 I regard tobacco and cigarettes as a distinct line of merchandise from food products, gum or candies, and I have never heard or known of a confections or food products company which made any tobacco products. I have never seen a package put out by the Beech-Nut Packing Company, which looked like either a scrap tobacco or a cigarette package.

We handle Star Hams and Star bacon, made by one company, and Star tobacco made by a different company.

3761 It is Stipulated that objection is made by plaintiff's counsel to the witness' testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have been managing this chain of stores for a number of years now; since before we first put in Beech-Nut Scrap tobacco and Beech-Nut cigarettes. I do the buying. When I first placed the Beech-Nut Scrap tobacco and Beech-Nut cigarettes in our stock I knew
3762 they were products of the P. Lorillard Co.

I have been handling tobacco among other things, for a good many years and am familiar with the different brands. I have sold large quantities of P. Lorillard Co. products and have, for a long time, known the Lorillard salesmen who take my orders.

As I do not wait on customers myself I am not often in any one store continuously, and when I am on the floor of any one store I am usually too busy to listen to what customers are saying unless it is in regard to complaints or such matters.

I have never had much opportunity to talk to cus- 3763
tomers at our various tobacco sections or to listen to what they were saying.

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments. or remarks, I mean that I don't remember any.

Re-direct Examination. 3764

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

It is Stipuated by and between the parties hereto, through their respective counsel, that if the men whose names and addresses here appear, to wit: 3765

WILLIAM F. SMITH, Variety Store, 246 State St., Bridgeport, Conn.,

ERNEST RANKIN, Retail Tobacco Store, 1184 Boston Ave., Bridgeport, Conn.,

NATHANIEL OHM, Variety Store, 897 East Main St., Bridgeport, Conn.,

E. MERKIN, Variety Store, 633 East Main St., Bridgeport, Conn.,

WILLIAM SILVERMAN, Tobacco and Novelty Store, 4 Fairfield Ave., Bridgeport, Conn.,

3766 JOHN H. ECKLER, JR., Retail Tobacco, Candy Counter and Pool Parlor, 874 Main St., Bridgeport, Conn.,

HENRY SCHWARTZ, Retail Tobacconist, 205 Stratford Ave., Bridgeport, Conn.

were called as witnesses on behalf of P. Lorillard Co., defendant, they would each testify as follows:

Direct Examination.

I am of legal age. I have sold a number of the products of the P. Lorillard Co. for a number of years past,
3767 among them Beech-Nut Scrap tobacco and Beech-Nut cigarettes. I have always known that these two articles were manufactured by that company. I have handled for a number of years past Beech-Nut chewing gum and Beech-Nut Mints, and have always known that these products were made by the Beech-Nut Packing Company.

As a rule I am already acquainted with the Lorillard salesmen who call on me at frequent intervals, but when one of them calls, who is not already known to me, he introduces himself as a representative of the P. Lorillard Co.

None of these tobacco salesmen ever made any re-
3768 marks to me which indicated that there was any connection between the Beech-Nut Scrap tobacco and the Beech-Nut cigarettes and the makers of the Beech-Nut chewing gum or Beech-Nut mints.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from chewing gum or confections, and I have never heard of a chewing gum, confections or

food products company which manufactured any to- 3769
bacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

IT IS STIPULATED by the parties, through their respective counsel, that JOHN H. ECKLER, JR., named in this stipulation, would say that in addition he sells Star razor blades and Star tobacco, made by different companies; Chesterfield pipes and Chesterfield cigarettes, made by different companies; Uncle Sam playing cards and Uncle Sam Tobacco, made by different companies.

IT IS STIPULATED that objection is made by plaintiff's 3770
counsel to the witness's testimony in regard to different goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have handled tobacco for some years and am familiar with the different brands. I have sold a considerable quantity of P. Lorillard Co. products and knew that the Beech-Nut Scrap tobacco and Beech-Nut cigarettes were products of that company, before I first put 3771
them in to stock.

A customer hardly ever asks me who makes the tobacco or cigarette he is buying.

I am kept pretty busy looking after my store and waiting on customers and haven't much time to talk to customers or listen to what they are saying around the tobacco and cigarette counter.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or

3772 not they are made by the same company that makes the Beech-Nut gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments, or remarks in any appreciable numbers, or frequently, I think I would have remembered same, for such would have been impressed on my memory.

3773

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if A. H. GOTCH were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. H. GOTCH, I am of legal age and am a retail tobacconist by trade and do business at 428
3774 Barnum Avenue, Bridgeport, Connecticut. I sell about four hundred customers a day and in addition to tobacco, I handle candy, stationery and periodicals.

I have sold Beech-Nut Scrap tobacco for the past five years, have always known this to be a product of the P. Lorillard Co. and have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that this Beech-Nut Scrap tobacco was a product of the Beech-Nut Packing Company, the makers of Beech-Nut chewing gum and Beech-Nut Mints, which articles I handle here in this store.

I have sold Beech-Nut cigarettes since they appeared 3775
on this market two years ago, and when they first appeared I heard possibly as many as three or four customers inquire whether the Beech-Nut cigarette was made by the same company that manufactured the Beech-Nut gum.

I knew that this was not the case and told these inquirers that the Beech-Nut cigarette was made by the P. Lorillard Co. whereas the Beech-Nut gum was made by the Beech-Nut Packing Company, and that there was no connection between the two concerns.

Except for these three or four inquiries when the cigarette first came out I have never heard any re- 3776
marks, inquiries or comments among my customers or others to the effect or which led me to believe that they thought the Beech-Nut cigarette was made by the same company which manufactured the Beech-Nut chewing gum.

I have handled Lorillard products for a great many years and I know the Lorillard Co. to be one of the oldest and largest of the tobacco concerns.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from gum, confections or food products, and I have never known of a gum, confections or food products concern which manufactured any 3777
tobacco products. I have never seen a package put out by the Beech-Nut Packing Company which looked like either a scrap tobacco or a cigarette package.

I sell Blue Ribbon matches and Blue Ribbon Playing Cards, made by different companies; Star tobacco and Star shaving brushes, made by different companies; Chesterfield Pipes and Chsterfield cigarettes, made by different companies.

It is Stipulated that objection is made by plaintiff's counsel to the witness's testimony in regard to different

3778 goods sold under similar names and the makers of same, on the ground that the same is incompetent, irrelevant and immaterial.

Cross Examination.

I have handled tobacco for a good many years and am familiar with the different brands. I have sold large quantities of P. Lorillard Co. products.

I am kept pretty busy in my store and haven't much time or opportunity to talk to customers or listen to what they are saying. I have made no effort to remember any remarks, comments or inquiries as to whether 3779 the Beech-Nut Scrap tobacco and Beech-Nut cigarettes were made by the same people that make the Beech-Nut chewing gum and other Beech-Nut Packing Company products. When I say that I have heard three or four such remarks or inquiries, I mean that I do not remember any more than that.

Re-direct Examination.

If I had heard a considerably greater number of such inquiries than the three or four which I have mentioned, I am sure I would have recalled the fact, and I can say 3780 positively that I have never heard any such inquiries or remarks since shortly after the appearance of the Beech-Nut cigarette on this market.

3781

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if MRS. H. FINESON were called as a witness on behalf of P. Lorillard Co., defendant, she would testify as follows:

Direct Examination.

My name is MRS. H. FINESON. I am of legal age and am the manager of an up-to-date variety store, located at No. 5 Main Street, Norwalk, Connecticut. I have been in this business for five years past and 3782
have sold Beech-Nut Scrap tobacco all that time.

I have always known this to be a product of the Lorillard Co. When the Lorillard salesmen first called on me after I opened this store, they introduced themselves to me as representatives of that company.

I have sold Beech-Nut cigarettes since they appeared on this market about two years ago and have always known that this product was also made by the P. Lorillard Co. I sell Beech-Nut chewing gum and Beech-Nut Mints, made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or com- 3783
ments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were made by the Beech-Nut Packing Company.

I regard tobacco and cigarettes as a distinct line of merchandise from confections or food products. I have never heard of a food products company which made any tobacco products, and have never seen a package put out by the Beech-Nut Packing Company which looked like either a cigarette or a scrap tobacco package.

784 *Cross Examination.*

I have handled tobacco for a long time, and am familiar with the different brands. I have sold considerable quantities of P. Lorillard tobacco products and know the Lorillard salesmen who come into my store to take orders.

I keep a good many different kinds of things in my store and am kept pretty busy waiting on customers, who are asking for the different things. I haven't much time or opportunity to talk to the customers or listen to what they are saying about tobacco or cigarettes. A customer hardly ever asks me who makes the particular tobacco or cigarette he is buying.

785

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut chewing gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

786 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

3787

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if JAMES P. SHEEHAN were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is JAMES P. SHEEHAN, I am of legal age, a retail tobacconist, and do business at No. 23 Wall Street, Norwalk, Connecticut. I have been in the retail tobacco business for the past thirty years and all that time have handled some of the products of the P. Lorillard Co. I know of that concern as one of the largest and oldest of the tobacco companies. 3788

I have sold Beech-Nut Scrap tobacco for the past five or six years and Beech-Nut cigarettes for the past two years, and have always known that both of these products were made by the P. Lorillard Co.

I also sell Beech-Nut chewing gum and Beech-Nut Mints made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company. 3789

I regard tobacco and cigarettes as an entirely distinct and separate line of produce from gum and mints. I have never heard of a gum, confections or food products concern which put out any tobacco products and have never seen a package put out by the Beech-Nut Packing Company which looks like either a Beech-Nut Scrap tobacco or a cigarette package.

3790 *Cross Examination.*

I have sold large quantities of Lorillard tobacco products during my time in the business, and have, for many years, known the Lorillard salesmen who come into my store to take orders.

I have a busy tobacco store and haven't a great deal of time or opportunity to talk to customers or listen to what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut
3791 Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut chewing gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I
3792 think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if A. M. SELIGSON were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is A. M. SELIGSON, I am of legal age and am the manager of the S. & S. Tobacco Company, 36

Wall Street, Norwalk, Connecticut. This company 3793
operates a retail store where tobacco, razors, flash lights, chewing gum and candy are sold. I, myself, am in charge of this store and wait on the customers, who number about four hundred a day.

I have handled Beech-Nut Scrap tobacco for the past five years and Beech-Nut cigarettes since they appeared on this market about two years ago. I have always known these products to be made by the P. Lorillard Co. I sell Beech-Nut chewing gum and Beech-Nut Mints, made by the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct line of merchandise from gum and confections, and have 3794
never heard of a confections or food products concern which manufactured any tobacco products, and have never seen a package put out by the Beech-Nut Packing Company, which looked like either a scrap tobacco or a cigarette package.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

Cross Examination. 3795

I have been a long time in the trade and have sold large quantities of P. Lorillard Co. tobacco products. I know the Lorillard salesmen who come into my store to take orders.

I am in a busy store and haven't much time or opportunity to talk to customers or listen to what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether

3796 or not they are made by the same company that makes the Beech-Nut chewing gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks, I mean that I don't remember any.

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such
3797 would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel, that if W. A. CLARK were called as a witness on behalf of P. Lorillard Co., defendant, he would testify as follows:

Direct Examination.

My name is W. A. CLARK, I am of legal age, and
3798 I have been in the retail tobacco business for the past thirty years and have been located for the past fifteen years at Washington and South Main Streets, South Norwalk, Connecticut.

My store is at the very center of South Norwalk and I have about three hundred customers a day. This store is one block from the store where Mr. Morelli works.

I have sold Beech-Nut Scrap tobacco for the past five or six years and Beech-Nut cigarettes for the past two years, and have always known that both of these products were made by the P. Lorillard Co.

I also sell Beech-Nut chewing gum and Beech-Nut 3799
Mints made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco, and cigarettes as an entirely distinct and separate line of produce from gum and mints. I have never heard of a gum confections or food products concern which put out any tobacco products and have never seen a package put out by the Beech-Nut Packing Company which looked like either a Beech-Nut Scrap 3800
tobacco or a cigarette package.

Cross Examination.

I have sold large quantities of Lorillard tobacco products during my time in the business, and have, for many years, known the Lorillard salesmen who come into my store to take orders.

I have a busy tobacco store and haven't great deal of time or opportunity to talk to customers or listen to what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying.

3801

I have made no effort to remember any inquiries, comments or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarettes, and as to whether or not they are made by the same company that makes the Beech-Nut chewing gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments or remarks I mean that I don't remember any.

3802 *Re-direct Examination.*

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

STIPULATION.

IT IS STIPULATED by and between the parties hereto, through their respective counsel that if C. F. TARLOV were called as a witness on behalf of P. Lorillard Co., 3803 defendant, he would testify as follows:

Direct Examination.

My name is C. F. TARLOV. I am of legal age and a retail tobacconist, doing business under the name of Tarlov Brothers in a store, located just across the street from that of W. A. Clark, South Norwalk, Connecticut.

My store is located one block from the fruit store at No. 22 Union Street, South Norwalk, where John Morelli works.

I have sold Beech-Nut Scrap tobacco for the past five 3804 or six years and Beech-Nut cigarettes for the past two years, and have always known that both of these products were made by the P. Lorillard Co.

I also sell Beech-Nut chewing gum and Beech-Nut Mints made by the Beech-Nut Packing Company.

I have never heard any remarks, inquiries, or comments among my customers or others to the effect, or which led me to believe that they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes were the product of the Beech-Nut Packing Company.

I regard tobacco and cigarettes as an entirely distinct and separate line of produce from gum and mints. I

have never heard of a gum, confections or food products concern which put out any tobacco products and have never seen a package put out by the Beech-Nut Packing Company which looked like either a Beech-Nut Scrap tobacco or a cigarette package. 3805

Cross Examination.

I have sold large quantities of Lorillard tobacco products during my time in the business, and have, for many years, known the Lorillard salesmen who come into my store to take orders.

I have a busy tobacco store and haven't a great deal of time or opportunity to talk to customers or listen to what they are saying. A customer hardly ever asks who makes the tobacco or cigarette he is buying. 3806

I have made no effort to remember any inquiries, comments, or remarks as to who makes the Beech-Nut Scrap tobacco or Beech-Nut cigarette, and as to whether or not they are made by the same company that makes the Beech-Nut chewing gum or other Beech-Nut Packing Company products, and I had no reason to do so. When I say that I have never heard any such inquiries, comments, or remarks, I mean that I don't remember any. 3807

Re-direct Examination.

If I had heard any such inquiries, comments or remarks in any appreciable numbers, or frequently, I think I would have remembered the same, for such would have been impressed on my memory.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff,
vs.
P. Lorillard Co., Defendant.
In Equity
No. 3056.

CERTIFICATE.

State of Connecticut } ss.:
County of New Haven }

I HERBERT J. KRAUSE, a Notary Public, within and for the State of Connecticut, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing depositions of William J. Dolan, William H. Norton, John Racow, Philip Gerardi, Benjamin Saletan, Joseph A. Tevlin, Maxwell C. Durham, Barnett Dickestein, Paul Schwartz and William J. Coughlan were taken in behalf of the P. Lorillard Co., defendant, pursuant to agreement and notice before me, at Hartford, New Haven and West Haven, Connecticut, beginning August 6th, 1923; that each of the foregoing witnesses was by me duly sworn; that the testimony of said witnesses was taken down in shorthand by me; and thereafter reduced to typewriting by me; that the plaintiff, the Beech-Nut Packing Company, was represented by Charles C. Bulkley and H. McClure Johnson, and that the defendant, the P. Lorillard Co., was represented by Richard B. Cavanagh and Thomas L. Preston during the taking of said testimony; that the testimony was taken in Hartford, New Haven and West Haven, Connecticut,

beginning at eleven o'clock in the morning of August 6th, 1923, and ending at eleven o'clock in the morning of August 8th, 1923; that the said deposition of each witness was read by said witness before signing the same, except where the signature of a witness was waived, as indicated on the deposition, and except for the depositions which were stipulated as appears in this record. 3811

I am not connected by blood or marriage with either of the parties hereto, or interested either directly or indirectly in the matter in controversy.

I also certify that I have been paid my fees as Special Examiner and for copies made, in accordance with the attached bill, amounting to $ 3812

IN WITNESS WHEREOF, I have hereunto set my hand and Official Seal, this day of 1923.

HERBERT J. KRAUSE,
Notary Public,
My commission expires
February 1st, 1926.

3813

3814

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, Plaintiff.
vs.
P. Lorillard Co., Defendant.
In Equity No. 3056

CERTIFICATE.

3815 State of Connecticut } ss.:
County of New Haven }

I, HERBERT J. KRAUSE, a Notary Public in and for the State of Connecticut, acting as Special Examiner by consent of counsel, do hereby certify that the foregoing stipulations as to the testimony of B. T. Miller, Max Seltzer, Arthur Lennox, Morris Stein, H. Clymer, B. H. Pierce, I. Kaufman, C. R. Densmore, E. F. Killian, T. White, William Foster, Gus Steinmeyer, William Molumphy, R. F. Stahl, Agnes R. McKay, A. Wolinsky, Sam Sukloff, Jr., C. C. Gilllespie, Isadore Tagum,
3816 Harry Silverman, Mrs. N. Frantz, Meyer Levine, John K. Stevenson, William Silver, Trace Caldwell, L. Wolfson, Josephine Garbarino, —— Testivo, William Doll, W. J. Costello, A. B. Welsh, William P. Smith, Ernest Rankin, Nathaniel Ohm, E. Merkin, William Silverman, John H. Eckler, Jr., Henry Schwartz, A. H. Gotch, Mrs. N. Fineson, James P. Sheehan, A. M. Seligson, W. A. Clark and C. F. Tarlov, were taken on behalf of the defendant, P. Lorillard Co., pursuant to notice and agreement before me, at Hartford and New Haven, Connecticut, on August 6th, 7th and 8th, 1923; that said stipulated depositions of said witnesses were

taken down in shorthand by me at the joint dictation 3817
of the counsel of the parties hereto and therafter reduced to typewriting by me; that the plaintiff, the Beech-Nut Packing Company, was represented by its counsel, H. McClure Johnson and Charles C. Bulkley, and that the defendant, P. Lorillard Co., was represented by its counsel, Richard B. Cavanagh and Thomas L. Preston; that the aforesaid counsel for the respective parties agreed to stipulate the said testimony of the said witnesses; that the counsel of both parties read over and approved and agreed to the stipulated testimony after it was written out.

I am not connected by blood or marriage with either 3818
of the parties hereto, or interested either directly or indirectly in the matter in controversy.

In Witness Whereof, I have hereunto set my hand and Official Seal, this day of 1923.

HERBERT J. KRAUSE,
Notary Public.
My Commission expires
February 1st, 1926.

3819

Vol. IV

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1926

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)

(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

VOLUME IV

INDEX

	Page
Proceedings before United States Patent Office	2150
Answer to notice of opposition	2150
Statement of evidence	2155
Testimony of Walter H. Lipe	2155
Thomas Lynch	2175
Clarence Lindholm	2179
J. Wesley Wood	2183
W. C. Arkell	2187
Guy W. Sharpe	2197
Stipulation re invoice of American Tobacco Co.	2203
Notice of taking testimony	2206
Testimony of Mrs. Matilda Wedel	2208
R. J. Yunkers	2218
Joseph Fleming	2224

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

	Page
Testimony of Walter Peabody	2229
Ludwig Nurnberg	2234
Harry F. Stickney (stipulated)	2239
Louis Worthen (stipulated)	2240
Notice of opposition	2243
Stipulation re filing of testimony	2247
Notice of taking testimony	2248
Statement of evidence	2251
Stipulation of facts	2251
Testimony of David Haines Ball (stipulated)	2253
S. E. Spence (stipulated)	2257
Benjamin I. Belt (stipulated)	2261
Alfred W. Haywood (stipulated)	2263
Jacob Levy (stipulated)	2264
Monroe W. Rothschild (stipulated)	2266
Jesse R. Taylor (stipulated)	2267
J. Lewis Orrick (stipulated)	2269
W. H. Nichol (stipulated)	2275
Charles C. St. Clair	2280
William M. Gormly (stipulated)	2282
H. H. Arnold	2291
T. F. Coyle (stipulated)	2292
H. O. Evans (stipulated)	2294
Herbert C. Boykin	2303
Ralph Bowman	2315
Wade Sheltman	2335
Albert P. Gans	2339
James F. Summers	2354
Notice of taking testimony	2376
Testimony of Jacob Levy	2378
Stipulation re invoice of American Tobacco Co	2386

In the United States Patent Office

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY.

Trade-Mark Opposition No. 2805.

Beech-Nut.

Answer.

TO THE HON. COMMISSIONER OF PATENTS:

The Answer of Beech-Nut Packing Company to the Notice of Opposition of P. Lorillard Company, Opposition No. 2805.

This applicant, now and at all times saving and reserving unto itself all benefit and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the Notice of Opposition contained for answer thereto, or to so much and such parts thereof as this applicant is advised it is material or necessary for it to make answer to, answering says:

First: This applicant admits the allegations in the first paragraph of the Notice of Opposition.

Second: This applicant, further answering, denies that for many years past, to-wit, since 1899, or prior thereto, the word symbol Beech Nut has been continuously used by the opposer, P. Lorillard Company, or its predecessors in business and title as a trade-mark for tobacco products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Third: This applicant denies that the opposer, P. Lorillard Company, is the owner of all the right, title and interest in and to the said trade-mark Beech Nut for tobacco products.

Fourth: This applicant denies that at all times since the alleged adoption of the trade-mark Beech Nut by the opposer, about 1899, or prior thereto, the opposer has continuously used the said trade-mark, or its predecessors in business, from whom it derived title, as a trade-mark for tobacco products, and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Fifth: This applicant denies that since the alleged adoption of the trade-mark Beech Nut by the opposer in 1899, or prior thereto, as aforesaid, the said trade-mark has been uniformly known and recognized as indicating the true origin of the goods and as being the true property of the opposer or its predecessors.

Sixth: This applicant denies that the tobacco products of opposer, P. Lorillard Company, and its predecessors in business, marketed under the said trade-mark Beech Nut, have had for many years and now have an enviable reputation as of superior quality.

Seventh: This applicant admits that the trade-mark Beech Nut sought to be registered by the applicant, Beech-Nut Packing Company, conflicts with the trade-mark Beech Nut of the opposer, but denies that the trade-mark Beech Nut sought to be registered by the applicant is an infringement upon any trade-mark rights of the opposer.

Eighth: This applicant denies that the goods for which applicant seeks to register the trade-mark Beech Nut

are of the same descriptive property and belong to the same class as those to which the trade-mark of the opposer has been and is now being used.

Ninth: This applicant denies that the trade-mark Beech Nut of the opposer has been in actual and continuous use as a trade-mark by the opposer and its predecessors since a date prior to the use of the word symbol Beech Nut as a trade-mark by the applicant, Beech-Nut Packing Company, prior to any use of the word symbol Beech Nut as a trade-mark by the applicant Beech-Nut Packing Company.

Tenth: This applicant admits that the word symbol Beech Nut sought to be registered by Beech-Nut Packing Company as a trade-mark is so similar in form, appearance, sound and other characteristics to the trade-mark Beech Nut of the opposer, as to be identical therewith, and actually does cause confusion to the purchasing public, and is liable to cause damage to the applicant, but denies that the use of the trade-mark by the applicant has caused any damage to the opposer, P. Lorillard Company, and denies that the P. Lorillard Company is the lawful owner of the trade-mark Beech Nut.

Eleventh: This applicant admits that the manner in which the Beech-Nut Packing Company uses its alleged trade-mark upon and in connection with tobacco products is such as to obviously cause confusion and deception to the purchasing public by leading the purchasing public into the belief that it is buying or accepting, and into buying or accepting the goods of the P. Lorillard Company in place of the goods of the Beech-Nut Packing Company.

Twelfth: This applicant avers that since 1891 this applicant and its predecessors have used the trade-mark Beech Nut as the predominating trade-name or mark of the business of this applicant corporation and its predecessors and for many years have used the trade-mark Beech Nut as part of the corporate name of the Beech-Nut Packing Company; that the business of the applicant is constantly expanding by adding to the line of manufacture of the applicant many new products which can be marketed through the same channels as its other products, and that the manufacture or sale of a tobacco product logically comes within the general line of expansion of the business of the Beech-Nut Packing Company.

Dated at Canajoharie, New York, December 5th, 1919.

BEECH-NUT PACKING CO.
By F. E. BARBOUR,
[Corporate Seal.] *Secretary.*
OFFIELD & POOLE,
Attorneys for Beech-Nut Packing Company.

STATE OF NEW YORK, }
County of Montgomery, } *ss.*

On this 5th day of December, 1919, before me personally appeared F. E. Barbour, who being duly sworn, deposes and says that he is Secretary of Beech-Nut Packing Company, the applicant herein, and the person who signed this Answer on behalf of said applicant; that he has read the foregoing Answer as subscribed to by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them

to be true, and that as an officer of the Beech-Nut Packing Company he has full authority to sign this Answer in its behalf.

E. W. SHINEMAN,
Notary Public.

[SEAL.]

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY.

Trade-Mark Opposition No. 2805.

Beech-Nut.

Acknowledgment of Service.

The undersigned, attorneys for P. Lorillard Company, do hereby acknowledge receipt and service of Answer filed in behalf of Beech-Nut Packing Company to the Notice of Opposition of P. Lorillard Company, Opposition No. 2805.

Signed at Washington, D. C., this 10th day of December, A. D., 1919.

MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Company.

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY. } Trade-Mark Opposition No. 2805.

Beech-Nut.

Depositions of Witnesses.

Testimony taken on behalf of Beech-Nut Packing Company at the office of Beech-Nut Packing Company, Canajoharie, New York, beginning August 3, 1920, at 2:00 P. M., before Fred M. Geortner, a Notary Public, acting as special examiner by consent.

Present: Sebastian Hinton for Beech-Nut Packing Company; Richard B. Cavanagh for P. Lorillard Company.

Walter H. Lipe,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Please state your name, age, residence and occupation.

Answer. Walter H. Lipe; age, 60; Canajoharie, N. Y.; Vice President and General Manager of the Beech-Nut Packing Co.

Q. 2. How long have you been connected with this Company?

A. Since 1891.

Q. 3. Under what name was the Company then operating?

A. Imperial Packing Company.

Q. 4. What products did the Company make in 1891?

A. Hams and Bacon.

Q. 5. Were these products labeled at that time?

A. Yes, sir.

Q. 6. With what label?

A. Imperial Ham and Bacon.

Q. 7. Was there any name or mark on the Hams and Bacon?

A. The first few months we did not have any but shortly after we chose the name "Beech-Nut."

Q. 8. How was the name Beech-Nut written?

A. It was two words, hyphenated, Beech-Nut.

Q. 9. Did the Imperial Packing Co. subsequently increase its line?

A. Yes.

Q. 10. Speaking of the period prior to 1904, can you state some of the products which were added to the line of the Imperial Packing Co.

A. Sliced Beef, Sliced Bacon, Grape Jam, Ginger Pear.

Q. 11. How were these products labeled?

A. They were labeled with Beech-Nut label.

Q. 12. To what extent was this label similar to the one employed on the hams?

A. It was supposed to be identical.

Q. 13. When was the name of your Company changed from the Imperial Packing Company to the Beech-Nut Packing Company?

A. 1899.

Q. 14. Was the Beech-Nut Packing Co. incorporated?

A. Yes.

Q. 15. How did it become the successor of the Imperial Packing Co.?

A. It bought the assets of the Imperial Packing Co.

Q. 16. Did the purchase include trade-marks?

A. Everything.

Counsel for the Beech-Nut Packing Co. introduced into evidence certified copy of Certificate of Incorporation of the Beech-Nut Packing Co.

Q. 17. Under what name does this Company still continue to operate?

A. Beech-Nut Packing Company.

Q. 18. Can you produce a summarized statement indicating the extent of the line of Beech-Nut Packing Co. for the year 1903?

A. Yes.

Q. 19. And subsequent to that date?

A. Yes.

Q. 20. Will you please explain how this statement which you have produced was made up?

A. From pricelists.

Stipulated that the original pricelists from which this summarized statement was made need not be produced in evidence; summarized statement to have all force of effect of such originals if produced.

Q. 21. I notice that the summarized statement begins with the year 1903. Will you please explain why it does not go back before that?

A. Because we had a fire and lost all records previous to 1903.

Q. 22. When was this fire?

A. February 26, 1903.

Q. 23. This summarized statement contains the name of a great many products. Will you kindly state under what name these products were sold?

A. Under the Company's name.

Q. 24. What brand appeared on the label? In addition to Beech-Nut Packing Co. was there any other name on these labels.

A. We had other brands, for instance "Mohawk," "Holly" and "Erie." We packed inferior goods to Beech-Nut under those brands.

Q. 25. First quality goods you always sold under Beech-Nut Brand?

A. Always.

Q. 26. In addition to the name Beech-Nut, did any other symbol or device appear on the label?

A. A picture of the beech nut always appeared on the label.

Q. 27. How long has this been?

A. Since 1892.

Q. 28. How long has the label been employed?

A. Since 1892.

Q. 29. How does the label upon goods which you have previously mentioned and upon the first quality of goods contained in the summarized statement you have produced, compare with the label now used by the Beech-Nut Packing Co.?

A. My memory is it is identical.

Q. 30. Will you please describe the conspicuous features of the Beech-Nut Packing Co.'s label?

A. I would say that it was red and white with beech-nut in the center and it contains the name Beech-Nut. It contained the name Beech-Nut prior to 1906 (I think) and after that the words Beech-Nut Brands.

Q. 31. How is the word Beech-Nut written?

A. It is written same as it always has been, same as on the letterheads, and same as on all printed matter.

Q. 32. Can you produce a collection of labels illustrating the labels used on the Beech-Nut line?

A. I can and do.

By Mr. Hinton: The collection of labels produced by witness is offered and introduced into evidence as Beech-Nut Exhibit Collection of labels.

Summarized statement from Beech-Nut price-lists produced by the witness is offered and introduced in the evidence as Beech-Nut Exhibit Summary of Products.

Q. 33. To what extent has the business of the Beech-Nut Packing Co. been advertised?

A. In dollars and cents, you mean?

Q. 34. Approximately.

A. I could not say, but I would say millions of dollars. I think I can get that information.

Q. 35. Will you please get a statement showing the extent of advertising year by year since 1910, at your convenience?

A. Yes, sir.

Q. 36. In what territories has this advertising been done?

A. Nationally.

Q. 37. State whether or not this advertising has featured the Beech-Nut Packing Co.'s label, which you have described and produced?

A. It does.

Q. 38. From your knowledge of merchandising and of the Beech-Nut Packing Co., will you please state what the Beech-Nut label which you have described and produced stands for in the minds of the public?

A. I believe it has stood for the best that could be made of the article on which it appeared.

Q. 39. Will you please state whether or not it was associated in the mind of the public with any particular article.

A. There are various degrees of that.

Q. 40. My question is directed to the fact that whether the presence of the Beech-Nut label indicated that whatever article so marked was a product of the Beech-Nut Packing Co. or whether it was associated solely with a single article.

A. I think it means many articles.

Q. 41. Would these articles be of the same character?

A. No, sir.

Q. 42. I notice from the summarized statement which you have produced that at least as early as 1911, the Beech-Nut Packing Company was selling chewing gum. I understand that this chewing gum bore the same label as applied to the rest of the Beech-Nut products, is that correct?

A. That is correct.

Q. 43. Can you produce a memo. taken from the records of your Company indicating the growth of the business in chewing gum of your Company?

A. Yes.

Q. Will you kindly write into the records the figures from this memo. which you have, showing sales of chewing gum in boxes by the year.

A. Yes, sir.

1912	829,089
1913	2,955,284
1914	5,124,797
1915	6,428,585
1916	7,231,891
1917	7,404,584
1918	3,392,707
1919	3,646,324

Q. 45. How many packages of gum were in a box?

A. Twenty.

Q. 46. You have testified about the standing of the Beech-Nut label, which you have described and produced, before the public. Upon what do you base your opinion as to the meaning of the Beech-Nut label to the public?

A. I can only say again that the Beech-Nut label means quality to the buyer.

Q. 47. Have you had any conversations which indicate to you that the Beech-Nut label has this meaning before the public?

A. Yes. I have had people say to me 'you can sell anything under the Beech-Nut label.'

Q. 48. How many times has that sort of conversation occurred?

A. Many times. My answer has always been that we had to make goods of high quality if they are to sell under the Beech-Nut label.

Q. 49. In what class of stores are Beech-Nut products sold?

A. In all kinds of stores.

Q. 50. State whether or not the Beech-Nut label, which you have described, is and has been prominently displayed in stores where the goods are sold.

A. It is.

Q. 51. How generally is this true?

A. It is true to the extent of our having used window display material to the extent of thousands of dollars per year, and that material has invariably been placed in the window.

Q. 52. I refer to the actual label on package.

A. Actual labels. All packages without exception bear fac-simile of the label or the package has a label on it. In fact on our chewing gum box there is a reproduction of the package.

Q. 53. How large was the business of the Imperial Packing Company in 1891? How many operatives did they employ at that time?

A. We had only five or six.

Q. 54. What is your monthly business at the present time?

A. Over a million dollars.

Direct examination closed.

Cross-Examination by Mr. Cavanaugh.

X-Q. 55. I understood you to say that the Imperial Packing Company in 1891 packed beef and bacon?

A. No, hams and bacon.

X-Q. 56. Can you produce any of the labels used by the Imperial Packing Co. on these products?

A. Not that I know of.

X-Q. 57. Are you familiar with the labels?

A. We might or might not have had what was called a label in those early months. As I remember it now within a few months of the start we put on the Beech-Nut label, for we realized after we started in business that "Imperial" was not a good name, was not a brand name. It was criticized by some people as being a foreign name, not an American name.

X-Q. 58. You were one of the Trustees of the Imperial Packing Co., were you not?

A. Yes, sir.

> Offered in evidence by Mr. Cavanaugh: I now offer in evidence the certified copy of the Certificate of Incorporation of the Imperial Packing Co., and notary is asked to mark the same P. Lorillard Co. Cross Exhibit 20.

X-Q. 59. I have you herewith a Patent Office copy of registered trade-mark No. 19838 dated July 7, 1891, to the Imperial Packing Co. for hams and bacon, and the drawing of this registration copy shows what is evidently a label. Do you ever recall the Imperial Packing Company used a label like that upon its goods?

A. That was branded on the ham. Branded in with an iron.

X-Q. 60. The entire representation?

A. Yes, without doubt.

X-Q. 61. I also show you a Patent Office copy of trade-mark Reg. No. 24978, dated July 3, 1894, to Imperial Packing Co. for Pork Lard. Do you ever recall that label being used by the Imperial Packing Co. on its goods?

A. That was another brand, used by branding with iron.

X-Q. 62. Do you recall that label?

A. That looks just like an old branding iron to me.

X-Q. 63. I also call your attention to Patent Office copy of registered trade-mark No. 36,444, registered May 21, 1901, by the Beech-Nut Packing Co. Do you recognize that label or mark shown on the drawing?

A. Yes, I recognize that.

X-Q. 64. Did the Beech-Nut Packing Co. use that identical mark?

A. In connection with something else, in connection with label or something.

X-Q. 65. What I want to know, did the Beech-Nut Packing Co. ever use that identical mark shown in that drawing?

A. I think it was used in connection with wording.

X-Q. 66. Did it have a circle?

A. It is evident it had.

X-Q. 67. Likewise the Imperial Packing Co. used the matter shown on the two registrations?

A. Those were brands as I stated.

X-Q. 68. Never used it in the form of a label?

A. I do not remember that. I do remember the brands.

X-Q. 69. Both brands are identical with the drawings?

A. They must have been.

X-Q. 70. I understand you cannot produce any of the labels originally used by the Imperial Packing Co.

A. I do not think we could. Everything we had was burned in 1903, unless we could get something from some outside place.

X-Q. 71. Can you state when the Beech-Nut Packing Co. began the use of the oval in connection with its label or mark?

2164

A. My memory is from the very first.

X-Q. 72. What date was that?

A. I would say in 1892.

X-Q. 73. I understand you used that mark on all its goods?

A. All except the other brands, viz., Mohawk, Holly and Erie, so branded because they were not as good as Beech-Nut.

X-Q. 74. I have called your attention to the trade-mark that showed a circle and showed a beech nut.

A. I think that was used only for burning purposes.

X-Q. 75. Was it used on canned goods?

A. We did not make canned goods at that time. It may have stipulated that, but we did not make them.

X-Q. 76. I am directing your attention to trade-mark 36,440 registered May 21, 1901. It shows a circle with the word Beech-Nut and picture of nut with three leaves in the center. In the certificate of registration it is stated:

> "It is usually displayed on the cans, jars, boxes and other packages containing the goods, by placing thereon a printed label on which the described trade-mark is shown."
>
> Now, this registration No. 36,444 does not show the oval but it shows a circle. I understood you to state from the beginning you have used the oval trade-mark such as shown on the specimen label you have produced.

A. That is my memory.

X-Q. 77. You do not recall that the concern used that on canned goods?

A. I do not recall that the Company used that other than to burn into the meat.

X-Q. 78. But that trade-mark No. 36,444 is for canned goods.

A. We did not make any canned goods at that time.

X-Q. 79. As I understand it at the time this trade-mark was obtained you did not make canned goods?

A. Yes, that is from the standpoint of glass jars.

X-Q. 80. You do not recall having used that mark?

A. I do not recall. I recognize it as something we used in burning into the brand, and I think on account of the small size of that we had difficulty in making the impression with such a long brand, and I think possibly that was the idea of using that without letters or printed matter.

X-Q. 81. Your recollection is, as I understand it, you used the oval since the Beech-Nut Packing Co. was incorporated?

A. My recollection is we used the oval label on hams and bacon since 1892.

X-Q. 82. Then it appears that although your Company registered trade-marks 24978 and 36,444 in the Patent Office in 1892, you did not at that early date show the present oval label which is shown on the specimen.

Objected to by Mr. Hinton: That question is objected to as being entirely unwarranted. The witness has not been qualified to state that he knows all of the early registrations of the Beech-Nut Packing Co. nor has there been any further evidence offered to indicate how many additional registrations were obtained for that Company.

By Mr. Cavanaugh: The witness was one of the Trustees or officers of the original Imperial Packing Co. and is now an officer of the Beech-Nut Packing Co., and as such is presumed to be familiar with the business.

By Mr. Hinton: He would not necessarily be familiar with the great many registrations of the Company, neither would be necessarily be familiar with the very minor variations in the labels. It is particularly called to the attention of the Court that in Registration No. 19,838, it is stated emphatically: that the various accessories including the name Imperial Packing Company, and other features of the picture with the exception of the word "Beech-Nut" may be varied or omitted, and statement to the same effect appeared in Registration No. 36,444 and in Registration No. 24,-978 of 1894 these words appear:

"The trade-mark of said company consists of the word-symbol "Beech-Nut." This has generally been arranged as shown in the accompanying fac-simile, consisting of an oblong card in the lower left hand corner of which is a representation of the leaf of beech tree resting on an oval, etc."

These remarks are interjected simply to clear up the matter at the proper place.

X-Q. 83. In this summary of goods sold by the Beech-Nut Packing Company, that you have produced, I ask you if the schedule for each year as set out therein is complete as to the general character of the goods put out by this Company?

A. Yes, I think so, taken right from the pricelists.

X-Q. 84. As I understand it, in 1919, the Beech-Nut Packing Company packed and marketed bulk goods, ham and bacon; sliced bacon and beef in glass; Sauce, Catsup, Preserves of various sorts; Jellied Fruit; Chewing Gum and Candies. Is that right?

A. Yes.

X-Q. 85. That is about a complete list of goods. Have not mentioned every article that appeared on the list.

A. Yes.

X-Q. 86. Did you put out any cigarettes?

A. Yes.

X-Q. 87. When did you put out the cigarettes?

A. I could not tell you the exact date.

X-Q. 88. It was in the year 1919, was it not?

A. I could not say that for sure.

X-Q. 89. Are you putting out any cigarettes or other tobacco products today?

A. No, sir.

X-Q. 90. When did you stop putting them out?

A. We only made two or three sales of cigarettes. I do not know that there was more than one sale. I could not tell you when.

X-Q. 91. Would your records show that?

A. Yes.

X-Q. 92. Would you mind telling me the name of the party you sold them to?

A. I will get it later.

X-Q. 93. I note that your application for registration of trade-mark for cigarettes No. 119,930, and which is involved in this opposition proceedings, claims a trade-mark use of the word Beech-Nut for cigarettes since June 12, 1919. Will that assist in refreshing your recollection as to the date when the Beech-Nut Packing Company began to put out cigarettes.

A. I have to be governed by what the records show.

X-Q. 94. Did the Beech-Nut Packing Co. ever put out other tobacco products outside of cigarettes?

A. Not that I know of.

X-Q. 95. How large a quantity of these cigarettes was put out?

A. I would have to refresh on that by the actual sale.

X-Q. 96. Did I understand you to say that you had available at the present time a sample package of the cigarettes?

A. I do not know if we have or not. I could find out by inquiring.

X-Q. 97. Did you ever see one of these packages of cigarettes?

A. Yes, sir.

X-Q. 98. Can you describe it to me? How was it labeled?

A. I cannot describe it. I cannot give what might be called a good description.

X-Q. 99. What was the color of the box?

A. I would have to see it to give you an accurate description. I would not want to say it was white and red and then have it turn out blue and red.

X-Q. 100. How was the word Beech-Nut printed on?

A. Will see if I can find a package.

> The witness produced a package of cigarettes bearing the word "Beech-Nut" thereon. Hands it to the counsel for Lorillard Co.

X-Q. 101. This package represents the cigarettes as they were packed and put out by the Beech-Nut Packing Co.?

A. Yes.

X-Q. 102. This package does not show the oval label or picture of Beech-Nut and Beech-Nut inside the oval, does it?

A. No, sir.

X-Q. 103. So you did not use on these cigarettes the oval label which you use on the other Beech-Nut goods?

A. No, sir.

X-Q. 104. To the best of your recollection the Beech-Nut cigarettes which you sold were packaged and labeled as shown in the specimen box you have produced?

A. I would not want to answer that because we might have some labels with the oval.

X-Q. 105. For how long a period did you sell cigarettes or were they on the market under this Beech-Nut name?

A. I think we made one sale.

X-Q. 106. That was since 1919?

A. Whatever our sales show in the books.

X-Q. 107. Did the Imperial Packing Co. ever make tobacco products and sell them under the name "Beech-Nut"?

A. No, sir.

X-Q. 108. Who made those cigarettes?

A. I think the American Tobacco Co.

At this point the witness furnished 2 oval labels and makes the verbal statement: my memory is we could not get those labels for ten days or two weeks but they were ordered. If we sold more we would have sold them with that label.

Mr. Hinton: By that label you mean the label just produced?

A. Yes, sir.

X-Q. 109. But this Beech-Nut label which you just produced was never used on the goods, on that one sale?

A. I do not know of any. I could not tell you.

X-Q. 110. Did you see the labels in the Patent Office?

A. No, I did not see them. This was looked after by our attorney.

X-Q. 111. You say the American Tobacco Co. made these cigarettes?

A. No, I would not say so.

X-Q. 112. At the present time you do not know who made the cigarettes?

A. My memory is that someone told me they were made by the American Tobacco Co. That is all I know about it.

X-Q. 113. That is all you know about it?

A. Yes, that is all I know about it.

X-Q. 114. Does the Beech-Nut Packing Co. handle or pack tobacco products of any sort at the present time?

A. No sir.

X-Q. 115. Up to the present time the only tobacco put out was one order. Is that correct?

A. My memory is that the only cigarettes we bought and sold was this particular lot. They might be sold to more than one person. I would have to be governed by what the books say.

X-Q. 116. You will furnish me a statement as to whom you sold that order of cigarettes?

A. Yes.

X-Q. 117. I call your attention to trade-mark No. 35,-731, reg. January 8, 1901, by Beech-Nut Packing Company for cured, dried and smoked beef, and direct your particular attention to the drawing of the registration. Do you recall that identical mark being used on the labels?

A. No, I do not remember that ever having been used except it was for branding purposes. I know we bought some of those burr branding iron and when we tried to brand the burr in it always burned, it never was a success.

X-Q. 118. You do not recall the design or mark being used?

A. I do not recall it being used for label. We might have used it for a branding iron. It does not mean anything to anyone without wording or anything of that kind.

X-Q. 119. Were you present with Mr. Bartlett Arkell at an interview or conference at the office of the P. Lorillard Co. about July, 1919?

A. I remember calling on Mr. Mahoney and some other gentlemen, but I do not know the date. It was the only time I was ever there so it must be the time you mention.

X-Q. 120. What was the subject matter discussed?

A. It was a general talk, about the Beech-Nut label being used by the Lorillard Co.

X-Q. 121. That is all you recollect?

A. I recall it was a pleasant interview. I do not recall anything special about it. I know when we came away the general feeling was we had not accomplished very much.

X-Q. 122. You knew the Lorillard Co. intended to put out a Beech-Nut cigarette?

A. They told me they did. They showed me a package of cigarettes.

X-Q. 123. You do not recall the date?

A. I think it is within two years. Maybe a little over a year. I know the one thing that impressed me that made me feel that Lorillard really had taken advantage of us—I may not be exact in this—but I remember this sort of a slogan on the cigarettes and it was more or less red—"The first cigarette of Beech-Nut quality ever offered to the trade."

X-Q. 124. You knew the Lorillard Co. were putting out tobacco product under Beech-Nut label, did you not?

A. Certainly.

X-Q. 125. Before you started to put out cigarettes, you knew it?

A. I remember Mr. Mahoney said they had ordered a lot of labels. We talked about their changing the label. It was some sort of a conversation like this. We said the labels on the Beech-Nut cigarettes, for instance, looked like a Beech-Nut label, had same style of letters. There was some talk as to if or not they would change, at least the lettering, and the same color of label so that they did not copy our letters, copy our color and should change their slogan so that it did not mean "Beech-Nut" to the average person.

X-Q. 128. It was not a question of the word "Beech-Nut"?

A. We never got to that. We had doubts about it, but I do not remember there was anything said about it. We had a long talk but I do not remember every word.

X-Q. 127. The main discussion in your interview, as you remember it, was the label?

A. Style of letters, color, etc. When we came away we felt that we had not gained anything—that we had not found a common ground. I think my memory is pretty clear on this that Mr. Mahoney inferred if we would consider reimbursing them for the amount they had paid out for the labels, they would change the label or discontinue. That is the impression he gave me. I would not say that was really spoken, but I gathered if we said to him we would make goods for the money put into these labels, he would have said they would quit. Possibly he did not intend that at all.

X-Q. 128. As you understand it, if you had reimbursed them for the labels he would have changed the style of labels?

A. I would not say that he said that, but that was the inference—he would change it or something like that.

X-Q. 129. Did your Company as early as 1915 know that the Lorillard Co. was putting out a tobacco?

A. We knew it as soon as they put it out. If it was 1915, we knew it within a month. A man wrote us in July, an old stockholder of the Beech-Nut Packing Co., and sent us an order for a certain amount of Beech-Nut tobacco. That is five years after they started to put out that tobacco, and while this man was a stockholder in this Company and supposed to be fully conversant with all the Beech-Nut products, he did not know but that the Beech-Nut Packing Co. made these goods.

X-Q. 130. What do you do with these orders for Lorillard Co.?

A. We refer them to Lorillard Co.—many, many of them.

Redirect Examination.

Rd-Q. 131. You said that orders were received by you for Beech-Nut Scrap Tobacco. These orders were sent to the Lorillard Co.?

A. I do not say that we sent them, but referred the customer to the Lorillard Co.

Rd-Q. 132. What did you do that for?

A. We did that as we wanted the buyer to know that we did not make tobacco.

Rd-Q. 133. Did you want the buyer to get some response to his inquiry: in other words, why did you not ignore them?

A. We could not ignore them. These are all good customers of ours, men who order without even putting in the price or without requesting price, simply order 25 cases, 50 cases, a gross—whatever it may be. We want a man to get a response to his order so we reply.

Rd-Q. 134. To what extent, to your personal knowledge, have these orders been received?

A. We have received numerous orders. I think the records will show a considerable number. I do not know how many.

Redirect examination closed.

Deposition closed.

WALTER H. LIPE.

By Mr. Cavanaugh: Copies of trade-mark registrations 19,838; 24,978; 35,731 and 36,444 are fastened together to form one exhibit and are introduced in the evidence, and notary is asked to mark the same "P. Lorillard & Co. Cross Exhibit 21."

The oval cigarette label, Beech-Nut Brand, produced by the witness, Mr. Lipe, is offered in evidence, and notary is requested to mark the same "P. Lorillard & Co. Cross Exhibit No. 22."

Thomas Lynch,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Please state your name, residence, age and occupation.

Answer. Thomas Lynch, 43 Cliff St., Canajoharie, 76, retired.

Q. 2. Were you ever employed by the Beech-Nut Packing Co.? If so, between what years?

A. I was first employed by the Imperial Packing Co., January 1, 1892, and I continued in their employ until April, 1917.

Q. 3. What did you do for the Company during the year 1892?

A. I traveled on the road and sold Beech-Nut hams and bacon to Beech-Nut customers, through the Eastern states, New York and Pennsylvania. After that I took charge of the plant as foreman and continued as such for several years until the business was divided. Then I took charge of the bulk meat department until I retired.

Q. 4. What was the Company selling in 1892?

A. Hams, bacon and lard.

Q. 5. Did these products bear any label when they were put on the market?

A. They did.

Q. 6. Can you describe a label that was on the ham?

A. I would have to describe it from the present label. Oval label with the word "Beech-Nut" on the top, ham at the bottom, a red border and design of beech nut burr in the center.

Q. 7. Did the word Brand appear on the older labels?

A. Not at that time.

Q. 8. What sort of a label was used on the bacon in 1892?

A. The same style of printing but the label was oblong and had rounded corners instead of the oval label.

Q. 9. How long did these labels continue to be used?

A. During my whole service.

Q. 10. Can you produce some of the stationery used by the Imperial Packing Co. in 1892?

A. I can.

Q. 11. Where did you get this sheet?

A. In the first place, I got it from the office of the Imperial Packing Co. After I stopped traveling for the Company, I put that away in my desk at home with other papers and it has been there ever since.

Q. 12. Is this one of the sheets you carried with you in 1892?

A. It is. There is also a small size sheet.

Sheet produced by the witness is offered in evidence as Beech-Nut Exhibit Stationery of 1892.

Q. 13. Do you know Mr. Clarence Lindholm?

A. I do.

Q. 14. Did he ever have any connection with you in connection with the Beech-Nut Packing Co. or its predecessor? If so state same.

A. He was employed by the Imperial Packing Co. while I was traveling on the road in 1892, and he continued in the employ of the Company after I became foreman of the Company.

Q. 15. What was his duty?

A. Helping to handle the meat, wash it, bring it to the smoke and take it out of smoke, and as a boy his work was to label the hams and bacon and some times cut the sacks.

Direct examination closed.

Cross-Examination by Mr. Cavanaugh.

X-Q. 16. Mr. Lynch, I call your attention to the copies of trade-mark registrations which are numbered 19,838, 24,978, 35,731 and 36,444. Do you recall that design of label of 19,838?

A. No, I do not.

X-Q. 17. Do you recall design of label of 24,978.

A. I really do not remember the label that was put on the lard but it was an oval label and we had a hard time to make the label stick.

X-Q. 18. You do not remember that particular label?

A. No.

X-Q. 19. Do you recall 35731. Do you recall seeing that design?

A. No, I do not know where we would use that design with circle. As I remember it all the labels had the other design on them.

X-Q. 20. Did they have circles?

A. There were none in my department.

X-Q. 21. As to label 36,444, do you remember it?

A. I remember Beech-Nut Brand in that manner and this design of the beech nut.

X-Q. 22. Do you recall the circle?

A. No.

X-Q. 23. Did you ever sell Beech-Nut Tobacco?

A. Never heard of it before.

Cross-examination closed.

Deposition closed.

THOS. LYNCH.

Clarence Lindholm,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is Clarence Lindholm, you are forty-five years of age, residence Canajoharie, N. Y., present employed by the Beech-Nut Packing Co. in its Traffic Department. Is that not correct?

Answer. That is correct.

Q. 2. When did you first begin to work for the Beech-Nut Packing Company?

A. In 1891.

Q. 3. How long did you work subsequent to 1891?

A. I worked in 1891 and during the year 1892.

Q. 4. And then severed your connection with the Company?

A. Yes.

Q. 5. When did you return to the Company?

A. About six years ago—in 1914.

Q. 6. Do you know Mr. Thomas Lynch?

A. I do.

Q. 7. Was he employed by the Company when you first came with the Company?

A. He was.

Q. 8. What was he doing?

A. On the road traveling for the Beech-Nut Packing Co.

Q. 9. What were your relations subsequent?

A. My job was to put labels on the hams and bacon, cut the sacks and take meat out of smoke.

Q. 10. Did you work under *Mr. Lynch?*

A. Yes.

Q. 11. Can you describe from memory the labels employed by the Imperial Packing Co. on hams and bacon in 1891 and 1892.

A. Yes. The ham label was an oval label with Beech-Nut trade-mark, with Beech-Nut burr in the center and had a red margin upon it.

Q. 12. What was the bacon label like?

A. The bacon label was a long label with rounded corners with the word "Beech-Nut Bacon" with the same trade-mark as Beech-Nut Ham and the word Beech-Nut hyphenated in both instances.

Q. 13. Are any of these labels available at the present time?

A. No, sir.

Q. 14. Why not?

A. Fire destroyed the records of the old labels.

Q. 15. Can you relate any circumstance in addition to the fact that you actually did the labeling, which makes your recollection of these labels clear?

A. Yes, I can. We had a stringer in the room and on that stringer we had a number of labels. Hams were placed thereon,—gone out of existence now.

Cross-Examination by Mr. Cavanaugh.

X-Q. 16. I call your attention to certain U. S. trade-marks Nos. 19,838, 24,978, 35,731 and 36,444. Will you examine these and tell me if you recall the use of any or all of these labels as shown on the drawing on the packed products of either the Imperial Packing Co. or the Beech-Nut Packing Co.?

A. Lard label No. 24,978 was used after my employment. We did not handle lard. No. 35,731 and 36,444 are cuts representing a branding iron. 19,838 represents a brand—a brand put on by a branding iron.

Witness is pointing to device showing the ham and picture of which appears in the panel.

X-Q. 17. As to trade-mark 24978, you never saw that used by the Company?

A. No, I did not.

X-Q. 18. As to the No. 19,838, did you ever see or know of any brand used by the Company showing the oval panel, that is with the words "Sweet Beech-Nut Ham, Imperial Packing Co., Canajoharie, N. Y.," with the center rectangular shaded, strips across the oblong in addition to the brand on the ham itself, which was already pointed out: in other words, did you ever see that complete device used upon any Beech-Nut products?

A. No, I did not.

X-Q. 19. You say that the mark or device shown in the drawing of No. 36,444 represents a brand?

A. Represents the impression that a branding iron makes on the side of a ham.

X-Q. 20. That is including the circle?

A. Yes.

X-Q. 21. I call your attention to 36,444 is for canned goods and that it says, "It is usually displayed on the cans, jars, boxes and other packages containing the goods, by placing thereon a printed label, on which the described trade-mark is shown." Do you recall a printed label on canned goods of the Beech-Nut Packing Co. showing that circle?

A. Yes, sir.

X-Q. 22. Note that on canned goods they did not show the oval entirely but also used circle.

A. Yes, sir.

X-Q. 23. That was while you were with the Company?

A. No. Wait—at the time, 1891 and 1892 there were no canned goods. That was ahead of my time.

X-Q. 24. This was in 1901.

Mr. Hinton.

Rd-Q. 25. You were not connected with the Company in 1901?

A. No.

Mr. Cavanaugh.

Rx-Q. 26. We had reference to canned goods. So you do not know anything about these marks?

A. No, and still I do in a way because I handled the goods although I did not work for the Beech-Nut Packing Co. I sold them over the counter in retail store.

Rx-Q. 27. Did you handle any Beech-Nut goods with a circle on them like that?

A. Yes. As I recall it the label on the Conserves had a circle inside.

Rx-Q. 28. Ever handled any tobacco under the name of Beech-Nut?

A. No, sir.

Rx-Q. 29. Do not handle any now?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 30. As I understand it, the hams were branded and labeled both?

A. Yes.

Rd-Q. 31. Where was the brand put?

A. On the back or hide of the ham.

Rd-Q. 32. Where was the label put?

A. The label was put on the outside of the ham. Most of the hams were canvased and the label would be on the outside of the canvas.

Rd-Q. 33. The brand is out of sight?

A. Yes, out of sight.

Cross-examination closed.

Deposition closed.

CLARENCE LINDHOLM.

J. Wesley Wood,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is J. Wesley Wood, you are a traveling salesman with the Beech-Nut Packing Co., your residence is Troy, N. Y., is that correct?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Co.?

A. About twenty-two or twenty-three years.

Q. 3. In what capacity?

A. Salesman.

Q. 4. During that time have the products of the Beech-Nut Packing Co. been labeled? If so, please describe the label on the first quality of goods.

A. Beech-Nut label has been an oval label with the outer edge red and white, center of the label there is another oval surrounded by a blue line with the word Beech-Nut hyphenated, usually blue and underneath that the Beech-Nut in colors.

Q. 5. What does that label stand for before the public?

A. It stands absolutely as a quality label. It is understood by the consumer and trade to indicate the highest quality goods possible to pack.

Q. 6. Is that label associated by the public to one article?

A. Of course with some of our original products. The line has continued to increase so that it is now associated with the full line.

Q. 7. What does that label indicate to the consumer of the goods?

A. That it was packed by the Beech-Nut Packing Co.

Q. 8. Has the public seen from time to time that new goods, different from old goods, bore the same label?

A. Yes.

Q. 9. What is the effect of the use of that label upon new goods of different character from the old goods previously offered?

A. They are willing to accept it at once as the same high quality goods as all the others.

Q. 10. And as made by any particular concern?

A. As made by the Beech-Nut Packing Co.

Q. 11. Have you in your experience ever come across a scrap tobacco sold under the name "Beech-Nut" put out by the Lorillard Co.?

A. Yes, I have.

Q. 12. How is that tobacco received by the public?

A. I think a great many people thought it was a product of the Beech-Nut Packing Co.

Q. 13. On what do you base your answer?

A. From the large number of people who call my attention to the fact and who ask me how long we have been in that business.

Direct examination closed.

By Mr. Cavanaugh.

X-Q. 14. Did you ever sell tobacco?

A. No, sir.

X-Q. 15. Do you know anything about the tobacco business?

A. Only from observation.

X-Q. 16. Do you know how tobacco is sold or made or blended or anything of that sort?

A. No, so that I would be an expert.

X-Q. 17. Do you know how the tobacco is received in the trade?

A. No, sir.

X-Q. 18. You do not know what it is to make a tobacco a success on the market?

A. Perhaps I should say no.

X-Q. 19. You do not know where it comes from, you do not know anything about it?

A. Only from observation.

X-Q. 20. If you were going to buy a food product you would not take a package of tobacco in place of that product, would you?

A. No.

X-Q. 21. Do you know how the Lorillard people are regarded as to standing, in the trade?

A. I should judge they had good standing.

X-Q. 22. Do you know the amount of business it does per year?

A. I do not.

X-Q. 23. Know about the selling force and the tremendous selling organization?

A. I do not.

X-Q. 24. You have seen a package of the Lorillard Beech-Nut Tobacco?

A. Yes.

X-Q. 25. Does the word Lorillard appear on it?

A. I presume it does.

X-Q. 26. I show you a package of Lorillard Beech-Nut Tobacco, which is like P. Lorillard Exhibit No. 16, with the word Lorillard appearing on it. I call your attention to certain copies of trade-mark registrations as follows: I first direct your attention to No. 19,838 to Imperial Packing Co. Did you ever see that label used by the Imperial Packing Co.?

A. I do not know that I have just like that.

X-Q. 27. As to registration 24,978, did you ever see that?

A. I never sold lard. Never handled it.

X-Q. 28. As to 35,731, did you ever see that label with the circle?

A. I do not recall it.

X-Q. 29. As to 36,444, which is for canned goods, did you ever see that circle?

A. I do not recall it.

X-Q. 30. You do not know if they ever used this or not?

A. Not to my knowledge.

X-Q. 31. Did you ever sell Beech-Nut Tobacco for the Beech-Nut Packing Co.—cigarettes?

A. No, sir.

X-Q. 32. So far as you know this Company does not manufacture cigarettes?

A. No, sir.

X-Q. 33. Or any tobacco products?

A. Not to my knowledge.

Cross-examination closed.

Deposition closed.

J. WESLEY WOOD.

Adjourned till Aug. 4, 1920, 10:00 A. M.

Convened Aug. 4, 1920, 10:00 A. M.

Present as before.

W. C. Arkell,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is W. C. Arkell, age 32, residence Canajoharie, N. Y., you are Assistant Secretary of the Beech-Nut Packing Co. Is that true?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Company?

A. In one way or another since the Spring of 1911, except during the war.

Q. 3. Has the Beech-Nut Packing Co. to your knowledge received orders for Beech-Nut Scrap Tobacco?

A. It has.

Q. 4. To what extent and from whom?

A. Numerous orders. They came from jobbers mainly who buy our other products.

Q. 5. What has been done with the originals of these orders in most instances?

A. At first the customers were advised that we did not manufacture that product, after that they were sent direct to Lorillard Co., in a number of instances and still later sent to you.

Q. 6. Were some of these orders returned to customers?

A. I do not believe the orders were returned to them, they were written. The original order was not on an order blank but simply on a letterhead.

Q. 7. Is it your practice to make for inter-departmental use, copies of correspondence received from customers?

A. Yes, to a considerable extent.

Q. 8. Can you produce an illustrative collection of inter-departmental copies of correspondence received from customers and letters addressed to customers in connection with orders received by your Company for Beech-Nut Scrap Tobacco?

A. Yes.

Stipulated that the copies produced by witness may be used in place of and with the effect of the originals. Copies produced by the witness are offered and introduced into the evidence as Beech-Nut Exhibit Correspondence.

Q. 9. Have you at the present time a stock of labels used for cigarettes, corresponding to Lorillard Cross Exhibit 22?

A. We have.

Q. 10. Are you prepared to continue the exploitation of cigarettes after the solution of the present controversy with the Lorillard Co. is settled?

A. We are.

Q. 11. How long has the Beech-nut Packing Co. had under discussion the sale of cigarettes under the Beech-Nut label?

A. That matter has been considered as far back—I forget—possibly two or three years before the war, something like 1914, 1915, 1916. I went in the army in 1917 and it was way ahead of that. I can only say in that connection, at one time or other possibly everything that could be sold in a grocery, drug or confectionery store has been considered. Our favorite method of considering products is to take a wholesale grocery, drug and confectionery catalogue and see what items could be merchandised through our company.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 12. Did you have anything personally to do with the getting up of the Beech-Nut cigarettes put out by the Beech-Nut Packing Co.?

A. I did not.

X-Q. 13. Beech-Nut Packing Co. is not now putting out any tobacco products under the name of Beech-Nut?

A. Not just at the present moment.

X-Q. 14. Do you know when it first started to put out Beech-Nut cigarettes?

A. No, I do not know the dates.

X-Q. 15. When did you enter the army?

A. I entered the army in August, 1917.

X-Q. 16. When were you discharged?

A. December 11, 1918.

X-Q. 17. So you were connected with the Beech-Nut Packing Co. as Assistant Secretary in July, 1919?

A. No. I was here, but I was not Assistant Secretary.

X-Q. 18. You were in the office?

A. Yes.

X-Q. 19. You were familiar with the business of the Company at that time?

A. Yes.

X-Q. 20. You do not know when they began to put out cigarettes?

A. I simply do not know, because I have not the books here and I have not looked it up.

X-Q. 21. Have you any idea as to the extent of the sales?

A. They made several sales.

X-Q. 22. Can you give an idea of the quantity of these sales?

A. They were not large sales. Not any more than any product when first put out.

X-Q. 23. Did you ever sell tobacco products under the name Beech-Nut from this plant here at Canajoharie?

A. No, sir.

X-Q. 24. You are not now selling it?

A. No, sir.

X-Q. 25. Mr. Arkell, I show you copy of a letter purporting to be written by James R. Offield, counsel

for the Beech-Nut Packing Co., to yourself, dated July 22, 1919. Do you remember seeing that letter?

A. I think I do.

It is stipulated between counsel that the letter may be read in full into the records, subject to comparison and correction, and it is further stipulated that a copy of this letter was sent to the P. Lorillard Co. by Mr. Bartlett Arkell, President of the Beech-Nut Packing Co.

OFFIELD & POOLE,
1225 Monadnock Bldg.,
Chicago, Ill.

July 22, 1919.

MR. W. C. ARKELL,
c/o Beech-Nut Packing Co.,
Canajoharie, N. Y.

Dear Sir:

In re. Beech-Nut Stogie Company.

In reply to your letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any bearing upon your right to stop the use by them of your mark. Of course, the time to have taken the matter up was upon the first shipment, but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Co.

Very truly yours,
JAMES R. OFFIELD.

X-Q. 26. I understood you to testify that you sent a number of orders which you received for Beech-Nut Scrap Tobacco to the Lorillard Co. Why did you do this?

A. Most of these customers who sent in these orders are good customers of ours, and as a matter of common honesty to the customer we would have to do a thing of that kind.

X-Q. 27. You knew all the time that the P. Lorillard Co. was putting out a tobacco product under the name Beech-Nut?

A. It depends on what you mean by all the time. I do not suppose we knew when it was first put out.

X-Q. 28. I mean at the time you received these letters and sent them to Lorillard Co.

A. Certainly.

X-Q. 29. You knew the P. Lorillard Co. had Beech-Nut tobacco on the market before you ever had your Beech-Nut cigarettes made, did you not?

A. Yes

X-Q. 30. Did you ever put out a cigarette with label like P. Lorillard Cross Exhibit No. 22 on it?

A. No, sir.

X-Q. 31. You never used that label?

A. No, sir.

X-Q. 32. Yesterday during the examination of Mr. Walter H. Lipe, I requested him to produce an invoice for orders showing the sale to customers of your Beech-Nut cigarettes, and after his examination he kindly produced an invoice from the American Tobacco Co., Order No. 19122, showing that the American Tobacco Co. on July 12, 1919, sold to the Beech-Nut Packing Co. and shipped to three separate parties:

B. Arkell,
Equitable Bldg.,
New York City, N. Y.
James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.
New Jersey Tob. Co.,
Jersey City, N. J.

2060 Beech-Nut cigarettes, total net cash value of $11.85. Can you tell me if that represents all of the Beech-Nut cigarettes made for and sold on behalf of the Beech-Nut Packing Co.?

A. No, I cannot.

X-Q. 33. You do not know if there were any other sold?

A. No.

X-Q. 34. Did you know there were only one or two orders sold?

A. No.

X-Q. 35. Did you know there were only one or two orders sold?

A. There were several orders. I do not know if there were one, or two or three. There were several.

X-Q. 36. Do you mean that there were other sales than those indicated by this invoice of July 12, 1919?

A. There were several billings from us. That would not constitute a billing by us, that was a billing to us. There were several billings by us. I do not know the details without looking up our records. I do not carry that in my mind.

X-Q. 37. Would your records here show all sales and shipments by the Beech-Nut Packing Company of Beech-Nut Cigarettes?

A. Yes.

X-Q. 38. Will you produce for me records showing such shipments and reference to whom the goods were shipped?

Mr. Hinton: I have no objection to the witness examining the records, but I do not want the witness to supply the Lorillard Co. with names of Beech-Nut Packing Co.'s customers for cigarettes. He can ascertain whether or not additional sales have been made and state the facts from the records.

Mr. Cavanagh: This witness has testified that his concern has made several sales of Beech-Nut cigarettes. Certainly to investigate the truth of his story on his testimony I am entitled to know the persons to whom such sales were made. It is very evident as the witness has testified that there were relatively few sales and that no sales are now being made and that we are entitled to know the extent of such sales.

X-Q. 40. Did any other concern other than the American Tobacco Co. make Beech-Nut cigarettes for the Beech-Nut Packing Co.?

A. No, sir.

X-Q. 41. Does this invoice of July 12, 1919, represent the total amount of cigarettes made for your concern by the American Tobacco Co.?

A. To the best of my knowledge and belief.

X-Q. 42. The Beech-Nut Packing Co.'s business is that of packing shipping food products, is it not?

A. I should say it includes the packing and shipping of food products. It would not say that it was exclusively confined to the sale of food products.

X-Q. 43. What other products does it pack and ship outside of food products?

A. Chewing gum, beverages, tinfoil, formerly made corrugated boxes, and makes those by a subsidiary company now.

X-Q. 44. Does the Beech-Nut Packing Co. make and sell tinfoil under the name Beech-Nut?

A. It does not brand each piece of tinfoil, but it is sold by the Beech-Nut Packing Co.'s Foil Department.

X-Q. 45. Does the Company sell it under the trade-mark Beech-Nut?

A. I would not say it was under the trade-mark Beech-Nut, but I would say that the trade-mark "Beech-Nut" is on the top of our letterheads.

X-Q. 46. If you wanted to purchase a jar of Beech-Nut Bacon and went to a store and the man handed you a package of Beech-Nut tobacco, would you take it in the place of bacon?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 47. There has been read into the record copy of letter dated July 22, 1919, from Mr. Offield to Mr. W. C. Arkell, which apparently was forwarded by Mr. Bartlett Arkell to the P. Lorillard Co. At the time this correspondence occurred, state whether or not negotiations looking toward a settlement of this controversy were (foreseen)?

A. They were.

Rd-Q. 48. Were the negotiations successful?

A. No, sir.

Rd-Q. 49. If you went into a store and desired to purchase a bottle of Beech-Nut Ginger Ale made by your Company, would you accept in its place mustard, ham, chewing gum or sliced bacon?

A. I certainly would not.

Recross Examination by Mr. Cavanagh.

Rx-Q. 50. Do you know when this controversy over Beech-Nut tobacco between P. Lorillard Co. and the Beech-Nut Packing Co. started?

A. No.

Rx-Q. 51. Do you know that as early as 1915 the Beech-Nut Packing Co. had some correspondence with the P. Lorillard Co. regarding the use by Lorillard Co. of the trade-mark Beech-Nut for tobacco?

A. I understand so.

Rx-Q. 52. Then you knew that for a number of years or until about 1919 there was nothing further done in the matter until the question of its use by the P. Lorillard Co. for trade-mark for cigarettes came up?

A. I would not state nothing was done. I would state that the matter was being considered by at least one person in that place all the time.

Rx-Q. 53. This letter from Mr. Offield to you is dated July 22, 1919. I note that the Beech-Nut trade-mark application involved in this opposition was filed complete June 25, 1919. In the application, the Beech-Nut Packing Co. claimed date of use since June 12, 1919. So approximately about a month or thereabouts prior to the writing of this letter received by you, the Beech-Nut Packing Co. had started to use the trade-mark for cigarettes and had filed an application for such registration for trade-mark "Beech-Nut."

A. I do not recall the dates. If you state so from the official papers, they must be correct.

Cross-examination closed.

Deposition closed.

W. C. ARKELL.

Stipulated by and between the parties hereto, through their respective counsel, that the Exhibits herein may be retained in the custody of the counsel producing the same, subject to production on or before final hearing. These exhibits or copies thereof to be available at all times to opposing counsel.

Stipulated by and between the parties herein, through their respective counsel, that the time the Beech-Nut Packing Co. for taking its testimony may be extended sixty days beyond August 14, 1920, subject to the approval of the Patent Office.

Guy W. Sharpe,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says. (Formal notice of this witness being waived.)

Question 1. Your name is Mr. Guy W. Sharpe, you are 35 years of age, residence, Canajoharie, N. Y., you are a member of the Sales Department of the Beech-Nut Packing Co. Is that true?

Answer. That is true.

Q. 2. How long have you been connected with the Beech-Nut Packing Co.?

A. Since April, 1915.

Q. 3. Have you had occasion in your employment by the Beech-Nut Packing Co. to come in intimate contact with trade purchasing products of this Company?

A. I have.

Q. 4. During what period?

A. From April, 1915, until April 28, 1919.

Q. 5. Since then what have you done?

A. I have been connected with the Sales Department.

Q. 6. State whether or not the Beech-Nut Packing Co. has from time to time added to its line of products, new products quite different from previous products sold by the Beech-Nut Packing Co.

A. It has.

Q. 7. Were these products labeled?

A. Yes.

Q. 8. With what label?

A. With the Beech-Nut label.

Q. 9. Is it the label which appears on the exhibit produced by Mr. Lipe?

A. Yes.

Q. 10. Including the red and white border, blue line, oval, picture of beech-nut and the name Beech-Nut hyphenated in blue?

A. It is.

Q. 11. Have you had occasion to investigate the growth of the business of the Beech-Nut Packing Co. prior to your connection with the Company?

A. I have.

Q. 12. Is your statement as to the additions to the line of this Company true during the period prior to your connection with the Company?

A. Yes.

Q. 13. Have you had occasion to come in contact with the Lorillard Scrap Tobacco package as shown in Lorillard Exhibit 16?

A. I have.

Q. 14. Can you state from your knowledge of the trade and public, obtained in actual selling experience,

what the impression has been and is in the minds of the trade and public as to this product?

A. It has been quite generally and is quite generally believed that this product was put out and merchandised by the Beech-Nut Packing Co.

By Mr. Cavanagh: That question and answer is objected to upon the ground it is evident attack to lay foundation for charge of unfair competition and which issue is not involved in procedure of this character.

It is stipulated that this objection may stand as to similar questions along this line put to this witness.

Q. 15. Upon what do you base your answer just given?

A. Upon the conversations with dealers and general public in which the question has been frequently asked whether or not it was a Beech-Nut product, and frequently the admission has been made that they presumed it was a Beech-Nut product.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 16. I understand you came here in 1915?

A. I came here in 1919.

X-Q. 17. How long have you been connected with the Company?

A. Since April 1, 1915.

X-Q. 18. You say you have made investigations as to the additions of various products to the Beech-Nut line, prior to April 1, 1915?

A. Yes, sir.

X-Q. 19. What was the scope of your investigation and what procedure did you follow in this investigation?

A. Please repeat the question.

X-Q. 20. You say you made an investigation prior to your connection with this firm in 1915?

> Mr. Hinton: I think the witness possibly misunderstood the question. I do not understand that he made the investigation prior to 1915, but that during his connection with the Company familiarized himself with the extensions of the Beech-Nut line, which happened before his connection with the Company.
>
> By Mr. Cavanagh: This deposition is being taken in stenographic notes. The stenographer is now requested to turn to her notes and read for the benefit of the witness and counsel for Lorillard Co. that portion of deposition in which the witness refers to the investigation he made.
>
> Stenographer turned to notes and read portion of deposition referred to.

A. General investigation for purpose of familiarizing myself with the business of the Company through the Division Salesman under whose charge I was and through various members of the organization on occasion of visits to the plant.

X-Q. 21. You made the investigation of these matters, which occurred prior to your connection with the firm?

A. Yes.

X-Q. 22. When did the Beech-Nut Co. add Peanut Butter to its list?

A. I could not say.

X-Q. 23. When did it add candy to its list of products?

A. My answer would be rather indefinite as to candy, I think the latter part of 1914 or early part of 1915.

X-Q. 24. What would be your answer as to Catsup?

A. I cannot give a definite answer on any of those as to the dates. It was prior to my connection with the Company.

X-Q. 25. When did they add cigarettes to the line?

A. I cannot say as to that.

X-Q. 26. Did you ever sell Beech-Nut tobacco to the trade?

A. I did not.

X-Q. 27. Did you ever know of the Beech-Nut Packing Co. selling tobacco products to the trade?

A.I never knew of their doing so.

X-Q. 28. Are you familiar with the tobacco trade?

A. Somewhat.

X-Q. 29. Did you ever sell tobacco products?

A. I did not.

X-Q. 30. Did you ever have anybody in the tobacco industry ask you if the Lorillard Beech-Nut Tobacco was put out by the Beech-Nut Packing Co.?

A. Yes, I have.

X-Q. 31. Who asked you that?

A. That is rather a difficult question to answer. I know of one instance, W. A. Riendel, Lansing, Mich.

X-Q. 32. Where does he live?

A. Lansing, Michigan.

X-Q. 33. What line of business was he in?

A. Tobacco.

X-Q. 34. Wholesale or retail?

A. Retail.

X-Q. 35. Was he handling Beech-Nut Tobacco?

A. Yes.

X-Q. 36. Had on sale the Lorillard Beech-Nut Tobacco?

A. Yes.

X-Q. 37. As a tobacco man he asked you if the Beech-Nut Packing Company made that?

A. That is the question he asked me.

X-Q. 38. Were you ever asked that by the United Cigar Stores?

A. I do not think I ever had any conversation about this with the United Cigar Stores.

X-Q. 39. You examined that package, Exhibit 16, have you not?

A. I have.

X-Q. 40. Do you find the word Lorillard printed on?

A. I do.

X-Q. 41. Do you find the phrase, Beech-Nut Packing Co. on it?

A. No, sir.

X-Q. 42. As an intelligent man, if you saw that package with the Lorillard name on it and did not find the Beech-Nut Packing Co.'s name, would you think the Beech-Nut Packing Co. made it?

A. I would not.

X-Q. 43. Referring to charts which were produced by Mr. Lipe and which shows the labels of the various Beech-Nut products, as I understand it you do not know the particular date upon which any of those products were first put out by the Beech-Nut Packing Co.

A. I could not give you the dates.

X-Q. 44. If you went into a store to purchase one of the products indicated by the labels on this chart, would

you permit the leader to sell you Lorillard Beech-Nut Tobacco in place of such products?

A. Certainly not.

X-Q. 45. So you would not make the mistake in taking tobacco for any of those products?

A. No, sir.

Mr. Hinton.

Rd-Q. 46. Mr. Cavanaugh asked whether if you went into a store to purchase any one of the products on the collection of labels produced by Mr. Lipe, would you accept a package of scrap tobacco in its place and you answered you would not.

I ask if you went into a store for the purpose of purchasing any one of the products, such, for instance, as sliced bacon which labels are displayed in this collection, would you accept in its place any of the other products, such as Cranberry Sauce?

A. I would not.

Cross examination closed.

Deposition closed.

GUY W. SHARPE.

It is stipulated by and between counsel for the parties hereto, through their respective counsel, that the invoice from the American Tobacco Co. to the Beech-Nut Packing Co., dated July 12, 1919, order No. 19122 and shipped from Kinney Duke Branch reads in essential parts as follows:

Entered 7/11, Order of 7/11

	Gro.	*Price.*	*Total.*
2060 Beech-Nut Cigarettes 10s.....	2060	5.75M	11.85 net cash

Shipped to the following:
B. Arkell, Equitable Bldg.,
120 Broadway, New York.

James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.

New Jersey Tobacco Co., Jersey City Branch, Jersey City, N. J.

Production of the original invoice in evidence was waived.

Statement of advertising appropriation referred to by Mr. Lipe in his testimony is produced by Mr. Lipe and it is stipulated that it may be incorporated in the records.

1910	$70,986.37
1911	89,936.01
1912	138,463.18
1913	130,333.91
1914	148,258.85
1915	206,415.53
1916	299,976.60
1917	366,227.04
1918	308,224.72
1919	433,724.98

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY.
"Beech-Nut."

Trade-Mark Opposition No. 2805.

STATE OF NEW YORK,
County of Montgomery, } *ss.*

Notary's Certificate.

I, Fred. M. Geortner, a Notary Public, in and for the County of Montgomery, State of New York, do hereby certify that the foregoing depositions of Walter H. Lipe, Thomas Lynch, Clarence Lindholm, J. Wesley Wood, W. C. Arkell and Guy W. Sharpe were taken on behalf of Beech-Nut Packing Company pursuant to agreement and by consent, before me, at Canajoharie, County of Montgomery and State of New York, on the 3rd and 4th days of August, 1920; that the witnesses were by me each duly sworn; that the testimony of each witness was taken, in my presence, in shorthand by Miss M. Therese Kane, and by her reduced to typewriting; that the foregoing pages contain a true and accurate transcript of her stenographic notes; that the opposing parties were represented by counsel during the taking of said testimony; that said testimony was taken at Canajoharie, New York, and was commenced at 2 o'clock on the 3rd day of August, 1920, and was concluded on the next day at about 2 o'clock

P. M.; that the deposition of each witness was read to or by such witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Canajoharie, County of Montgomery, State of New York, this 25th day of August, 1920.

FRED. M. GEORTNER,
Notary Public.

[SEAL.]

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY.
Beech-Nut.

Trade-Mark Opposition No. 2805.

Notice.

Meyers, Cavanagh & Hyde,
200 Fifth Ave., New York, N. Y.

Gentlemen: Please take notice that on Thursday, December 16, 1920, we shall proceed to take the testimony in the above entitled case, pursuant to the rules and statutes in such case made and provided, at the office of Offield, Poole & Hinton, Room 1737, 38 S. Dearborn Street, Chicago, Illinois, beginning at 12:30 A. M. The following witnesses will be examined.

S. W. Billepp
H. F. Stickney

R. S. Yunker
Joseph Fleming
Mrs. Matilda Wedel
Walter Peabody
Louis Nernberg
and perhaps others.

All of the witnesses reside in Chicago, Illinois.

OFFIELD, POOLE & HINTON,
Counsel for Beech-Nut Packing Co.

Due and timely service of the above notice acknowledged this 16th day of Dec., 1920.

MEYERS, CAVANAGH & HYDE,
Attorneys for Lorillard Co.

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
vs.
BEECH-NUT PACKING COMPANY.
} Trade-Mark Opposition No. 2805.

"Beech Nut."

Depositions of Witnesses.

Testimony taken on behalf of Beech-Nut Packing Company at the office of Offield, Poole & Hinton, 1737-38 S. Dearborn Street, Chicago, Illinois, and 1143 E. 55th Street, Chicago, Illinois, beginning December 16, 1920, at 2:00 P. M. before Sarah E. Harvey, a Notary Public, acting as special examiner by consent.

Present: Sebastian Hinton for Beech-Nut Packing Company, Richard B. Cavanagh for P. Lorillard Company.

Mrs. Matilda Wedel,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:—

Question 1. Please state your name, residence and occupation.

Answer. My name is Matilda Wedel, 3312 N. Leavitt Street. My business is in the cigar business. I own the business.

Q. 2. Where is your cigar business located?

A. Monroe Building. Monroe and Michigan. Large office building. Contains sixteen floors.

Q. 3. How long have you conducted the cigar stand in the Monroe Building?

A. Four years in April.

Q. 4. Do you employ any assistance in running that cigar business?

A. Two people work in the stand. One relieves.

Q. 5. I show you a package of chewing tobacco, which is a duplicate of a package in evidence in this case as Lorillard Exhibit 16, and ask if you handle this product in your cigar stand?

A. I have handled it until the last two months. I am not handling it now. I am too busy. It dries out. When a man comes in and says, "Ain't you got Beech-Nut Scrap." I say I haven't it now. If you want it now, I will get it for you. I have had it all the time.

Q. 6. How long have you handled Beech-Nut Scrap tobacco?

A. Four years. I have had Beech Nut Scrap Tobacco all the time, where I don't have other tobacco.

Q. 7. Will you tell me whether you now know who makes Beech Nut Scrap?

A. I know its made by Lorillard now.

Q. 8. How long have you known it was made by the Lorillard Company?

A. Since one week ago.

Q. 9. By whom were you first advised that this tobacco was made by the Lorillard Company?

A. The salesman Mr. Lewis came in with another man. He was connected with the Beech-Nut concern also. I don't try to remember names. He was talking about Beech-Nut cigars. I said something about the Beech-Nut tobacco, and he says, "Well, you think that Beech-Nut tobacco is made by the same concern?" (I was saying how good it was.) I said yes, I thought so. And he says, "Well, what makes you think so." Well, because it has the same trade-mark, the same oval mark. I have heard different remarks, but I couldn't mention names, because I never gave it a thought. For years I have heard that.

Mr. Cavanagh: Last part of question is objected to as hearsay.

Q. 10. Do I understand you to say that for years you have heard customers * * *?

A. Often. We talked about Beech-Nut. "Everything is good about Beech-Nut." "Even Beech-Nut Scrap is good." "Do you think they make it." I said "Yes." "Sure." "I guess so."

Q. 11. By whom do mean when you say "they"?

A. The Beech-Nut Products.

Q. 12. Do you mean the same people who make other Beech Nut products?

A. Yes. Not Lorillard. Didn't know that until a week ago.

Q. 13. Do I understand you to say that you were first advised that the Beech-Nut Company did not make Beech Nut Scrap Tobacco, by a Beech-Nut Packing Company representative about a week ago?

A. Yes.

Q. 14. And until that time you believed it was a product of the Beech-Nut Packing Company?

A. I did.

Q. 15. What other products of the Beech-Nut Packing Company do you handle, Mrs. Wedel?

A. I handle. * * * To specialize the items—all their mint products and all their products like lemon and sour drops, I would call it. That's all there are.

Q. 16. Do you handle chewing gum?

A. Oh! yes.

Q. 17. What made you believe that Beech Nut Scrap Tobacco was made by the Beech-Nut Packing Company?

A. Again I will say, it was the same label, the same trade-mark, their oval stamp, and the later ones that they have on cough drops. They even have a narrow striped cough drop—blue, and this is red.

Q. 18. You mean that the Beech-Nut Packing Company has this same label on all their products.

A. Yes. And the Horehound drops.

Q. 19. But do you mean that the oval label appears on other Beech-Nut Packing Company products?

A. On all products, they have their label, their oval label. On all I have seen. Mints and sour drops I have stated I have handled and also that tobacco.

Q. 20. What is the standing of the Beech-Nut Packing Company's products, which you have described, in the public mind? Do you know?

A. I don't just understand.

Q. 21. What does the public think of products with that label on it?

A. There are loads more like myself, as I make the statement. I have had that same thought brought to me over the counter, and I haven't been in business to handle Beech-Nut, and never thought of it, until somebody made the remark to me, and when I handled Beech-Nut tobacco I saw it had the same label as the gum. The gum was the first item I handled and Beech Nut Scrap tobacco was the second I handled. Until I handled those two I was so sure they were together.

Q. 22. Do you know whether or not the public regards with favor any product bearing the oval Beech-Nut label?

A. Whether they prefer the oval Beech-Nut label? They would have it sooner than anything. Some are skeptical about other things. When I take Beech-Nut and say, I have not Life Savers, but this is far superior. I can say that. I just know that of myself.

Q. 23. When customers, however, asked you about the Beech Nut Scrap Tobacco, by whom have you told them it was made?

A. We never had that discussed. It was just an off-hand way.

Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. What did you say is your line of business?

A. I am in the cigar business and light candy. Packaged.

X-Q. 2. Do you own the business?

A. Yes, sir.

X-Q. 3. Buy goods yourself?

A. Yes, sir.

X-Q. 4. From whom did you buy your Beech Nut Tobacco?

A. From Thorwart & Roehling. Somewhere on Lake Street.

X-Q. 5. Do you know where located?

A. On Lake Street somewhere.

X-Q. 6. In what quantities did you buy that tobacco?

A. Every week. One dozen packages just like that.

X-Q. 7. I presume that you can read?

A. Yes.

X-Q. 8. What is the name on that package?

A. Lorillard.

X-Q. 9. Do you find the name Beech-Nut Packing Company on that package?

A. Not at all. If I had ever stopped to read, I would have never said this was Beech-Nut Packing Company's product.

X-Q. 10. If you had stopped to read the package you would never have said it was Beech-Nut Company's?

A. No.

X-Q. 11. What brands of cigarettes do you handle?

A. All popular brands. Means most established.

X-Q. 12. Do you handle Murad?

A. All. All of Lorillard.

X-Q. 13. You know Lorillard is a good tobacco concern?

A. Yes, sir.

X-Q. 14. If you had ever taken the slightest trouble to examine that package you would have connected it with the Lorillard Company?

A. Yes, sir. Lorillard.

X-Q. 15. And a good responsible concern?

A. Yes, I would say that. Until now I have never seen that Lorillard.

X-Q. 16. Never took trouble to look for it?

A. No. It was scrap tobacco. We only notice those things as what the people ask for. We get it from a jobber. If we were dealing wth the people direct, like with Beech-Nut people, then we would know what people made the goods.

X-Q. 17. You handle lots of Lorillard tobacco products, do you not? How do you know that goods like Murad or Mogul are Lorillard?

A. A salesman comes in. They say, I am the Murad man from P. Lorillard. I am salesman. Or I am manager, and once in a while he will leave a sample package of cigarettes. I thank him and he may have an order and he may not.

X-Q. 18. Now. On this Beech Nut Tobacco. I understand it is the only scrap tobacco that you sold?

A. At the present time. Within the last six months.

X-Q. 20. You never bought any direct from Lorillard? Only from some jobber?

A. Yes. Before I go any further. All cigarettes are handled through a jobber that I buy.

X-Q. 21. You were speaking about a horehound package and you said it had some lines on it. What did you mean?

A. It is a long package. Did you see their lemon drops?

X-Q. 22. No.

A. Long package three-fourths (¾) inch in diameter. About three to three and one-half inches long. It has blue instead of red. I don't know whether they come wider. Straight lines.

X-Q. 23. As you are in the candy and tobacco business, if a customer came in to you and wanted to buy some Beech Nut Tobacco, would you be so confused as to sell him that horehound candy package for this Beech Nut tobacco package.

A. No. I would say to him "Beech Nut Scrap"? or something like that.

X-Q. 24. Wouldn't be confused into selling Beech-Nut candy?

A. He wouldn't take it. I wouldn't give it to him. If I had known it made such a difference, I would have noticed the name.

X-Q. 25. Can you tell me whether the oval on this Beech Nut package of tobacco is like or different from the oval on the chewing gum?

A. They have same label all over on Beech-Nut goods.

X-Q. 26. Would you say that this particular oval is exactly like or different?

A. Not exactly like. But at a slight glance, a person not noticing the name and handling it for years would think it was the same. That oval circle there or trademark.

X-Q. 27. The only Beech-Nut products you handle are candy?

A. Yes. In the name of Beech-Nut.

X-Q. 28. Who do you buy your Beech-Nut candy products from?

A. I buy them direct and jobbing.

X-Q. 29. You buy some direct from Beech-Nut Packing Company?

A. Yes. And some from a jobber. Jobber handles *candy, gum and other things.*

X-Q. 30. You never ordered any tobacco from the Beech-Nut Packing Company?

A. No. Tobacco and cigars are ordered through a jobber. By one jobber. By the cigar jobber.

X-Q. 31. You never ordered any Beech-Nut tobacco from Beech-Nut Packing Company?

A. Never.

X-Q. 32. You do not order Beech-Nut tobacco from the same man as you order Beech-Nut candy from.

A. No. But they handle the gum.

X-Q. 33. Which jobbers?

A. Thorwart & Roehling, that I order my cigars from. A jobber that handles cigars, handles all tobaccos, all cigars, and handles candy, and mints and gums, sometimes. I am not saying that these people always have them, but I have gotten them from them.

X-Q. 34. What kind of jobbing business are they in?

A. Cigar jobbing.

X-Q. 35. Exclusively tobacco jobbing?

A. Yes.

X-Q. 36. I thought you said they handled gum?

A. I can get it there.

X-Q. 37. What else do they handle besides tobacco?

A. Certain brands of cigars that they are distributors for. All brands of cigars—if they haven't got them, they will get them for you. All tobaccos, smoking and chewing. That's all that I know that's in my mind, and gum. I told you that before. That's what I can buy from them.

X-Q. 38. You buy your Beech-Nut gum from those people?

A. Wherever I can get it.

X-Q. 39. Then where did you get it?

A. When the market is scarce on Beech-Nut goods, like last two years, we had to buy it where we could get it.

X-Q. 40. If you ordered from this jobber one dozen packages of Beech Nut Tobacco, and he sent you one dozen packages of Beech-Nut Gum, what would you say?

A. I would say I didn't want them and send them back.

X-Q. 41. You wouldn't possibly confuse the two.

A. I wouldn't make a mistake. Might be mistake on the order, but I couldn't make a mistake.

Mr. Cavanagh: That's all.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. Do your customers, Mrs. Wedel, ever come in and say "Give me a package of Beech-Nut?"

A. Yes.

Rd-Q. 2. And what do you give them?

A. Gum.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. Suppose he is a big, strong, rough-looking, healthy man, who comes in to your place, weighing two hundred pounds, chewing a wad of tobacco, and he takes it out of his mouth, throws it on the floor, and says "Give me some Beech Nut." What would you give him?

A. I would give him gum.

Rx-Q. 2. You would give that big longshoreman gum?

A. Scrap tobacco is only used by working class and they are not customers in the building. I am handling it for the people in the building.

Rx-Q. 3. But did I ask you that? I asked you, if a big, longshoreman, weighing two hundred pounds comes in chewing Beech Nut, would you hand him gum?

A. Yes. He had to say Scrap.

Rx-Q. 4. Suppose he said tobacco. He would get tobacco?

A. Yes.

Rx-Q. 5. This package?

A. Yes.

Rx-Q. 6. If he asked for tobacco, you wouldn't give him gum?

A. No.

Rx-Q. 7. You would disregard all other Beech-Nut products?

A. Yes. Unless he says what he wants, Beech-Nut gum was on the market before anything I know of.

Rx-Q. 8. Do you know how long Beech-Nut gum has been on the market?

A. No.

Recross examination closed.

MATHILDA WEDEL.

R. J. Yunkers,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Roy J. Yunkers, 6156 Kenwood Ave., Chicago, occupation retail cigar salesman.

Q. 2. You are the manager of the Albert Breitung Store, at 409 S. Dearborn Street, Chicago?

A. Yes, sir.

Q. 3. Is this a down-town store?

A. Loop store.

Q. 4. Is it in Old Colony Building?

A. Yes, sir.

Q. 5. The Ild Colony Building is a large down-town Chicago business building?

A. Yes, sir.

Q. 6. How many empoyees work in the storo of which you are manager?

A. Myself mostly. Extra man during holidays.

Q. 7. How long have you been selling tobacco over the counter?

A. About twelve years.

Q. 8. Has the Albert Breitung Company other Chicago stores?

A. Yes, sir.

Q. 9. How many other stores?

A. Twelve. All in the loop.

Q. 10. I show you a package which is a duplicate of opposer's Exhibit No. 16, Beech Nut Scrap Tobacco. Have you sold this product over the counter?

A. I have.

Q. 11. For how long?

A. Four or five years, I would say.

Q. 12. Did you ever chew this product yourself?

A. I have chewed it.

Q. 13. To what extent have you sold this product over the counter? I mean has it been a big seller?

A. It has been a big seller.

Q. 14. Do you now know who makes this product?

A. Well, I wouldn't say for sure. I understood it was Beech-Nut people. I always understood it was the Beech-Nut people.

Q. 15. When did you first receive information to the effect that this might not be a product of the Beech-Nut Packing Company?

A. About two weeks ago. One of the salesmen of the Beech-Nut people.

Q. 16. I understand you to say that the first time you received information that this product might not be a product of the Beech-Nut Packing Company came from a Beech-Nut Packing Company salesman about two weeks ago?

A. Yes, sir.

Q. 17. What led you to believe prior to that time that this was a product of the Beech-Nut Packing Company?

A. The trade-mark or label of the package looked the same as any other package the Beech-Nut people put out.

Q. 18. From your experience in dealing with the public over the counter, what would you say as to what the public believes on the question of who makes this product?

A. I had quite a number of times customers coming in and wanting to know if Beech-Nut people were going

into the tobacco business—if tobacco was put up by the Beech-Nut people. I always told them yes.

Q. 20. You have testified that the label on this package of tobacco is like the label on Beech-Nut products.

A. Yes, sir.

Q. 21. Is the label on Beech-Nut products well known to the public?

A. Yes, sir. Very well known.

Q. 22. And for how long has it to your knowledge been well known to the public?

A. As long as I have been in the game behind the counter. Maybe longer than that. You cannot sell anything but Beech-Nut.

Q. 23. What products would that be true of?

A. The gum, the candy, which I mostly handle. Lime drops.

Q. 24. How long after the first appearance of the Beech-Nut gum was it before this gum became popular?

A. Well, I cannot say to that. It seemed to come on here about five or six years ago. I notice it more than anything on gum. Couldn't get gum. Couldn't sell any other gum. They would walk away.

Q. 25. What was the name of the Beech-Nut Packing Company salesman who advised you first that this product Beech Nut tobacco was not made by the Beech-Nut Packing Company?

A. Mr. Lewis.

Q. 26. Is he Chicago representative of the Beech-Nut Packing Company?

A. Yes, sir.

Q. 27. State whether or not chewing gum is sold in tobacco stores generally.

A. Chewing gum is sold in tobacco stores, in department stores, in drug stores. Anybody that can handle gum sells Beech-Nut.

Q. 28. State whether or not what you have referred to as the trade-mark or label of the Beech-Nut gum is like the badge or label on Beech Nut tobacco.

A. The oval shape on the Beech Nut gum, the label is always oval. The tobacco is oval shape. I was under the impression that both were the same.

Q. 29. When a customer comes into your store and asks for Beech-nut, what do you give him?

A. Lots of times, if he looks rough, I ask him if he wants tobacco or gum or candy. If you give him gum, he says he wants tobacco. I have that happen to me many times. Sometimes in morning rush, you could stand and notice it.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

Cross-question 1. How long have you been in the tobacco business?

Answer. Twelve years.

X-Q. 2. Can you name some of the large tobacco manufacturers? Big concerns?

A. Liggett & Myers, Lorillard, American Tobacco Company, Reynolds.

X-Q. 3. I show you this package. Exhibit 16, and ask you if you can read that name?

A. Lorillard. Yes. sir.

X-Q. 4. Whose tobacco would you take that to be from that package?

A. I would take it to be Lorillard's tobacco.

X-Q. 5. You do not find the word Beech-Nut Packing Company any place on that package?

A. No, sir.

X-Q. 6. And you know that Lorillard is a large and reputable manufacturer of tobacco?

A. Yes, sir.

X-Q. 7. Have you a very good standing in the trade?

A. Very good.

X-Q. 8. If a man asked you whose tobacco that was, if you took time to even look at it you would say it was Lorillard?

A. Yes, sir.

X-Q. 9. You would immediately connect the name with such cigarettes as Murad, Mogul, Egyptian Dieties, and Climax chewing tobacco?

A. Yes, sir.

X-Q. 10. If a customer came into your store and asked you for a package of Beech-Nut tobacco would you give him a package of chewing gum?

A. Not if he asked for tobacco. A lot come in and ask for Beech Nut. Not if they ask for tobacco.

X-Q. 11. Wouldn't confuse it with candy?

A. No, sir.

X-Q. 12. And you would hand him this package or package like this, which I understand you keep in stock, and if you had ever taken the trouble to read name, you would have known it was manufactured by Lorillard?

A. Yes, sir.

X-Q. 13. You never took the trouble to examine the package?

A. No, sir.

X-Q. 14. Never had examined the package?

A. No, sir; I haven't. So many customers come into store and ask for Beech Nut. I heard lot of remarks. I asked Mr. Lewis two weeks ago. I said I had

heard remarks passed by lots of people. I have been behind the counter for a long time. Never paid much attention to the package.

X-Q. 15. Do you buy the supplies in your store or are they delivered from other stores?

A. Delivered. Sometimes from wholesale and sometimes from J. B. Moos, wholesale jobber in city.

X-Q. 16. Where is Moos place?

A. On West Randolph Street, Washington Street.

X-Q. 17. Do you know how tobacco comes billed?

A. No. Never see that at all.

X-Q. 18. If you were asked if this were made by Beech-Nut Packing Company * * * *?

A. If I looked closely, I would say "No." I never gave it a thought. I just guessed at it. Never looked at the package. Never examined it closely.

X-Q. 19. Never took the trouble to find out whose tobacco it was?

A. I can't hardly say that. I may have known that it was Lorillard at one time way back. Never gave it a thought. Have too many other things on my mind to think about.

X-Q. 20. What is the color of the Beech-Nut oval on its chewing gum and candy products?

A. Well, on the products, it is dark center, of dark blue. The gum has gold band around it. Some have darker band.

X-Q. 21. Do they have these red radiating lines on it?

A. No, sir.

Redirect Examination by Mr. Hinton.

Redirect Question 1. Do I understand you to say that you have actually handed out this package to customers many times in the course of your selling experience?

Answer. Yes.

Rd-Q. 2. In other words, you have taken the package off the shelf and given it to the customers when they asked for it in the ordinary way.

A. Yes, sir.

Rd-Q. 3. You have done this very many times?

A. Quite a number of times.

RAY J. YUNKER.

Joseph Fleming,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Joseph Fleming, 51 this month, residence 6645 Yale Avenue, Chicago, grocer.

Q. 2. Where is your grocery store located?

A. 1833 W. 103 St.

Q. 3. How long have you been in the grocery business?

A. All told, over thirty years.

Q. 4. Are you one of the proprietors of the store at the address you gave?

A. I am.

Q. 5. Have you in the course of conducting the grocery store handled products of the Beech-Nut Packing Company?

A. I have.

Q. 6. For how long?

A. For twelve or thirteen years anyhow. Maybe more.

Q. 7. Could you give me from your memory a complete list of all the products the Beech-Nut Products Company puts out?

A. Beech-Nut Peanut Butter, Beech-Nut Catsup, Baked Beans, Chili Sauce, Beech Nut Jellies.

Q. 8. Could you give a complete list or could you not?

A. That is just some we have in the store.

Q. 9. The question was, could you give a complete list of all the products made by the Beech-Nut Packing Company from memory—could you or could you not?

A. No. I don't think I could.

Q. 10. In other words, the Beech-Nut Packing Company makes products which you could not mention offhand?

A. No.

Q. 11. How would you tell from examination of the product whether or not it was made by Beech-Nut Packing Company?

A. Naturally the first thing is "Beech-Nut."

Q. 12. Have you seen in the course of your experience from time to time new products come out with the Beech-Nut Company's label on them?

A. Yes. Sure.

Q. 13. Have these products been different from every preceding products, which bore the same label?

A. They have.

Q. 14. How have such products, although new, been received by the public?

A. My experience has been that the Beech-Nut was that when they had an article that suited them with the name Beech-Nut on it, it impressed the public very satisfactorily. That is, they buy without very much recom-

mendation just because Beech-Nut was on it. I know from my standpoint, not the public, that it is easier to sell a Beech-Nut article that has given satisfaction.

Q. 15. What does the Beech-Nut label stand for in the mind of the public?

A. First quality goods. Purity of goods.

Q. 16. How long as the Beech-Nut label been displayed to and before the public?

A. Twelve or thirteen or fourteen years. Has been added to very extensively since that time. Other lines.

Q. 17. I show you a package, a duplicate of which is in evidence as opposer's Exhibit No. 16, and ask you whose product you thought this was when you first saw it?

A. Beech-Nut.

Q. 18. You mean the product of the Beech-Nut Packing Company?

A. I do. My very first impression.

Q. 19. Why did you think it was their product? The product of the Beech-Nut Packing Company?

A. Advertisement there is so much similar to the Beech-Nut. First thing that came to my mind.

Q. 20. From your contact daily over the counter with customers, what can you say as to what the public would think in that respect?

Mr. Cavanagh: Objected to as calling for an opinion.

A. I believe the public would think just as I have. They would say it was a Beech-Nut product.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. Do you sell Beech Nut tobacco?

A. No.

X-Q. 2. Ever sold any of it?

A. No.

X-Q. 3. Do you know of the Lorillard Company?

A. I do not.

X-Q. 4. You do not handle tobacco at all?

A. No.

X-Q. 5. Ever handle it?

A. No.

X-Q. 6. Would you look at that package which Mr. Hinton has called your attention to. Do you find the name Lorillard on it?

A. Yes.

X-Q. 7. Do you find the name Beech Nut Packing Company on it?

A. No.

X-Q. 8. Did you ever see a Beech-Nut Packing Company package with red radiating stripes of varying width as shown there?

A. No.

X-Q. 9. If a man came into your grocery store and asked you for a package of Beech Nut tobacco, would you sell him preserves or Beech-Nut Peanut Butter, or candy, or chewing gum for the Beech-Nut tobacco.

A. I wouldn't sell it because I did not handle it.

X-Q. 10. Would you confuse Beech-Nut tobacco with a Beech-Nut can of Peanut Butter?

A. No. If we were handling it he would get Beech Nut tobacco.

X-Q. 11. Would not hand him Beech Nut Peanut Butter for tobacco.

A. No.

X-Q. 12. There would be no confusion in your mind as to the kind of goods?

A. No. Of course not.

X-Q. 13. You wouldn't have a bit of difficulty in distinguishing tobacco from grocery line you spoke of?

A. No.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. I understand you to say that if a man came into your store and asked you for a bottle of catsup, you would not give him a can of beans?

A. No.

Rd-Q. 2. If a man came into your store and asked you for any one of the Beech-Nut Packing Company's line, would you give him any other one?

A. Certainly not.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. When did you first see that package of tobacco?

A. About three weeks ago?

Rx-Q. 2. You had never seen Beech Nut tobacco before it?

A. No.

Rx-Q. 3. Do you smoke?

A. No.

Rx-Q. 4. Do not use tobacco in any form?

A. Never have.

Recross examination closed.

JOSEPH FLEMING.

Walter Peabody,

a witness called on behalf of the Beech-Nut Packing Company first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:—

Question 1. Please state your name, age, residence and occupation.

Answer. Walter Peabody, 28; 7144 Emerald Avenue; grocery clerk.

Q. 2. How long have you been in the grocery business?

A. In and out of the grocery business, out for two and one half years, in for the last six years.

Q. 3. Out during war period?

A. Yes.

Q. 4. Do you smoke?

A. Surely.

Q. 5. How long have you smoked?

A. Say ten years.

Q. 6. Are you familiar with the product Beech-Nut Scrap Tobacco?

A. I have seen it. I do not use it.

Package shown to witness is a duplicate of Opposer's Exhibit No. 16.

Q. 7. Do you know now who makes it?

A. I know now.

Q. 8. How long have you known?

A. About a week.

Q. 9. By whom were you told?

A. By Mr. Lewis of Beech-Nut Packing Company and you.

Q. 10. How long have you been familiar with that product?

A. I remember it coming out I should judge three years ago—four years ago.

Q. 11. By whom did you think this product was made before Mr. Lewis told you?

A. By Beech-Nut Packing Company.

Q. 12. What made you think that?

A. I had several occasions. One time when I was down here in a cigar store, a man was trimming a window for Beech-Nut, and knowing Mr. Lewis, I asked him if Mr. Lewis was still with the firm. And he said yes, and spoke like he knew him very well—he is a good fellow and everything. Then I asked him how long they had been putting up this tobacco. Thought it was product of the Beech-Nut Packing Company. He didn't make any definite answer, so I went away thinking it was naturally a Beech-Nut product put up by Beech-Nut Packing Company.

Q. 13. Mr. Lewis is a salesman for the Beech-Nut Packing Company, is he not?

A. Yes, sir.

Q. 14. How does the label on the package of scrap tobacco compare with the standard Beech-Nut label?

A. Well, after you make a close examination of it, it isn't quite like it. But I never gave it a second thought. It has an oval label. Never gave it a second thought.

Q. 15. What does the Beech-Nut Packing Company's standard label stand for in the minds of the public?

A. Don't hardly know what you mean.

Q. 16. Is it well received by the public?

A. Anywhere you mention Beech-Nut, it is high grade article.

Q. 17. Have you in your experience seen new products come out from time to time, put out by Beech Nut Packing Company and marked with its standard label.

A. Yes.

Q. 18. How have such products been received by the public when offered?

A. Very good. No more than two weeks ago put spaghetti and macaroni on market. It is moving.

Q. 19. Did you ever hear any comment in this store about Beech Nut tobacco?

A. Yes, I have. Just one instance I remember. May be more. Just last week a man walked in here previous to time Mr. Lewis was out here, I had this picture of the Xmas basket.

Q. 20. Beech Nut basket.

A. Yes. "I see Beech-Nut is going into the packing game quite extensively." I said I never knew that they put up anything besides lozenges and Beech-Nut tobacco.

Q. 21. He was a customer or salesman?

A. I don't quite know who it was. We were talking about Beech Nut goods. Wasn't Beech-Nut salesman. Salesman from some other house or customer.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

X-Q. 1. You don't know the name of the man that made that statement?

A. No, sir. I don't remember who he was. Man walked in here.

X-Q. 2. What was name of man you spoke to that was decorating the window?

A. I don't know. Can tell you where he is. He is driving Ford machine.

X-Q. 3. Don't know his name?

A. Not acquainted with him at all.

X-Q. 4. You smoke?

A. Yes, sir.

X-Q. 5. Do you use cigarettes?

A. Only.

X-Q. 6. Do you know of the Murad cigarette?

A. Yes, sir.

X-Q. 7. The Mogul.

A. Yes, sir.

X-Q. 8. And the Egyptian Diety?

A. Yes, sir.

X-Q. 9. Whose cigarettes are they?

A. I don't know that. I don't even know who puts out the cigarette I smoke.

X-Q. 10. Did you ever hear of P. Lorillard Tobacco Company?

A. No, sir. Never in my life.

X-Q. 11. Would you look at this package, which is like Exhibit No. 16, and tell me what name is on it.

A. Lorillard.

X-Q. 12. Do you find the name of the Beech-Nut Packing Company on it?

A. No, sir.

X-Q. 13. Did you ever know of any Beech-Nut products to have these red radiating lines on them?

A. No, sir.

X-Q. 14. As one engaged in the grocery business, if I came into your store and asked you for a package of Beech Nut tobacco would you sell me a Beech-Nut ham, or a Beech-Nut package of Peanut Butter or Beech-Nut candy?

A. Why no.

X-Q. 15. You wouldn't confuse the goods?

A. Why, no. If anyone asked for Beech Nut Chili Sauce, I wouldn't sell him Peanut Butter.

X-Q. 16. You wouldn't sell him tobacco?

A. No, sir.

X-Q. 17. You would think a man who would take Beech-Nut Chili Sauce for tobacco crazy, wouldn't you?

A. Yes, sir.

Redirect Examination by Mr. Hinton.

Rd-Q. 1. Do you sell chewing gum in this store?

A. No, sir.

Rd-Q. 2. If a man asked you for any Beech-Nut product, would you give him some other Beech-Nut product?

A. In regards to what?

Rd-Q. 3. Well, for instance if a man asked you for Beech-Nut marmalade, would you give him Beech Nut gum?

A. No, sir. I would explain to him that we didn't handle either of them here. We have been out of chili sauce and couldn't get ahold of it. They asked for Beech-Nut Chili Sauce. "I am out of it." "I have the catsup." Lots say "Give me the catsup." Nearly alike. Catsup and Chili Sauce, are about same. One is seasoned a little more.

Rd-Q. 4. You wouldn't offer her Beech-Nut ham in place of Chili Sauce?

A. No.

Recross Examination by Mr. Cavanagh.

Rx-Q. 1. The Beech-Nut products you sell here are in the grocery line and not tobacco line?

A. Yes, sir.

Rx-Q. 2. Those are two distinct lines of business?

A. Yes, sir.

WALTER PEABODY.

Ludwig Nurnberg,

a witness called on behalf of the Beech-Nut Packing Company, first being duly sworn, in answer to interrogatories propounded by Mr. Hinton, deposes and says:

Question 1. Please state your name, age, residence and occupation.

Answer. Ludwig Nurnberg, 5507 University Ave., grocery man.

Q. 2. You are the proprietor of the Busy Bee Grocery located at 1143 E. 55th Street?

A. Yes, sir.

Q. 3. How long have you been in the grocery business altogether?

A. Since 1895.

Q. 4. How long have you been proprietor of the Busy Bee?

A. 10½ years. 11 in April.

Q. 5. Have you dealt in the product of the Beech-Nut Packing Company?

A. Sure.

Q. 6. How long have you dealt in the product of the Beech-Nut Packing Company?

A. I should judge at least fifteen years, if not more. Fifteen anyhow. I used to sell them where I was working.

Q. 7. What sort of a reputation has the Beech-Nut Packing Company?

A. Quality.

Q. 8. I show you a package which is a duplicate of opposer's Exhibit No. 16. When you first saw this package, by whom did you think this product was made?

A. Naturally Beech-Nut Packing Company.

Q. 9. What made you think that this was made by Beech-Nut Packing Company?

A. The trade-mark. Are these supposed to be Beech-Nuts? I suppose so. Beech Nut is that same thing. (Witness picks up package).

Q. 10. Had you ever seen this package before it was shown you?

A. Once when you was here. That was first time.

Q. 11. Mr. Lewis showed you that package?

A. Yes. Yes.

Q. 12. Mr. Nurnberg, could you recite a list of all the products the Beech-Nut Packing Company makes?

A. Pretty near all. According to what I handle. What I don't handle now, I have handled.

Q. 13. Has it been your experience that the Beech-Nut Packing Company from time to time comes out with new products different from preceding products?

A. Certainly.

Q. 14. And how does the public receive these new products?

A. In general, with favor.

Q. 15. How are the goods of the Beech-Nut Packing Company marked? Do they all have the same style of label?

A. Yes. The oval part, yes. The trade-mark "Beech-Nut," yes.

Q. 16. Do I understand that the rest of the wrapper may be different in different packages?

A. Yes. The label is most always the same, as far as I know.

Q. 17. Do you handle chewing gum in this store?

A. No.

Q. 18. What stores handle chewing gum?

A. Drug stores, billiard rooms, candy shops; I guess that's about all.

Q. 19. Do you smoke?

A. Yes, sir.

Direct examination closed.

Cross-Examination by Mr. Cavanagh.

Cross-question 1. Did you ever sell tobacco?

Answer. No, sir.

X-Q. 2. Whose name is on that package?

A. Lorillard.

X-Q. 3. You have heard of Lorillard Company?

A. Well! I might and I might not. Lorillard? I might have heard of them. I can really not say. That I really don't know, because I don't use smoking tobacco. I know they don't make cigars. I have never seen them.

X-Q. 4. Did you ever see a Beech-Nut Packing Company's package with radiating red stripes (like Lorillard's Exhibit No. 16)?

A. No. I don't think I did.

X-Q. 5. You spoke of the Beech-Nut Packing Company's bringing out new lines of goods from time to time.

A. Yes.

X-Q. 6. This lines all relate to the grocery business or candy business?

A. Grocery and candy business mainly. Yes.

X-Q. 7. And if a man wanted some Beech-Nut groceries or Beech-Nut candy you wouldn't sell him Beech-Nut tobacco?

A. Not unless he asked for it.

X-Q. 8. Wouldn't confuse it with Beech-Nut tobacco?

A. No.

X-Q. 9. And if you want to see who puts out a package of goods you look for the name on it?

A. Not necessarily. Not necessarily. If I look at whole of package of goods, the first impression is what counts. If I see package of Fould's Macaroni, the yellow package draws my attention. That is Fould's Macaroni if I don't see name on it. If I see Heinz's Beans, a light blue can, I know that is Heinz' beans.

X-Q. 10. The word Beech-Nut on here attracts you?

A. Yes. Absolutely on that. "Beech-Nut" and the oval brand, and this little ding-a-lings. (Witness points to red Beech Nut in center of label.)

X-Q. 11. And you said that the Beech-Nut wrappers were different colors. What colors have they had?

A. The baked beans have now a brown label, brown colored. The trade-mark—I couldn't say exactly what color that is. It is oval o nthem. The macaroni, that's too new. I don't remember now what the color is on that. I know it has got oval trade-mark label with Beech-Nut mark on it. I know that. That's what I show when I have goods displayed. I am very careful that I have the package shown so that they can see the name of Beech Nut with oval label because that stands for quality.

X-Q. 12. What other colors do they use?

A. Jams, jellies, catsup? That I really cannot now recollect. Really I cannot say what colors.

X-Q. 13. In the grocery business tobacco is regarded as different from food products?

A. In grocery store of my kind. I have lot of people coming in, from smaller towns for package of tobacco. People do that naturally. Whenever anybody does come in. * * * *

X-Q. 14. Tobacco is different thing from food?
A. Naturally. Naturally.

Redirect Examination by Mr. Hinton.

Redirect Question 1. I understand you to say that in smaller towns people expect to find tobacco for sale in store which also sells groceries?

A. Absolutely. Absolutely. If I take an automobile trip and I go to a small place in the country, in general store, little country store, I go in there. One out there to Dunning and those places. Small stores. You find groceries, you find candies, you find ham, tobacco, cigarettes, cigars, and you even find stockings and those things.

Recross Examination by Mr. Cavanagh.

Recross Question 1. If you went into one of those country stores and asked for package of Beech Nut tobacco, but he handed you Beech-Nut Peanut Butter, you would think him crazy, wouldn't you?

A. I suppose so. Absolutely.

LUDWIG NURNBERG.

Stipulation.

It is stipulated by and between the parties hereto through their respective counsel that if Harry F. Stickney, 1154 54th Place, Chicago, Illinois, were called on, he would testify as follows:

My name is Harry F. Stickney, of lawful age. I am owner and manager of University Market, located at 1357 E. 57th Street, Chicago, Illinois.

I have for many years carried the Beech-Nut Packing Company's products and am familiar with its labels. The Beech-Nut label has stood for quality. It has been my experience that whenever the Beech-Nut Packing Company has come out with a new product different from previous products, bearing the same label, the public has very favorably received the new product. We do not handle chewing gum in our store. Chewing gum is generally carried by drug stores, candy stores, cigar and tobacco stores. When I saw Beech-Nut Scrap Tobacco, a duplicate of the package, Opposer's Exhibit No. 16, I immediately accepted this as a product of the Beech-Nut Packing Company by reason of the fact that the oval label on the package was the same as that which has appeared on the Beech Nut products I have for many years handled. I could not myself give a list of Beech-Nut Packing Company products. The only way I could tell whether a product was a Beech-Nut product would be to examine it and if I saw the Beech-Nut label on it, I would take it to be a Beech-Nut Packing Company product.

I do not sell tobacco, and therefore do not handle packages of tobacco like that shown by Exhibit 16. Furthermore if a purchaser came into the store, and asked me for a food product of the Beech-Nut Packing Company, such as preserves, Beech-Nut Peanut Butter,

chewing gum, or the like, I would not be confused into selling him a package of Beach Nut tobacco, like Exhibit No. 16, for a food product.

It is stipulated further by and between the parties hereto through their respective counsel, that if Louis Worthen of Chicago, Illinois, were called, he would testify as follows:

My name is Louis Worthen. I am of legal age and owner and manager of a grocery and confectionery on Sheridan Road, Chicago, near Irving Park Boulevard. This region is a region of apartment houses with a more or less mixed class of population.

I have for many years handled Beech-Nut products. The Beech-Nut oval labels stands for quality. It has been my experience that whenever this label appears on a new product the public will favorably accept that new product. I could not tell from memory what products the Beech-Nut Packing Company is making. In order to tell whether a product was a product of the Beech-Nut Packing Company, I would look for the Beech-Nut oval label.

I have seen during the past few years, the Beech Nut Scrap Tobacco, such as shown in Opposer's Exhibit No. 16. I always believed that this was a product of the Beech-Nut Packing Company by reason of the similarity of the label on this package to the Beech-Nut label. I do not handle tobacco products. I continued to believe that the Beech-Nut Scrap Tobacco referred to was the product of the Beech-Nut Packing Company until I was advised by Mr. Lewis, a salesman of the Beech-Nut Packing Company, that this product was not made by the Beech-Nut Packing Company. Mr. Lewis, left, perhaps by accident, a package of scrap tobacco in my store. This was laid on the shelf in the back part of the store.

Shortly after the package was placed there, a man came in to repair the telephone, observing the package, he said to me, "I didn't know that the Beech-Nut Company was putting out tobacco."

It is my opinion and belief that the public, familiar with the Beech-Nut Packing Company's label, through the very heavy advertising of the Beech-Nut Packing Company, would believe as I did that the Beech Nut Scrap Tobacco was part of the Beech-Nut Packing Company's line.

As above stated, I do not handle tobacco, and therefore do not sell this package like Exhibit No. 16.

I cannot recall the name of the man who stated that he did not know that Beech Nut Packing Company was putting out tobacco. Furthermore, if a customer came into my store and asked me for a package of Beech Nut Tobacco, I would not be confused into selling him chewing gum or a food product of the Beech-Nut Packing Company, such as preserves or Peanut Butter for a package of Beech-Nut Tobacco. Neither would I sell him preserves if he asked for macaroni, nor would I sell him any one food product in place of any other.

By Mr. Cavanagh: Attorney for P. Lorillard objects to such parts of the depositions of the witnesses Mrs. Matilda Wedel, Roy S. Yunker, Joseph Fleming, Walter Peabody, and Ludwig Nurnberg as relate or appertain to matters of alleged unfair competition, as being immaterial and irrelevant, in that such matters are not pertinent to or proper in connection with this opposition, and it is stipulated and agreed between counsel that this objection may stand as if made in detail in connection with the objected parts of the testimony of each of said witnesses.

Session closed.

Notary's Certificate.

STATE OF ILLINOIS)
County of Cook)ss.

I, Sarah E. Harvey, a notary public within and for the county of Cook, and State of Illinois, do hereby certify that the foregoing depositions of Mrs. Mathilda Wedel, Joseph Fleming, Roy S. Yunker, Walter Peabody and Ludwig Nurnberg were taken on behalf of Beech-Nut Packing Company in pursuance of the notice hereto annexed, before me, at 1737-38 S. Dearborn Street and 1143 E. 55th Street, in the city of Chicago, in said county, on the 16th and 17th days of December, 1920; that said witnesses were by me duly sworn before the commencement of their testimony; that the testimony of each witness was taken by me stenographically and by me transcribed; that Richard Cavanagh, Esq., counsel for P. Lorillard Company, the opposing party, was present during the taking of said testimony; that the deposition was read by each witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Chicago, in said county, this 3rd day of January, 1921.

SARAH E. HARVEY,
Notary Public.

[SEAL.]

IN THE UNITED STATES PATENT OFFICE.

P. LORILLARD COMPANY
v.
BEECH-NUT PACKING COMPANY.

Trade-Mark Opposition No. 2805.
Beech Nut.

NOTICE OF OPPOSITION.

Honorable Commissioner of Patents:

Sir: In the matter of the application of the Beech-Nut Packing Company of Canajoharie, New York for the registration of the trade-mark Beech Nut filed June 25, 1919, Serial No. 119,930, for Cigarettes, in the Class of Tobacco Products; and published in the Official Gazette of September 9, 1919, at page 282, Vol. 266; P. Lorillard Company, a corporation, organized and existing under the laws of the State of New Jersey, and having its office and principal place of business at Number 119 West 40th Street, City, County and State of New York, believes that it would be damaged by such registration and hereby gives notice of its intention to oppose, and does hereby oppose, the registration of said trade-mark.

The grounds for opposition are as follows:

First.—That opposer is a corporation duly organized and existing under the laws of the State of New Jersey and having an office and principal place of business at No. 119 West 40th Street, New York City, N. Y., and is and has been for many years past engaged in manufacturing and marketing in large quantities throughout the United States, Tobacco Products in

various forms, such as cigars, little cigars, cigarettes and chewing and smoking tobacco of all kinds.

Second.—That for many years past, to wit, since about 1899, or prior thereto, the word symbol Beech Nut, has been continuously used by the opposer, P. Lorillard Company, or its predecessors in business and title as a trade-mark for Tobacco Products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Third.—That the opposer, P. Lorillard Company, is now the owner of all the right, title and interest in and to the said trade-mark Beech Nut for Tobacco Products.

Fourth.—That at all times since the adoption of this trade-mark Beech Nut, about 1899, or prior thereto, it has been continuously used by the opposer or its predecessors in business, from whom it derived title, in connection with and as a trade-mark for Tobacco Products and particularly scrap tobaccos which are adapted to and utilized for both chewing and smoking purposes.

Fifth.—That since its adoption in 1899, or prior thereto as aforesaid, the said trade-mark has been uniformly known and recognized as indicating the true origin of the goods and as being the true property of the opposer or its predecessors.

Sixth.—That the Tobacco Products of opposer, the P. Lorillard Company and its predecessors in business, marketed under the said trade-mark Beech Nut have had for many years and now have an enviable reputation as of superior quality.

Seventh.—That the trade-mark Beech Nut sought to be registered by the Applicant, the Beech-Nut Packing Company, as aforesaid, conflicts with and is an in-

fringement upon the aforesaid trade-mark Beech Nut of this opposer.

Eighth.—That the goods for which Applicant seeks to register the trade-mark Beech Nut are of the same descriptive property and belong to the same class as those upon which the trade-mark of the opposer has been and is now being used.

Ninth.—That the trade-mark Beech Nut of the opposer has been in actual and continuous use as a trade-mark by the opposer and its predecessors since a date prior to the use of the word symbol Beech Nut as a trade-mark by the Applicant, Beech-Nut Packing Company, for any Tobacco Product, and, as opposer believes, prior to any use of the word symbol Beech Nut as a trade-mark by the Applicant, Beech-Nut Packing Company.

Tenth.—That the word symbol Beech Nut sought to be registered by the Beech-Nut Packing Company as a trade-mark is so similar in form, appearance, sound and other characteristics to the trade-mark Beech Nut of the opposer, as to be identical therewith, to be liable to cause confusion, and to cause confusion to the purchasing public, to be liable to cause damage, and to cause damage to this opposer, P. Lorillard Company, as the lawful owner of the trade-mark Beech Nut as aforesaid.

Eleventh.—That the manner in which the Applicant, Beech-Nut Packing Company, uses its alleged trade-mark upon and in connection with Tobacco Products, is such as to obviously cause confusion and deception to the purchasing public by leading the purchasing public into the belief that it is buying or accepting, and into buying or accepting the goods of the Applicant so marked for and in place instead of the goods of P.

Lorillard Company, this opposer, the owner of the trade-mark aforesaid.

Wherefore, this opposer prays that the said alleged trade-mark of the Applicant herein opposed, be refused registration, as equity and good conscience demands.

Dated New York, N. Y.

P. LORILLARD COMPANY,
Opposer.
By THOMAS P. MALONEY,
(Corporate Seal.) *President.*
MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Company.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } *ss.:*

On this 30th day of September, 1919, before me personally appeared Thomas J. Maloney, who being duly sworn, deposes and says that he is President of P. Lorillard Company, the opposer herein, and the person who signed this notice on behalf of said opposer; that he has read the foregoing notice of opposition as subscribed to by him and knows the contents thereof, and that the same is true of his own knowledge, except as to matters therein stated on information and belief, and as to those matters he believes them to be true, and that as an officer of the P. Lorillard Company he has full authority to sign this opposition in its behalf.

S. E. SPENCE,
(Seal.) *Notary Public*
New York Co. No. 275;
New York Register No. 1115.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
"Beech Nut."

STIPULATION.

Honorable Commissioner of Patents:

Sir: The parties hereto, through their respective counsel, having stipulated the testimony or depositions of David Haines Ball, S. E. Spence, Benjamin I. Belt, Alfred W. Haywood, Jacob Levy, Monroe W. Rothschild, Jesse R. Taylor, J. Lewis Orrick, all on behalf of P. Lorillard Company, said parties having further stipulated that the exhibits introduced by both parties might remain in the custody of such parties until final hearing, subject to call for inspection by the parties;

Therefore, it is stipulated and agreed by and before the parties hereto, through their respective counsel, that the delay in the filing of said stipulated depositions was inadvertent, and with the full knowledge of both parties, and the said stipulated depositions of P. Lorillard Company may now be filed without objection.

MEYERS, CAVANAGH & HYDE,
Attorneys for P. Lorillard Company.
OFFIELD, POOLE & HINTON,
Attorneys for Beech-Nut Packing Co.

New York, N. Y.,
August 27th, 1920.

IN THE UNITED STATES PATENT OFFICE.

In re Opposition No. 2805.

P. Lorillard Company

v.

Beech-Nut Packing Company.

NOTICE OF TAKING TESTIMONY.

James R. Offield, Esq.,
Attorney for Beech-Nut Packing Company,
38 South Dearborn Street,
Chicago, Ill.

Dear Sir: You will please take notice that beginning Wednesday, May 10th, 1920, at 11 o'clock in the morning, at the office of P. Lorillard Company, 18th floor, No. 119 West 40th Street, New York City, and before H. S. Ivie, a Notary Public in and for the County of New York, or other duly qualified officer, we will proceed to take testimony on behalf of P. Lorillard Company, one of the parties to the above-entitled opposition.

The witnesses to be examined are:
G. T. Minnegerode, 119 West 40th St., N. Y. City;
D. H. Ball, 119 West 40th St., N. Y. City;
George Lucius, 119 West 40th St., N Y. City;
Richard J. Boylan, Flushing, L. I., N. Y.;
S. E. Spence, 119 West 40th St., N. Y. City;
Jacob Levy, 22 4th Ave., N. Y. City;
Munroe W. Rothschild, Park Row, N. Y. City;
J. R. Taylor, 44 West 18th St., N. Y. City;

Alfred W. Haywood, 536 West 113th St., N. Y. City,

and others of whom due and timely notice will be given.

The examination will be adjourned from day to day. You are respectfully invited to attend and cross-examine.

Yours very truly,

MEYERS, CUSHMAN & REA,
Attorneys for P. Lorillard Co.

Dated New York, N. Y.,
May 14th, 1920.

Service of the above notice acknowledged this.... day of May, 1920.

....,
Attorneys for Beech-Nut Packing Co.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
"Beech Nut."

AFFIDAVIT.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

Personally appeared before me, a Notary Public in and for the County of New York, Richard B. Cava-

nagh, who being duly sworn, deposes and says that, acting for the firm of Meyers, Cushman & Rea, attorneys of record for P. Lorillard Company in the interference of P. Lorillard Company v. Beech-Nut Packing Company, No. 2805, that he served a true copy of the attached notice of taking testimony upon James R. Offield, the attorney for the said Beech-Nut Packing Company, by mailing to the said Offield a true copy of said annexed notice of taking testimony, the said copy being mailed to the said Offield on or about the 14th day of May, 1920, and addressed to said Offield at his office, No. 38 South Dearborn Street, Chicago, Illinois.

Deponent further says that in response to said notice the said Offield attended the taking of testimony as attorney for the Beech-Nut Packing Company.

RICHARD B. CAVANAGH.

Sworn to and subscribed before me this 7th day of September, 1920.

AGATHA F. BRESLIN,

(Seal.) *Notary Public, Bronx County.*

County Clerk's No. 88; Certificate filed in N. Y. County; Clerk's No. 633; Term expires March 30, 1921.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

DEPOSITIONS OF WITNESSES.

PRIMA FACIE PROOFS OF P. LORILLARD COMPANY.

Depositions taken on behalf of P. Lorillard Company, pursuant to notice, before H. S. Ivie, a Notary Public, at the office of P. Lorillard Company, No. 119 West 40th St., New York City, beginning this 19th day of May, 1920, at 2 P. M.

Present: R. B. CAVANAGH, for Meyers, Cavanagh & Hyde, attorneys for P. Lorillard Company;
JAMES R. OFFIELD, attorney for Beech-Nut Packing Company.

It is hereby stipulated by and between the parties to the above-entitled interference as follows:

1. By virtue of an assignment, an instrument in writing duly acknowledged and dated the 29th day of October, 1903, the Harry Weissinger Tobacco Company sold, assigned and transferred to the Continental Tobacco Company all its property and business, including amongst other matters and things, its business of manufacturing and selling tobacco in its vari-

ous forms, together with certain trade-marks and brand pertaining thereto, including the trade-mark Beech Nut, and the authenticity of said assignment is admitted.

2. That by virtue of an assignment, an instrument in writing duly acknowledged and dated the 17th day of December, 1903, the Continental Tobacco Company sold, assigned and transferred to Luhrman & Wilbern Tobacco Company, amongst other matters and things, all the right, title and interest of the said Continenta! Tobacco Company in the business of manufacturing and selling chewing and smoking tobacco bearing the trade-name or trade-mark Beech Nut together with the good will and reputation attaching or connected with said trade-name or trade-mark for smoking and chewing tobacco and the authenticity of said document is admitted.

3. By an assignment, an instrument in writing dated the 1st day of September, 1913, Luhrman & Wilbern Tobacco Company sold and assigned to P. Lorillard Company, the Opposer herein, all its assets and business as a going concern wheresoever situated, including all brands and trade-marks owned by it with the business thereon, and the good will thereof, and the authenticity of said assignment is admitted.

4. That Harry Weissinger Tob. Co. registered the trade-mark or brand Beech Nut for smoking tobacco with Connorton's Bureau of Registration for Tobacco Brands, as set forth on page 378 of Connorton's Tobacco Brand Directory of the United States for the year 1898, as follows: "Beech Nut granulated, Harry Weissinger Tob. Co., Louisville, Ky." That in Connorton's Tobacco Brand Directory of the United States for the year 1899 the trade-mark Beech Nut of the

Harry Weissinger Tob. Co., of Louisville, Ky., is listed as follows on page 172, under the heading "Smoking Tobaccos": "Beech Nut, Harry Weissinger Tob. Co., Louisville, Ky." That in Connorton's Tobacco Brand Directory of the United States for the year 1903, on page 328, under the heading "Smoking Tobaccos," the brand Beech Nut is listed as follows: "Beech Nut (scrap) Harry Weissinger Tob. Co., Louisville, Ky."

5. Concerning certain witnesses noticed to be called by P. Lorillard Company in the presentation of its prima facie case, it is hereby stipulated and agreed by and between the parties hereto, that if the following witnesses were called on behalf of the Lorillard Company and sworn under oath, each of said witnesses would testify as follows:

DAVID HAINES BALL.

My name is David Haines Ball; I am fifty years of age; address No. 119 West 40th Street, New York City; residence No. 327 E. Sidney Ave., Mt. Vernon, N. Y., and I am Vice-President of the P. Lorillard Company, which concern is engaged in the tobacco business. I have charge of the selling of smoking and chewing tobacco products of P. Lorillard Company.

I have been engaged in the tobacco business for the past thirty years and since 1911 I have been Vice-President of P. Lorillard Company. Prior to that time I was associated with The American Tobacco Company as a departmental head with particular reference to smoking tobacco.

The original Lorillard tobacco business was established by Pierre Lorillard in 1760, and the present company is a successor of this original house and is, therefore, to the best of my knowledge and belief the

oldest tobacco concern in the world. It is also one of the largest and at the present time is doing business of approximately eighty million dollars per year. Its business extends all over the United States and in foreign countries. This concern has twenty-five branches in twelve cities, with very large factories in New York City, N. Y., Richmond, Va., Baltimore, Md., Middletown, Ohio and New Jersey. P. Lorillard Company employs approximately 12,000 people. It manufactures and sells tobacco products of every character and description, except snuff. It owns, manufactures and markets some of the most prominent tobacco brands known to the public and to the trade. For example, it puts out such well known smoking tobacco as "Union Leader," "Sensation," "Mechanics' Delight," "Omega," "Just Suits," "Stag," and others. In cigarettes it owns the S. Anargyros Co., who manufacture and market such well known brands as "Egyptian Dieties," "Murad," "Mogul," "Helmar," "Turkish Trophies" and others. In chewing tobacco it owns, manufactures and markets "Climax," "Planet," "Neptune," "Mechanics' Delight," "Beech Nut," and "Red Cross." Amongst the fine cut tobaccos of this country are "Tiger," "Pioneer," "Old Fashioned," and "Eureka." As scrap tobaccos it owns, manufactures and markets "Honest," "Polar Bear," "Beech Nut," "Bag Pipe," "Old Nut" and others.

Referring particularly to the trade mark Beech Nut, the Lorillard Company has marketed and is marketing both chewing and smoking tobacco under this name and has made all its preparations for making and selling a cigarette under this name, though the cigarette has not yet been put upon the market.

So far as the history of Beech Nut as a trade mark for tobacco products is concerned my personal knowledge dates more particularly from the year 1915, when the Lorillard Company began actively pushing this brand on the market; but I do know that for many years prior to 1915 the Luhrman & Wilbern Tobacco Co., a predecessor of P. Lorillard Company, had been making and marketing tobacco for chewing and smoking under this trade mark.

I have been furnished a statement from the books of this company and that of Luhrman & Wilbern Tobacco Company showing the sales of the tobacco products under the brand Beech Nut, by years from 1904 to 1919 inclusive, by these companies hereto annexed as P. Lorillard Co., Exhibit 1.

In February, 1915, the Lorillard Company began to actively push this Beech Nut brand of tobacco under the trade mark "Beech Nut" and put it up in the form of both plug and smoking and chewing tobacco known as scrap and I submit herewith and make a part hereof as P. Lorillard Co. Exhibit 2 a sample package of the P. Lorillard Beech Nut scrap tobacco in the form in which it has been put upon the market since 1915. It will be noted from the schedule which I have submitted as Exhibit 1 that from 1915 down to the present year the sales of this Beech Nut scrap tobacco have increased by leaps and bounds, until in the year 1919 the total sales of this Beech Nut tobacco by P. Lorillard Company amounted to nearly twenty-six and one-half million pounds, with a money value of approximately fourteen millions of dollars. Its importance can be appreciated when it is realized that by these figures the Lorillard Company's business in Beech Nut tobacco for the year 1919 was approximately one-sixth of its entire business.

Beech Nut tobacco in packages, like Exhibit 2, has been sold in practically every State in the United States, and to the majority of the largest tobacco houses and dealers. In New York, it has been sold in great quantities to such well known tobacco jobbers and tobacco concerns as The Metropolitan Tobacco Company, the United Cigar Stores and Schulte Cigar Stores. It is well known that the Metropolitan Tobacco Company is the largest jobber and distributor of tobacco products in the United States and that there are hundreds of United Cigar Stores and Schulte Cigar Stores in the large cities throughout the United States.

I also submit herewith as P. Lorillard Co., Exhibit 3, a carton or pasteboard box in which the smaller or retail packages of Beech Nut scrap tobacco are packed and it will be noted that this carton has the word "Beech Nut" prominently displayed thereon, together with the word "Lorillard's."

Beech Nut in my opinion is recognized as the trade mark of the Lorillard Company when applied to tobacco products. The Lorillard Beech Nut tobacco has been extensively advertised since 1915 in various ways, has been displayed by advertisements, placards, window displays and window posters, and by the distribution of samples. I submit herewith as P. Lorillard Co. Exhibit 4 certain posters which are used in advertising the Lorillard Beech Nut scrap tobacco, packed as shown by Exhibit 2.

In the tobacco industry, cigarettes are recognized as belonging to the same general class of goods as smoking, chewing and plug tobacco of various forms, that is to say, cigarettes are a tobacco product just as smoking, chewing and plug tobacco are tobacco products, and the goods are of course sold by the same

class of jobbers and dealers, for example, through retail tobacco stores.

Therefore, in my opinion should any other person, or concern than the P. Lorillard Company place upon the market a cigarette or other tobacco product under the name Beech Nut, it would cause confusion in the tobacco trade, lead both the dealers and the purchasing public to believe that they were obtaining a Lorillard product when in fact they would be obtaining the late-comer's product, who would be selling his brand of tobacco upon a reputation established by the Lorillard Company for its Beech Nut brand, and consequently would naturally cause a loss of sales to the Lorillard Company and would interfere with its business thus causing it damage and injury.

In this connection another serious factor would be that the Lorillard Company, which has been established over 150 years, has a world wide reputation for the excellence of superior standard. The tobacco business requires men of peculiar skill and knowledge of the business and were Beech Nut tobacco to be put out by a concern not familiar and experienced in the manufacture and sale of tobacco products it could not but hurt the reputation and standard of the Beech Nut tobacco products put out by the Lorillard Company.

S. E. SPENCE.

My name is S. E. Spence; I am forty-nine years of age; address, No. 119 West 40th Street, New York City, and am District Manager for P. Lorillard Company; a corporation engaged in the manufacture and marketing of all kinds of tobacco products, except snuff. I have been in the tobacco business about seventeen years and have been with the P. Lorillard Company since December, 1911. From August, 1903, to Decem-

ber, 1903, I was associated with the Continental Tobacco Company, and from January, 1904, to December, 1911, I was Secretary and Auditor for Luhrman & Wilbern Tobacco Co. While I was with the Continental Tobacco Company in 1903 I know that it took over the property, business, trade marks, good will and the like of the the Harry Weissinger Tobacco Company of Louisville, Ky., including the trade mark Beech Nut which Weissinger used on tobacco, and that subsequently the Continental Tobacco Company transferred this brand Beech Nut together with the business and good will thereof to Luhrman & Wilbern Tobacco Company, and that subsequently Luhrman & Wilbern was taken over by the Lorillard Company together with all its business, trade marks and the like, and I was a witness to the written document of sale and assignment of the Luhrman & Wilbern Tobacco Co. to the P. Lorillard Company. I also know of my own knowledge that from 1904 to the time Luhrman & Wilbern was taken over by P. Lorillard Company it manufactured and marketed such brands of tobacco as "Polar Bear," "Old Nut," "Scrap Iron," "Bag Pipe" and "Beech Nut," except the years noted.

As to the Beech Nut tobacco I produce herewith and mark it P. Lorillard Co. Exhibit 5 one of the paper bags or packages in which Luhrman & Wilbern packaged and sold Beech Nut tobacco from 1904 to 1911. During the early years that Luhrman & Wilbern were putting out this Beech Nut tobacco, after taking over the business of Harry Weissinger Tob. Co., it sold what was quite a quantity for those days, although the same might appear small today. The brand was sold in those days particularly through such States as Ohio, Pennsylvania and West Virginia. It was sold in Pitts-

burgh to such concerns as Jenkins, Ewart, Arbuckles and others, and in Cumberland, Md., to J. C. Orrick & Sons Co. I refer to the table of sales forming part of the stipulated deposition of Mr. Ball, Vice-President of the Lorillard Company, Exhibit 1, and make particular reference to that portion of the table covering the years 1904-1911 when I was Secretary and Auditor of Luhrman & Wilbern Tobacco Company. This table was made from the books forming the records of the Luhrman & Wilbern Tob. Co., and it will be noted that the sales gradually diminished until 1910 but twenty-five pounds were made and sold. Luhrman & Wilbern did not make and sell any Beech Nut Tobacco during the years 1911-1914, as shown by said table, for the brand was not pushed during those years, as other brands were being actively marketed, and in the tobacco business, as in any other business it is necessary to actively push a brand and keep it before the public in order to keep up the sales. However, the brand and trade mark was not dropped or abandoned, for Luhrman & Wilbern during those years had on hand the necessary materials such as the formula, tobacco, wrappers and packages necessary to fill any order received from a customer for Beech Nut tobacco, and I, as Auditor and Credit man for this concern, would have O. K.'d any genuine order received from a responsible concern for this tobacco during those years. In February, 1915, the Lorillard Company as owners of the trade mark and brand again began to actively push this Beech Nut tobacco and it has had large sales ever since, until today it is one of the most prominent brands of tobacco owned and marketed by the P. Lorillard Company. During the time I was with the Luhrman & Wilbern Tobacco Co., this Beech Nut trade mark

2259

2260

for tobacco was recognized as the property of Luhrman & Wilbern Tobacco Co., as successors of the Harry Weissinger Tobacco Co., as it is today recognized as the trade mark of the P. Lorillard Company for tobacco products as the successor of the Luhrman & Wilbern Tobacco Company. The Continental Tobacco Co. held the mark and business for a short time before it transferred it to Luhrman & Wilbern Tobacco Co.

As one long engaged in the tobacco business, and familiar therewith, it is my opinion that should any other person or concern enter the market with a tobacco product, such as a cigarette, under the name or trade mark "Beech Nut," such action would be injurious and damaging to the P. Lorillard Company, for the reason that this concern in the tobacco industry is recognized as the owner and manufacturer and seller of Beech Nut tobacco. This company has an enviable reputation for the excellence of its tobacco product, and is one of the largest tobacco manufacturers in the United States, if not in the world, and also one of the oldest. Purchasers would in my opinion confuse the late-comer's tobacco with the P. Lorillard Company's Beech Nut tobacco, resulting in lost sales and consequent injury and damage to the business of P. Lorillard Company. The manufacturer of tobacco, particularly the blending thereof, requires a high degree of skill and experience, and the injury to P. Lorillard Company would be aggravated did the late-comer place upon the market a tobacco under the name or trade mark "Beech Nut," not up to the Lorillard's standard or not suitable to the public taste, as this would have a very bad effect upon the reputation of the Beech Nut tobacco now sold by P. Lorillard Company, and of great popularity as shown by the millions of pounds sold annually.

BENJAMIN I. BELT.

My name is Benjamin I. Belt and I am of lawful age. I reside at the Hotel Marie Antoinette in New York City, and am now a Vice-President of P. Lorillard Company, as I have been ever since the organization of the present Lorillard Company.

The Lorillard Company is one of the four largest makers and distributors of tobacco products in the United States, having outstanding securities as follows:

Preferred Stock	$11,307,600.00
Common Stock	30,311,200.00
5% Bonds	10,617,450.00
7% Bonds	10,208,300.00

For the year 1919 the aggregate retail money value of its output was something over $80,000,000.00. It has twenty-five branches located in twelve different cities of the United States. It makes and sells all manner of tobacco products with the single exception of snuff.

I am in direct charge of the selling of cigarettes for the Company and my knowledge of its products has more particular reference to cigarettes, but I do know that the Company has been for a good many years actively making and selling a tobacco under the trade mark "Beech Nut," which is adapted and used for both chewing and smoking, and that the term "Beech Nut" as applied to tobacco products has come to be known in the tobacco trade as indicating a product of the Lorillard Company.

Prior to coming with the P. Lorillard Company in December, 1911, I was connected with The American Tobacco Company as head of its cigarette selling department, and I have been in the tobacco business,

principally connected with the selling of cigarettes, for the past 20 years.

In or about the summer of 1916, this Company conceived the idea of making and marketing a blended cigarette, for which purpose it selected the trade mark "Beech Nut," as being a trade mark already owned by this Company for tobacco products and known throughout the tobacco world as indicating Lorillard tobacco products. For this purpose printers and lithographers were approached in order to obtain labels, wrapping material and advertising matter, with the result that after the trying-out of many different color schemes, there was adopted the package for this brand of cigarette, a sample of which is herewith filed and marked P. Lorillard Co. Exhibit No. 6. Raw material was acquired and a blend selected for the cigarette, and all preparations were made, and the Company had prior to May, 1919, put itself in a position of entire readiness to make this brand and place it on the market, but though many of the cigarettes were made up and packed into these packages, and the internal revenue stamps affixed and cancelled, no cigarettes under the brand "Beech Nut" had yet been sold, the reason being that the Company considered the time, for various reasons, unfavorable to an attempt to make and market this brand. The Company has in no wise abandoned its idea of making and marketing the cigarette under this trade mark. It is simply postponing so doing until what it considers a favorable time for the purpose.

I herewith file as an Exhibit, P. Lorillard Co. Exhibit No. 7, a letter to this Company from Wolcott Brothers Company, dated August 25th, 1916, and as P. Lorillard Co. Exhibit No. 8, an order O. K.'d by me under date of September 15, 1916, for one million

"Beech Nut" cigarette shells for the purpose of making and marketing this brand.

My experience in the tobacco business and my knowledge of the extent to which this Company has made and sold tobacco products under the trade mark "Beech Nut," makes me feel certain that the attempt by any other concern to make and market a tobacco product under the trade mark "Beech Nut" would operate most injuriously to the interests of this Company, as it would be a seller by the last comer on the reputation established for "Beech Nut" as a tobacco trade mark by the Lorillard Company, and if the product of the last comer were inferior, that inferiority would be charged by the trade against the products made and sold by the Lorillard Company under the trade mark "Beech Nut."

Furthermore, it would cause confusion in the trade and induce the public to buy the product of the last comer in the belief that they were thereby getting the product of the Lorillard Company with its usual standard of manufacturing excellence and quality. This would undoubtedly result, in my opinion, in the loss of sales by P. Lorillard Company, and consequently would result in damage, and inevitably loss and injury, to the business, reputation and finance of this Company.

ALFRED W. HAYWOOD.

My name is Alfred W. Haywood, of lawful age, residing at 536 West 113th St., New York City, and am an attorney at law by profession. During the year 1915 and for several years thereafter I was Assistant Counsel for P. Lorillard Company, tobacco manufacturers and distributors, No. 119 West 40th Street, New York City. In due course of business, on May 27th,

1915, June 10th, 1915, and June 19th, 1915, I wrote certain letters to the Broecker Tobacco Company of New Albany, Indiana, on behalf of the P. Lorillard Company, requesting them to desist in the use of the name Beech Nut for twist tobacco as this trade mark for tobacco product was the property of the P. Lorillard Company. I received a reply acknowledging these communications, which reply in reference thereto stated, in substance that our notice was sufficient. July 14th, 1915, I replied to this communication on behalf of the P. Lorillard Company stating that I understood the Broecker Tobacco Company would refrain from using the name "Beech Nut" tobacco. This "Broecker" correspondence is submitted herewith as P. Lorillard Co. Exhibit No. 9.

On October 1st, 1915, on behalf of the P. Lorillard Company, I addressed a letter to C. E. Schutz, Esq., Evansville, Indiana, calling attention to an earlier letter of September 16, 1915, wherein Mr. Schutz was requested to discontinue using the name Beech Nut for twist tobacco. On October 9, 1915, a reply was received from Mr. Schutz agreeing to discontinue as per our request. This "Schutz" correspondence is submitted as Lorillard Exhibit No. 10.

My recollection is that I also notified one or two other parties who were attempting to use Beech Nut for tobacco products, and that these parties also agreed to discontinue.

JACOB LEVY.

My name is Jacob Levy, of lawful age, address No. 22 Fourth Ave., New York City, and am buyer for the Metropolitan Tobacco Co., which is generally regarded in the tobacco industry as the largest jobber of tobacco

products in the United States. In the year of 1915, and since that time the Metropolitan Tobacco Company has purchased hundreds of thousands of pounds of Beech Nut tobacco from the P. Lorillard Company which is recognized as one of the oldest and largest tobacco manufacturing concerns in the United States. The Metropolitan Tobacco Company has in turn sold the Lorillard Beech Nut tobacco to numerous customers in the State of New York, New Jersey, Connecticut and other States. The Metropolitan Tobacco Company in and since 1915 has continually purchased this tobacco from the P. Lorillard Company, and is so purchasing it today. It is a very popular brand, has a wide sale, is recognized in the tobacco industry as the brand of P. Lorillard Company, that is to say, "Beech Nut" as applied to tobacco products is recognized as P. Lorillard Company's trade mark. Cigarettes in the tobacco business are recognized, of course, in the same category as smoking and chewing tobacco, cigars, plug, etc., as all are tobacco products, and are sold by cigar stores, tobacco dealers and others dealing in tobacco products. In my opinion should any other person or concern place a Beech Nut cigarette or other form of tobacco product upon the market it would be injurious and damaging to the business of P. Lorillard Company, and confusing to the public and dealers in tobacco, because it would lead the public and dealers to believe that the late-comer's brand of tobacco was that of the P. Lorillard Company, because of the use of the same name Beech Nut, would result in lost sales to the P. Lorillard Company, and if the late-comer's brand was not up to the recognized excellence of P. Lorillard Company's product, this would also seriously affect the reputation and sale of the P. Lorillard Company's Beech Nut tobacco.

MONROE W. ROTHSCHILD.

My name is Monroe W. Rothschild; I am of lawful age; address, World Building, New York City; have been in the tobacco business for fourteen years and am Sales Manager for the Schulte Company which has hundreds of Schulte Cigar Stores throughout the United States, these cigar stores being located in the principal large cities.

In 1915, and each year since then, up to the present time, the Schulte concern has purchased thousands of pounds of Beech Nut tobacco, under this name, from the P. Lorillard Company, and has sold this Beech Nut tobacco of P. Lorillard Company in the various Schulte stores throughout the country. It is a very popular brand of tobacco and has a wide sale through the Schulte stores. It is sold in the form shown by the Exhibit No. 2 of Mr. Ball's stipulated deposition, and it is also sold in plug form. In the tobacco industry, in which I have been engaged for the past fourteen years, Beech Nut, as applied to tobacco products, is recognized as the trade mark of P. Lorillard Company. In the trade cigarettes are recognized of course as a tobacco product and are sold by the same class of dealers as those dealing in other forms of tobacco, smoking and chewing, cigars and the like. In my opinion should another concern other than P. Lorillard Company place a tobacco product, such as a cigarette, on the market under the name Beech Nut, it would be damaging and injurious to the business of P. Lorillard Company by reason of causing confusion in the trade resulting in the sale of the late-comer's product as that of the P. Lorillard Company, thus resulting in lost sales to the latter concern. Beech Nut tobacco has been and is ordered by the Schulte Company from the Loril-

lard Company under the name Beech Nut, and has been and is sold in our stores as Beech Nut tobacco, the name appearing prominently on the packages.

JESSE R. TAYLOR.

My name is Jesse R. Taylor; I am of lawful age, address, No. 44 West 18th Street, New York City, and I am Vice-President of the United Cigar Stores Company of America. This company has hundreds of retail cigar stores throughout the United States, in practically all the principal cities of the United States. Beginning in 1915, and yearly and continuously thereafter it has purchased and sold hundreds of thousands of pounds of Beech Nut tobacco made by the P. Lorillard Company. It has purchased from the P. Lorillard Company and sold to customers hundreds of thousands of packages of Beech Nut tobacco like that exemplified by Exhibit No. 2 of Mr. Ball's stipulated deposition, and has also purchased and sold great quantities of the Beech Nut plug made by P. Lorillard Company. The P. Lorillard Company's Beech Nut tobacco is a very popular brand and has a tremendous sale, to my knowledge, through the United Cigar Stores. In the tobacco business cigarettes are recognized as a tobacco product, and are sold in our stores along with other forms of smoking and chewing tobacco, cigars and the like. The Beech Nut trade mark for tobacco products is recognized in the tobacco industry as the trade mark of the P. Lorillard Company, and should any other tobacco product be put upon the market by any other concern than the P. Lorillard Company under this name or trade mark Beech Nut, it would in my opinion be injurious and damaging to the P. Lorillard Company's business, particularly as

affecting the Beech Nut tobacco business of this concern, by reason of the fact that confusion would in my opinion occur in the trade and also to the public by reason of the identity of the names, and the latecomer's product would be confused with that of the P. Lorillard Company, thus affecting injuriously the sales of the latter's product. Furthermore the P. Lorillard Company's products, particularly Beech Nut tobacco, have a high reputation for excellence, and the appearance of another tobacco product than that of the P. Lorillard Company under this name Beech Nut would in some measure feed upon and reap the benefit of the reputation of the P. Lorillard Company's brand to the disadvantage financially and otherwise of the P. Lorillard Company.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company
v.
Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
"Beech Nut."

CERTIFICATE OF OFFICE.

COUNTY OF NEW YORK, } *ss.:*
STATE OF NEW YORK, }

I, H. S. Ivie, a Notary Public within and for the County of New York and State of New York, do hereby certify that the foregoing stipulated depositions of David Haines Ball, S. E. Spence, Benjamin I. Belt, Alfred W. Haywood, Jacob Levy, Monroe W. Roths-

child and Jesse R. Taylor were taken on behalf of P. Lorillard Company in pursuance of notice hereto annexed, before me, at the office of P. Lorillard Company, No. 119 W. 40th Street, in the State of New York, in said County, on the 19th day of May, 1920; that said stipulated testimony of said witnesses were written out by Margaret H. Gebhardt in my presence; that the opposing party, Beech-Nut Packing Company, was present, being represented by James R. Offield, as counsel; that said counsel for the Beech-Nut Packing Company agreed with counsel for P. Lorillard Company to stipulate the said testimony of the said witnesses; that the counsel of both parties read over and approved and agreed to the stipulated testimony after it was written out; and that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at New York City, in said County, this 22nd day of May, 1920.

(Seal.)

H. S. Ivie,
Notary Public.

New York Co. No. 25; New York Register No. 1122.

6. It is further stipulated by and between the parties hereto, that if J. Lewis Orrick, was called as a witness on behalf of P. Lorillard Company, he would testify as set forth in the below, duly executed, affidavit, notice of this witness and his production, for examination, being hereby waived.

STATE OF MARYLAND,
COUNTY OF ALLEGANY, } *ss.:*

J. LEWIS ORRICK

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Cumberland, Maryland, and am Secretary and Treasurer of the J. C. Orrick & Sons Co., of Cumberland, Maryland, wholesale grocers and jobbers. This concern has been continuously engaged in business for over half a century, being established in 1863, and incorporated in 1887. Its trade now, as in the past, extends throughout Maryland and the neighboring states. My father, Mr. C. J. Orrick, now deceased, was formerly President of the company, and I, myself, have been connected with this concern for many years past, and am, and have been, familiar with its business and its records.

I know that the J. C. Orrick & Sons Co., purchased, kept in stock and sold "Beechnut" tobacco for many years and it is at the present time, purchasing "Beechnut" tobacco and "Beechnut" plug tobacco from the P. Lorillard Company and is selling such "Beechnut" tobacco to its customers.

I have recently had occasion, at the request of certain representatives of P. Lorillard Company, to examine our old records, or rather the records of the J. C. Orrick & Sons Co., in my charge, for the purpose of endeavoring to ascertain when and from whom the J. C. Orrick & Sons Co. purchased "Beechnut" tobacco. As a result of this examination of the records of my company, and which records have been kept in due course of business, I produce herewith, certain paid invoices, showing that in 1902, in the months of February and November, the J. C. Orrick & Sons Co., pur-

chased "Beechnut" tobacco from Harry Weissinger Tob. Co.; that in February and March, 1903, this concern, the J. C. Orrick & Sons Co., purchased "Beechnut" tobacco, from the Continental Tobacco Co.; and that in December, 1906, and January, 1908, the J. C. Orrick & Sons Co. purchased "Beechnut" tobacco from Luhrman & Wilbern Tobacco Co.

For the sake of convenience, I now set forth in this affidavit, a tabulated statement of these invoices:

HARRY WEISINGER TOB. CO.

Invoice Date.	Manufacturers No.	Date Bill Paid by J. C. Orrick & Sons Co.
Feb. 2, 1902	1482	2-17-02
" 11, 1902	818	2-27-02
" 11, 1902	1495	2-21-02
Nov. 21, 1902	14851	11-21-02

CONTINENTAL TOBACCO CO.

Feb. 19, 1903	2638	2-29-03
Mar. 17, 1903	4656	3-29-03
Mar. 27, 1903	5481	4- 3-03

LUHRMAN & WILBERN TOB. CO.
(Goods shipped from Middletown, Ohio)

Dec. 13, 1906	(1—100 Polar Bear) (1—100 Beech Nut)	Dec. 1906
Jan. 24, 1908	71958 (1—100 Beech Nut)	Feb. 3, '08

The four original Weisinger Invoices are herewith submitted and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 11."

The three original Continental Tobacco Co. in-

voices, are herewith submitted and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 12."

The Luhrman & Wilbern Tob. Co., original invoices, are herewith submitted, and made a part of this affidavit, and are marked "P. Lorillard Co. Exhibit No. 13."

I might also state that in my examination of our records, I find that one of our stock books shows the following:

January	1, 1907—	"Beech Nut" in stock
December	31, 1908	do
January	1, 1910	do
August	4, 1910	do
March	1, 1911	do

From any familiarity with the records of the J. C. Orrick & Sons Co., and the system then employed in keeping the same, I can state that these entries mean that at the time of "taking stock," at or about the dates appearing, we had on hand, "Beechnut" Tobacco.

I will further state that some months prior to the making of this affidavit, a representative of the P. Lorillard Company, called at the place of business of the J. C. Orrick & Sons Co., here in Cumberland, Maryland, and made inquiry as to our having purchased and sold "Beechnut" tobacco in years gone by. I told him I thought we had some very old "Beechnut" tobacco still in stock, and upon looking into the matter, I found this to be so, and I sold the gentleman a large carton containing small retail packages of "Beechnut" tobacco, which the label on the package shows, was the product of the Harry Weissinger Tob. Co. of Louis-

ville, Kentucky. I produce herewith as Exhibit No. 14, one of these small packages of tobacco, identical with those in the carton sold to the P. Lorillard Co. representative, and it will be noted that it bears a red label, with the word "Beechnut" thereon, the picture of a squirrel, the words "Chewing and Smoking Tobacco" and the name of the manufacturer or producer, "Harry Weissinger Tobacco Co."

To the best of my knowledge and belief, this Harry Weissinger Tobacco Co., "Beechnut" tobacco, which the J. C. Orrick & Sons Co., recently sold to the P. Lorillard Co. representative, had been in our stock for many years, prior to such sale, and we always stood ready and willing to sell the same to any responsible purchaser who might call for it.

I have been connected with the J. C. Orrick & Sons Co., in one capacity or another, for nearly twenty years, and I know to my own personal knowledge, that this concern, during the first years of my connection therewith, was selling "Beechnut" tobacco which, to the best of my knowledge and belief, was purchased from Harry Weissinger Tob. Co., Continental Tobacco Co. and Luhrman & Wilbern Tobacco Co.

J. LEWIS ORRICK,
Affiant.

Sworn to and subscribed before me this 1st day of June, 1920.

LLOYD RAWLINGS,
(Seal.) *Notary Public, in and for Allegany County, Maryland.*

My commission expires 1st Monday in May, 1922.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company
v.
Beech-Nut Packing Company.

Trade-mark Opposition.

DEPOSITIONS.

Taken at Pittsburgh, Pa., Wednesday, June 9th, 1920, before Clarence A. Williams, Notary Public.

Pittsburgh, Pa., June 9th, 1920.

Met, pursuant to agreement, before Clarence A. Williams, a Notary Public in and for the County of Allegheny, Commonwealth of Pennsylvania, formal notice of the production for examination of the witnesses, W. H. Nichol, William M. Gormly, H. H. Arnold, Charles C. St. Clair, T. F. Coyle and H. O. Evans, being waived.

Present: R. B. CAVANAGH, ESQ., on behalf of P. Lorillard Company.
SEBASTIAN HINTON, ESQ., on behalf of Beech-nut Packing Company.

The direct testimony of W. H. Nichol, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the introduction in evidence of the record book referred to by the witness being waived.

W. H. NICHOL.

Being first duly sworn by the said Clarence A. Williams, acting as Examiner, by consent, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and am connected with Allen Kirkpatrick & Company, wholesale grocers and jobbers, located at 903 Liberty Avenue, Pittsburgh, Pennsylvania.

I have been connected with this concern for about twenty-five years, and I know that during the years of 1901-1902 to 1903, Allen Kirkpatrick & Company purchased tobacco, under the name or mark, "Beechnut," and sold this tobacco to the trade. Since 1915, and to the present time, Allen Kirkpatrick & Company have continuously purchased, from P. Lorillard Company, large quantities of tobacco, under the name or mark, "Beechnut," and put up in packages similar to that shown by P. Lorillard Company Exhibit No. 16.

Recently, I was asked by Mr. A. C. Hursh, a representative of the P. Lorillard Company, to examine some of our old records, for the purpose of ascertaining when and from whom "Beechnut" tobacco was purchased. Upon examining our Cost Book records, I find that the first purchase Allen Kirkpatrick & Company made of "Beechnut" tobacco was on the 25th of July, 1901, from Harry Weissinger Tobacco Company, of Louisville, Kentucky. In 1901, Allen Kirkpatrick & Company made six separate purchases of this "Beechnut" tobacco from Harry Weissinger Tobacco Company; in 1902, six purchases; in 1903, one purchase, from Luhrman & Wilbern Tobacco Company.

For the sake of convenience and clearness, I set forth here below a true copy of the entries appearing

upon these records of Allen Kirkpatrick & Company, relating to "Beechnut" tobacco, as follows:

PRICE BOOK

Cut & Dry—Sundry Brands Tobacco.

1901.

July 25— 5 cases—20—2½ oz. Beechnut H. W. Tob. Co. 24—24

Sept. 4—20 " 10—1 Beechnut H. Weissinger T. Co. 24—24

Sept. 25—20 " 10—1 Beechnut H. Weissinger T. Co. 20 C.—20

Oct. 4—25 " 10—1 Beechnut H. Weissinger 24—24

Tobacco—Harry Weissinger Tobacco Co.

Nov. 19—25 " 10—1 Beechnut 24 net

Dec. 27—50 " 10— Beechnut Harry Weissinger T. Co. 24—10%—2—3/5

1902.

March 20—40 " 10—1 Beechnut 24—24

May 31—20 " 10—1 Beechnut Harry Weis. T. Co. 24—

July 14—25 " 10—1 Beechnut Harry Weis. Tob. Co. 24—3—6/10 Del. 20 2/5

July 21—25 " 10—1 Beechnut 2½ oz. Harry Weissinger Tob. Co. 25—10% Deld 22½

Aug. 25—50 " 10—1 Beechnut 2½ oz. Harry Weissinger Tob. Co. 25—10% Deld 22½

Sept. 22—50 " 10—1 Beechnut 2½ H. W. Tob Co. 25—22½

1903.

April 18, 1903—1—100—Beechnut 2½ oz. Luhrman & Wilbern T. Co.—24 D. 24.

These entries in the records of Allen Kirkpatrick & Company are in my handwriting, and were made at or about the time the "Beech Nut" tobacco was received from the manufacturer.

These cost or price books form a part of the permanent records of this office, and the entries therein were made by me in due course of business.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 1. What was your capacity in Allen Kirkpatrick Company for the years 1901 to 1903?

A. I was buyer and general clerk.

XQ. 2. Did you continue to be buyer after 1903. That is, how long?

A. Up to the present moment.

XQ. 3. You are still buyer?

A. Yes, sir.

XQ. 4. Do you know why the Allen Kirkpatrick Company did not buy any tobacco manufactured by Luhrman & Wilbern or Harry Weissinger Tobacco Company under the name "Beechnut" after the year 1903?

A. Do I know why they did not buy during those years? I presume the reason was that it was taken over by another tobacco company.

XQ. 5. When was it taken over by another tobacco company; do you know?

A. I can't answer that without looking at the records.

XQ. 6. Assuming that this brand had been taken over by another tobacco company, would that account for the fact that Allen Kirkpatrick & Company did not buy any more of it after 1903?

A. Please repeat that question.

(Question read.)

A. Well, I think we did buy more of it after 1903.

XQ. 7. You think you did?

A. Yes.

XQ. 8. But you haven't any records, have you?

A. Our official cost book will show. That is the complete accurate record of all the purchases from that time to this date.

XQ. 9. Your cost books have been produced in evidence in the form of certain copies therefrom and I have just examined these cost books and do not find

any purchases of tobacco under the name "Beechnut" after the year 1903. If this examination was accurate, would that indicate that your concern did not buy this tobacco after 1903?

A. We have bought the tobacco after 1903.

XQ. 10. And prior to 1915?

A. I would have to look at the records to be certain as to that statement. The records are complete.

XQ. 11. Do these records to which you refer comprise these books out of which these entries have been copied?

A. They do.

XQ. 12. These are your cost books?

A. Those are our cost book records.

XQ. 13. They contain entries up to 1908 and 1909, if my examination is correct?

A. Yes, sir. They contain them not only for the years you mention, but right up to the present moment. Now, you understand, it is a loose leaf book; some of the pages have been put in the transfer bindings, but the records are complete.

XQ. 14. In other words, those books there are complete records?

A. Yes, sir, absolutely.

XQ. 15. It is a fact, isn't it, that those books do not contain a record of any purchase of tobacco under the name, "Beechnut" after the year 1903? At least, I have been unable to find any in the books, and I have just examined them.

A. You say after 1903. Do you mean after that date up to the present time?

XQ. 16. Yes, for 1903 and prior to 1915.

A. I would have to examine the books myself to make a positive statement on that.

XQ. 17. Would you mind looking them over? (To Mr. Cavanagh.)

(Mr. Cavanagh states that he has examined the record books that were submitted by Allen Kirkpatrick & Company and referred to by the witness, and finds no entries therein concerning the sale of "Beechnut" tobacco to Allen Kirkpatrick & Company after 1903 and until 1915.)

By Mr. Hinton:

XQ. 18. Mr. Nichol, how much personal recollection have you of the dealings in this "Beechnut" tobacco purchased by your concern around 1903, besides what you gather from these old records?

A. Well, I am not and was not the tobacco buyer, and my knowledge of it would be simply the record as it is recorded in the books.

XQ. 19. Who was the tobacco buyer at that time?

A. Mr. Charles C. St. Clair.

XQ. 20. Where is he located now?

A. Right here.

XQ. 21. Is he still tobacco buyer?

A. He is.

XQ. 22. You have no personal knowledge, then, of the reason that Allen Kirkpatrick & Company stopped buying "Beechnut" tobacco in 1903, if they did so stop?

A. No personal knowledge; no.

XQ. 23. You never, then, attempted to buy this tobacco or know of such an attempt being made prior to 1915, which attempt was unsuccessful?

A. I can't answer, because I was not the buyer—not the tobacco buyer.

W. H. Nichol.

CHARLES C. ST. CLAIR,

a witness produced on behalf of P. Lorillard Company, being first duly sworn, testified as follows:

DIRECT EXAMINATION.

By MR. CAVANAGH:

Q. 24. Please state your name, age, residence and occupation.

A. Charles C. St. Clair; age 50 years; residence, 1924 Perrysville Avenue, North Side, Pittsburgh, Pa., buyer, wholesale grocery business, Allen Kirkpatrick & Company.

Q. 25. How long have you been buyer for Allen Kirkpatrick & Company?

A. Twenty-five years.

Q. 26. Do you recollect ever purchasing "Beechnut" tobacco from that concern?

A. I do.

Q. 27. From what concern?

A. My first recollection is Luhrman & Wilbern Tobacco Company.

Q. 28. Will you please state in your own words, exactly what your recollection is as to the purchase of tobacco under the brand or name "Beechnut?"

A. I recall very definitely buying frequently "Beechnut" tobacco from Luhrman & Wilbern Tobacco Company, and we bought it in pretty large quantities later on from P. Lorillard Company. I don't know just the dates; I haven't got that in my mind. Those are the only two concerns that I remember buying distinctly "Beechnut" tobacco from.

Q. 29. Do you recollect buying any "Beechnut" tobacco from Harry Weissinger, personally?

A. I do not.

Q. 30. State the reason, if you know it.

A. There was another buyer prior to that time that looked after the tobacco business entirely.

Q. 31. What did your concern do with the "Beechnut" tobacco that it bought from Luhrman & Wilbern?

A. We sold it to the retail trade.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 32. Do you know when your company stopped buying "Beechnut" tobacco from Luhrman & Wilbern?

A. I can't tell you that without referring to the records.

XQ. 33. You have no recollection of why your company stopped buying "Beechnut" tobacco?

A. I have not.

XQ. 34. Can you make any supposition as to the reason?

A. Well, my only opinion would be that they were unable to get it; it was not manufactured; no other reason that I know of.

XQ. 35. Can you recall at all, Mr. St. Clair, when Allen Kirkpatrick—or about when they stopped buying "Beechnut" tobacco from Luhrman & Wilbern Company?

A. No, I cannot. If you had asked me privately I would have said that we have been buying it all these years. I did not recall that it was off the market.

XQ. 36. Your cost records on that would be accurate, I suppose?

A. Absolutely. We enter every foreign bill that we get in our Cost Book. There is no question about that.

XQ. 37. I understand that you keep your correspondence in letter press books.

A. Yes, sir.

XQ. 38. And have done so since when?

A. Well, now prior to my time. To my knowledge twenty-nine years.

XQ. 39. And the letters that you received, how long do you keep those?

A. They are filed away by months and those are kept in these cabinets here for I think five months. I think that is all they will hold. Then they are transferred to "Jumbo" letter files. Those are filed away upstairs.

XQ. 40. How long do you keep them?

A. I may say six years. When they get too numerous we simply take the old ones and destroy them. We feel that they are of no value after six years.

XQ. 41. You don't conduct a retail business, do you?

A. No, sir.

CHAS. C. ST. CLAIR.

(The direct testimony of William M. Gormly, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the introduction in evidence of the record book referred to by the witness being waived.)

WILLIAM M. GORMLY,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and am buyer with S. Ewart Company, 921

Liberty Avenue, Pittsburgh, Pennsylvania. This concern, S. Ewart Company, is engaged in the wholesale grocery and tobacco business, and does a large wholesale and jobbing business in Pennsylvania and neighboring states. I have been connected with this concern for about thirty years and am familiar with its method of doing business, its trade and its records.

I know that S. Ewart Company purchased and sold tobacco under the name and brand "Beechnut," beginning about 1901 and for several years thereafter, and that since 1915, to and including the present year, it has continuously purchased and sold large quantities of tobacco under the name or brand "Beechnut," which is manufactured by and obtained from P. Lorillard Company.

Recently, I had occasion, at the request of a representative of P. Lorillard Company, one Mr. A. C. Hursh, to examine certain old records of the S. Ewart Company for the purpose of endeavoring to ascertain when and from whom the S. Ewart Company purchased tobacco under the name or brand, "Beechnut." As a result of this examination of the records of S. Ewart Company, and which records were kept in due course of business, I find that the price or cost book of this concern shows the following purchases of "Beechnut" tobacco from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, on the dates herein mentioned. For the sake of convenience, I now set forth in this affidavit a copy of the entries appearing in this price book:

Louisville, Ky., July 25th, 1901. Page 627.

Harry Weissinger Tobacco Co. 2%

		15	Cases	Beech Nut	2½ oz	20,—300,—24—72.	Deld						
Nov.	12	10	Cases	Beech Nut		20—200							
1902.													
					20	lbs Free	180—24—43.20		Deld				
Feb.	4	20	"	"	20	" "	105 180—24—43.20		"				
"	11	25	"	"	25	" "	10c 225—25 fol 627		54.00				

Louisville, Ky., Feb. 18th, 1902. Fol. 627.

Harry Weissinger Tobacco Co. 2%

		30	Cases	Beechnut	2½ oz	30	lbs Free	270.24				64.80	Deliv	
May	10	50	"	"	10	lb	50	"	"	450.24		108.00	"	
"	15	50	"	"	10	"	50	"	"	450.24		180.00	"	
Aug.	14	30	"	"	10	"	30	"	"	270.25	10%	6.75	60.75	"
Sept.	4	30	"	"	10	"	30	"	"	270.25	10%	6.75	60.75	"
Nov.	14	30	"	"	10	"	30	"	"	300.25	10%	6.75	60.75	"
Dec.	27	40	Boxes	"	10	"	40	"	"	360.35	10%	9.00	81.00	"

I have been shown a package of "Beechnut" tobacco with the representation of a red squirrel thereon, and bearing the name, "Harry Weissinger Tobacco Co.," and which is marked "P. Lorillard Co. Exhibit No. 14," and to the best of my recollection, knowledge and belief, it is similar to such "Beechnut" tobacco packages as were purchased from Harry Weissinger Tobacco Company by S. Ewart Company in the years 1901-1902, and which were sold by the S. Ewart Company to the trade.

I have to submit herewith a package of "Beechnut" Chewing and Smoking Tobacco, which I have marked "P. Lorillard Co. Exhibit No. 17." It will be noted that this package of tobacco bears the word "Beechnut," the picture of a squirrel and the words, "Harry Weissinger Tobacco Co., Incorporated, Luhrman & Wilbern Tobacco Co., Successor." It will further be noted that the cancellation on the revenue stamp bears the date April 6, 1905. This package of tobacco, Exhibit No. 17, has been in the sample case of S. Ewart Company for many years. On June 3rd, 1920, I took this package of "Beechnut" tobacco from the sample case, along with a similar old package of "Beechnut" tobacco, the revenue stamp of which bore the cancellation date of May 3, 1905. Both these old packages are similar to or *facsimile* specimens of "Beechnut" tobacco which was bought and sold by S. Ewart Company around about the period of 1905, the cancellation dates of the revenue stamps. Packages like Exhibit No. 17 were, to the best of my recollection and belief, purchased from the Luhrman & Wilbern Tobacco Co., the concern whose name appears upon the Exhibit package.

I have also been shown P. Lorillard Company Exhibit No. 16, and can state that this is similar to the package of "Beechnut" tobacco which I have been purchasing on behalf of S. Ewart Company from the P. Lorillard Company since 1915, in large quantities, and am so purchasing at the present time.

I might further say that the cost book or record above referred to, and from which the entries have been copied, is very large and bulky, being of the general dimensions of a large ledger, and it forms a part of the permanent records of this office. The

entries, so far as concerns "Beechnut" tobacco, appearing therein, in 1901 and 1902, were made by Mr. H. H. Arnold, and I am familiar with his handwriting.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 42. How long have you been tobacco buyer for S. Ewart Company?

A. Well, full line, ten years.

XQ. 43. Who was tobacco buyer prior to your coming with the Company?

A. J. S. Arnold.

XQ. 44. Did you have charge of the tobacco buying of S. Ewart Company in any way prior to 1910?

A. Yes, in a way, but not as a full line.

XQ. 45. Where is J. S. Arnold at the present time?

A. J. S. Arnold is at Atlantic City.

XQ. 46. Can you give me his address?

A. Why I can get it for you. I understand he has left this year; he has retired.

XQ. 47. Do you know what he is doing?

A. Nothing; walking the boardwalk.

XQ. 48. He is broken down in health, is he?

A. No, not exactly; but he retired several years ago and went to Atlantic City.

XQ. 49. He was buyer prior to 1910?

A. He was one of the firm; the firm was then S. Ewart & Company; Samuel Ewart and J. S. Arnold.

XQ. 50. He was one of the partners?

A. Yes, he was the active member.

XQ. 51. You have produced a package of tobacco, Lorillard Exhibit No. 17. Will you please state fully where you got this package of tobacco?

A. Out of that old drawer of samples downstairs, that has been out of use—the drawer as a sample drawer has been out of use for ten years.

XQ. 52. What are the contents of that sample drawer?

A. Samples of various manufacturers' cut and dry.

XQ. 53. What is the condition of the drawer?

A. Of the drawer?

XQ. 54. Or of the samples that are in the drawer?

A. I guess they are pretty well dried out now, and the drawer was full until such time as we abstracted the "Beechnut."

XQ. 55. I noticed in that drawer, which you kindly showed me, a large number of packages of tobacco. Would you tell me how completely that line of tobacco in there represents the packages of tobacco which were on the market at the time Lorillard Exhibit No. 17 went into the drawer?

A. That drawer was supposed to be complete. Like all other sample cases, it never was.

XQ. 56. Was it nearly complete, in your opinion?

A. As complete as we could get it, because we would fill it up and some person would come and borrow one and put it in his pocket. It was supposed to be complete but never was.

XQ. 57. The drawer is nearly full at the present time. In your opinion, does it contain most of the samples that were originally in there?

A. I would think so.

XQ. 58. In other words, that drawer would give one a pretty fair idea of the kinds of packages of tobacco which were on the market when this Lorillard exhibit went in there?

A. It would give a very good idea of the different

kinds and different sized packages that we sold at that time.

XQ. 59. You have no intention of destroying that drawer, or breaking it up in any way, have you?

A. No definite intention now, except that it should have been done long ago.

XQ. 60. You are willing to preserve that drawer in its present condition for a little while, aren't you?

A. Well, until housecleaning.

XQ. 61. When will housecleaning be?

A. I don't know; as soon as we can get enough niggers to go to work.

XQ. 62. That drawer has been there in practically its present condition how long?

A. I guess about fifteen years. I know I have told people that have asked me several times for a package of tobacco to go there in that drawer and get some. They would take it on account of its age. That it wasn't my brand is the only thing that saved it.

XQ. 63. Have you any display case for tobaccos which you are now offering to the trade?

A. No; practically, no. There are some samples down there, but we are out of it more oftener than we have it and simply pay no attention to it.

XQ. 64. Have you any idea, Mr. Gormly, why the S. Ewart Company stopped buying "Beechnut" tobacco in packages corresponding to Lorillard Exhibit No. 17?

A. No, I don't know. Possibly just a lack of call for it.

XQ. 65. You have no definite recollection of that?

A. No.

XQ. 66. Mr. J. S. Arnold was in charge of those matters at about that time?

A. Yes, he had full charge of matters of that kind.

XQ. 67. How long do you preserve correspondence here?

A. I would hate to tell you. I found some the other day dated 1867.

XQ. 68. You are in the custom of preserving all your old correspondence?

A. Not if we have to look it up, we don't.

XQ. 69. You mean by that, that if you are asked to find it, it is destroyed?

A. Nothing doing on that.

XQ. 70. Well, just for general information, do you classify your correspondence, when it is filed away, by the name of the person to whom the letter is addressed?

A. We file everything in a cabinet file and when that file gets full, we put it in the transfer, and when we get a pile of them, case them and put them away.

XQ. 71. That correspondence is all more or less classified?

A. Oh, yes.

XQ. 72. So that you could pick out correspondence of any particular concern if you wanted to do so?

A. Oh, it could be done; yes.

XQ. 73. Will you do me the favor, Mr. Gormly, of letting me know before you destroy that old drawer of "Beechnut" tobacco? Would you be willing to do that?

A. Why don't you buy it and be done with it? We are not going to destroy it, as far as I know.

XQ. 74. The reason I don't want to buy it is because it would not be of much value to me as evidence only as it is. I am perfectly willing to buy all the packages in there if you will keep them for me as they are.

A. We are not going to destroy it, I don't think.

We offered to give it away several times and no person would take it on account of its age. Then it wasn't my kind and I don't use it.

XQ. 75. You don't run a retail business here?

A. No.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 76. Can you recall, Mr. Gormly, from what representative of the Weissinger company you first purchased "Beechnut" tobacco for S. Ewart Company?

A. John Davis.

RDQ. 77. Where was he located?

A. He was located here in the city. He was a resident agent.

RDQ. 78. For whom?

A. Weissinger.

RDQ. 79. And you first bought from John Davis?

A. Yes.

RDQ. 80. And subsequently from Luhrman & Wilbern?

A. Yes, I have bought it—I don't recall the name. John Davis was the original man. He had been with J. & W. Jenkinson a great many years and left there on account of his health and got hold of Weissinger's account.

RDQ. 81. You don't preserve all the old records here, do you?

A. No.

RDQ. 82. What do you do with them?

A. Burn them up. Every once in a while we find an old box with a lot of old junk in it. I think that drawer was forgotten.

W. M. GORMLY.

It is further stipulated, by and between the parties hereto, that if H. H. Arnold were called as a witness on behalf of P. Lorillard Company, he would testify as is set forth under oath below, production and examination of this witness being waived.

COMMONWEALTH OF PENNSYLVANIA, }
COUNTY OF ALLEGHENY, } *ss.:*

H. H. ARNOLD,

being first duly sworn deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania, and have been connected with the S. Ewart Company, 921 Liberty Avenue, Pittsburgh, wholesalers and jobbers of groceries and tobacco, for over thirty years.

I have been asked to examine a cost or price book of the S. Eward Company, for the period of 1901 and 1902, with particular relation to certain entries therein, covering the purchase of "Beechnut" tobacco from Harry Weissinger Tobacco Company. I may say that these entries covering "Beechnut" tobacco, as well as vast numbers of other entries in this book or record, are all in my handwriting and were made at or about the time the invoices for the goods were received.

H. H. ARNOLD.

Sworn to and subscribed before me, this 15th day of June, 1920.

CLARENCE A. WILLIAMS,
(Seal) *Notary Public.*

My commission expires January 19, 1923.

The direct testimony of T. F. Coyle, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the production of the bound price lists referred to by the witness being hereby waived:

T. F. COYLE,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Pittsburgh, Pennsylvania and am a buyer, connected with Arbuckles & Company, 808 Liberty Avenue, Pittsburgh, Pennsylvania, which concern is engaged in the wholesale grocery business, with a trade extending through Pennsylvania and neighboring States. I have been connected with this concern for at least twenty-five years past, and have purchased vast quantities of goods for it, including tobacco of various brands.

I distinctly recall purchasing "Beechnut" tobacco for this concern in the early 90's and as late as 1908. This tobacco was first purchased by Arbuckles & Company from Harry Weissinger Tobacco Company, of Louisville, Kentucky, and subsequently from the Continental Tobacco Company and Luhrmann & Wilbern Tobacco Company.

Recently, I was asked by Mr. A. C. Hursh, a representative of P. Lorillard Company, concerning purchases of tobacco under the name or mark "Beechnut," in the early 90's, and referring to our permanent records, I find that our printed price lists, which are in the form of bound volumes, show that we had in stock and were offering for sale this "Beechnut" tobacco. The first mention of this "Beechnut" tobacco appears in our price list of November 2nd, 1901, and the last mention of "Beechnut" tobacco appears in our

printed price list of November 28th, 1908. These printed price lists were issued by Arbuckles & Company, and then fortnightly, and all the price lists for each year were bound in a single volume, each yearly volume being about four inches thick, eight inches wide and about one foot in length. In each weekly or semi-monthly price list, from November, 1901, to November, 1908, "Beechnut" tobacco, together with the price thereof, appears listed, and this means that we had this tobacco in stock and were ready to sell it to our customers.

Since 1915, to and including the present time, Arbuckles & Company have been continuously purchasing from P. Lorillard Company large quantities of "Beechnut" tobacco, like P. Lorillard Company Exhibit No. 16.

It is stipulated by counsel, that:

Witness on Cross-Examination testifies that he was handling, from 1901 to 1908, a very large number of items, possibly five thousand, and that he has no distinct personal recollection of dealings in the old "Beechnut" tobacco, except that he knows that he bought this commodity.

He has no knowledge of the reason for discontinuing the sale of the old "Beechnut" tobacco; but he does know that he bought the old "Beechnut" tobacco a great many times, like the Weissinger package, Exhibit No. 14, and the Luhrmann & Wilbern package corresponding to Exhibit No. 17; and that when an item appears in the price lists of Arbuckles & Company, that shows that that item is in stock. If they should happen to run out of the item for a week or two, it is stricken from the weekly price list of that week in which it was not in stock.

At the request of counsel for P. Lorillard Company, Mr. Hinton states on the record that he has examined several of the weekly and fortnightly price lists for the year 1901 and the year 1908, and finds therein the name, "Beechnut."

THOMAS F. COYLE.

The direct testimony of H. O. Evans, a witness called on behalf of P. Lorillard Company, is hereby stipulated as follows, subject to cross-examination, the production in evidence of the books referred to by the witness being waived:

H. O. EVANS,

being first duly sworn, deposes and says as follows:

I am of lawful age, a resident of Knoxville Borough, Allegheny County, Pennsylvania, and am buyer for the wholesale grocery firm of Thomas C. Jenkins Company, 16 Terminal Way, Pittsburgh, Pa. I was connected with this firm for twenty-four years. This firm of Thomas C. Jenkins Company was established in 1863; retired April 30, 1920, and did a large jobbing and wholesale business throughout Western Pennsylvania, Eastern Ohio and West Virginia. During my connection with this concern, I have had occasion to familiarize myself with its records and have purchased great quantities of goods for the company.

I know, of my own knowledge, that Thomas C. Jenkins Company purchased, kept in stock, and sold, "Beechnut" tobacco, particularly during the period covered by the years of 1901, to and including 1907.

I also know that Thomas C. Jenkins Company has continuously purchased tobacco, known to the trade as

"Beechnut" brand, from P. Lorillard Company since 1915, and is now so purchasing this "Beechnut" tobacco for their trade to April, 1920, from the P. Lorillard Company in large quantities, approximately about one hundred gross of ten cent packages per week.

I have recently had occasion, at the request of certain representatives of P. Lorillard Company, to examine the old records of Thomas C. Jenkins Company, for the purpose of endeavoring to ascertain when and from whom the Company purchased "Beechnut" tobacco.

As a result of the examination of these records, I find that in 1901 and 1902, the Thomas C. Jenkins Company purchased from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, certain quantities of tobacco under the name or trade-mark, "Beechnut"; that in 1903, tobacco under the trade-mark or brand "Beechnut" was purchased from the Continental Tobacco Company; and that in 1904, 1906 and 1907, tobacco under the trade-mark or brand "Beechnut" was purchased from Luhrmann & Wilbern Tobacco Company. This tobacco was, of course, sold in due course of our wholesale business.

I have before me the cost records or books of the Thomas C. Jenkins Company, covering the periods above mentioned, that is, from 1901 to and including 1907, and for the sake of convenience, I now set forth in this affidavit a tabulated statement of the entries appearing in these records or cost books. I might say that these cost books or records were kept in due course of business and that most of the entries appearing therein, particularly those from 1901 to 1907, are in my handwriting. The entry appearing in 1901 was made by a party who is no longer connected with this concern and who is not available.

Harry Weissinger Tobacco Co.

1901
Oct. 8—10/10 Beechnut 2½ oz.—1 " free with ea. box 24 Del. 2% ch'd at 9 # to box

1902
July 16—15/10 Beechnut 2½ oz.—1 # free with ea. 10 # 25 Less 10% chg'd as 9 # box
Less 36/10c lb off bill per instructions their agent
Sept. 16—10/10 Beechnut 1 free ea. 10 # .25 Less 10%

Continental Tobacco Co.

1903
Jan. 17—20/20 Beechnut 2½ oz.—1 free with 10 # @ .25 Less 10% .22½ del. 2%
April 7—2/100 Beechnut 2½ oz. (20 # free) .24 " "
Aug. 5—1/100 Beechnut 2½ oz. .25 " "
Nov. 14—1/100 Beechnut 2½ oz. .24 " "

Luhrman and Wilbern Tobacco Co.

1904
Jan. 15—1/100 Beechnut 2½ oz. .24 Del. 2% 100 #—1/21/06

1907
92
Sept. 7—3/10 Beechnut 2½ oz. @ 26 Less 8% .23——Del. 2%

From my familiarity with the records of the Thomas C. Jenkins Company and from the fact that practically all of these entries were made by myself, I can state that following the usual practice, they were made in due course of business, on arrival of invoice.

I may further state that I distinctly recall, and can

therefore positively state, that Thomas C. Jenkins Company, during the period embraced by the years 1901 to 1907, inclusive, bought tobacco put up in packages bearing the name, "Beechnut," and with the names of the manufacturers thereon.

I also produce herewith, make a part of this affidavit, and mark as "P. Lorillard Company Exhibit No. 16," a package of "Beechnut" tobacco, such as Thomas C. Jenkins Company has been purchasing from P. Lorillard Company continuously and in great quantities since the year 1915, down to and including the present year of 1920.

I might state that our records do not show any purchases of "Beechnut" tobacco during the years 1908-1914, inclusive.

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 83. Were you tobacco buyer in 1901?

A. No.

XQ. 84. What was your capacity with this house at that time?

A. 1901? Why—what is the first entry there under——

MR. CAVANAGH: That is October 8, 1901.

THE WITNESS: No, the first entry in my writing.

MR. CAVANAGH: That is 1902.

A. Well, at that time, I was probably working on the day books.

XQ. 85. You were a bookkeeper at that time?

A. Yes, on the day books.

XQ. 86. When did you become a buyer?

A. Let's see; I think it was 1914; I think it was shortly after the war began.

XQ. 87. Then you have no personal recollection of the dealings in "Beechnut" tobacco in the period 1901 to 1907, except as shown by these books?

A. Well, this 1902 is my entry here from the invoice. That is, this invoice from this firm here, see, is my entry.

XQ. 88. Who was the buyer at that time?

A. Mr. T. Clifton Jenkins.

XQ. 89. Do you know why the Jenkins Company stopped buying "Beechnut" tobacco after 1907 up to 1915?

A. While the record doesn't show that they did buy it, that record does not prove that they did not buy it. The entries here will show that it was a very small factor in our business. The entries show that we bought it in 100 pound lots; that is a very small item for tobacco, and if we should drop any tobacco that we purchased in 100 pound lots, it is not a factor in our business, accustomed as we are to buy in carload lots. If we should stop buying any tobacco at all that we buy in five or ten case lots, it means nothing at all, because we pick up more than that every day in jobbing trades.

XQ. 90. You have no personal recollection of having stopped buying or why they stopped buying it, or anything of the kind?

A. I don't say that we had stopped buying; the record doesn't prove anything.

XQ. 91. You have no personal recollection?

A. No.

XQ. 92. How long do you preserve your correspondence here?

A. Oh, let's see—maybe two years.

XQ. 93. You destroy everything that is more than two years old?

A. Some records, yes; probably letters, useless letters, etc. There would be some files like this—of course this isn't a correspondence file—this cost record goes back to '97; but our letters would be destroyed every two years—useless letters.

XQ. 94. Supposing you had correspondence with the Weissinger Tobacco Company——

A. We don't have it.

XQ. 95. You never had it?

A. We don't have it.

XQ. 96. Suppose you had had, in 1908-9, in that period, would you be apt to have it?

A. We wouldn't have it at all. We moved over here from Penn Avenue about eleven years ago, and we had a clean-up of files at that time; and then, after coming over here, we put in new filing cases—cleaned out the old stuff then, and it has been gone over every two or three years since. We have been over here eleven years.

XQ. 97. Where is Mr. T. Clifton Jenkins?

A. He left for home about a half hour ago.

XQ. 98. He is still here?

A. Yes.

XQ. 99. You are a wholesale concern?

A. You are speaking of the Thomas C. Jenkins Company? They retired, you see, on April 30th.

XQ. 100. You say you are a wholesale concern?

A. We were a wholesale concern; yes.

XQ. 101. In the period 1901 to 1907?

A. Yes, until 1920.

XQ. 102. Wholesale exclusively?

A. Yes.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 103. Mr. Evans, on what theory are these entries made? Is an entry made every time an article is purchased?

A. Whenever there is any change, either in the size of the case, size of the package, price or terms, or the supplier—whenever there is any change of record necessary to indicate a different person bought from, or a difference, a change in terms, different price, different size package or different size case.

RDQ. 104. So that, so far as this record is concerned, there might have been other purchases of "Beechnut," which are not shown?

A. Yes; this record does not prove that we stopped buying. The entries prove that they were bought at that time.

RE-CROSS-EXAMINATION.

By MR. HINTON:

RXQ. 105. Can I see your last entry here of "Beechnut" tobacco?

A. What is the name of the firm?

MR. CAVANAGH: Luhrmann & Wilbern.

A. Is this it? (Referring to book.) That isn't our last record, you know; that is our last entry in this book. That check mark I put at the end of all the records, when we changed our system over to cards. We started our system and transferred the records over to cards after this.

RXQ. 106. Then, you have additional records beyond this?

A. Yes; do you want to see them?

RXQ. 107. I would like to, if you have them handy. handy.

Witness produces other records, on four cards, which are examined by counsel.

A. I don't have any stock records previous to 1917.

RXQ. 108. You have no other records between this book and 1917?

A. No; the stock cards would have proven that, but they are destroyed. Did you see these? (Referring to cards.)

RXQ. 109. I saw those.

A. I think that is what we had the other day.

RE-RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RRDQ. 110. These cards that you have produced, 1915, 1917 and 1919, show purchases of "Beechnut" from P. Lorillard Company?

A. Yes. That follows the record here, doesn't it? (Referring to book.)

RRDQ. 111. I am not sure.

Witness examines book.

A. When did Lorillard——

RRDQ. 112. 1915.

A. Well, that is probably when Lorillard's started in that size package, I guess—(Referring to card)—different sized cases or something, you see—yes, there you are—they were in 100 pound cases previously.

H. O. EVANS.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
"Beech-Nut."

NOTARY'S CERTIFICATE.

STATE OF PENNSYLVANIA, } *ss.:*
COUNTY OF ALLEGHENY, }

I, Clarence A. Williams, a Notary Public in and for the County of Allegheny, State of Pennsylvania, do hereby certify that the foregoing depositions of W. H. Nichol, Charles C. St. Clair, William M. Gormly, H. H. Arnold, T. F. Coyle and H. O. Evans were taken on behalf of P. Lorillard Company pursuant to agreement and by consent, before me, at Pittsburgh, County of Allegheny and State of Pennsylvania, on the 9th day of June, 1920; that the witnesses were by me each duly sworn, before the commencement of his testimony; that the testimony of each witness was taken, in my presence, in shorthand by Miss Bertha L. Gauvin, a shorthand reporter, and by her reduced to typewriting; that the foregoing pages contain a true and accurate transcript of her stenographic notes; that the opposing parties were represented by counsel during the taking of said testimony; that said testimony was taken at Pittsburgh, Pennsylvania, and was commenced at 11 o'clock A. M. on the 10th day of June, 1920, and was concluded on the same day at about 5.30 o'clock

P. M.; that the deposition of each witness was read to or by such witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Pittsburgh, County of Allegheny, State of Pennsylvania, this 15th day of July, 1920.

CLARENCE A. WILLIAMS,
(Seal.) *Notary Public.*

My commission expires January 19, 1923.

Met pursuant to agreement at Middletown, Ohio, this 10th day of June, 1920.

Present: R. B. CAVANAGH, on behalf of P. Lorillard Co.;
SEBASTIAN HINTON, on behalf of Beech Nut Packing Co.

HERBERT C. BOYKIN,

a witness called on behalf of P. Lorillard Co., being first duly sworn by J. V. Bonnell, Notary Public and acting examiner by consent, deposes and says as follows, and with formal notice of the production of this witness being waived.

Q. 1. Please state your name, age, residence and occupation?

A. Herbert C. Boykin, of lawful age, No. 507 Vandeveer St., Middletown, O., Tobacco Manufacturer, I am General Manager of the P. Lorillard Co., Middletown Branch, at Middletown, Ohio.

Q. 2. What does P. Lorillard Co. manufacture at this branch?

A. Scrap tobacco and plug tobacco and smoking tobacco.

Q. 3. How long have you been engaged in the tobacco manufacturing business?

A. About forty-seven years; a good long while, anyway.

Q. 4. Will you please state with what concerns you have been associated, giving them in order as near as you can recollect?

A. The first concern I worked with was Solomon Hancock of Richmond, Va., about 1872; in 1881 I came here to Middletown, Ohio, with The Wilson McCallay Tobacco Co., in 1902 I came with The American Tobacco Co. and have been right here with this business ever since.

Q. 5. In 1902 when you say you came with The American Tobacco Co., where and under what name was the plant known at that time?

A. This plant we are in at present, which is now and has been since 1911 known as the P. Lorillard Co., Middletown Branch, was when I came here in 1902, known as the P. J. Sorg Branch of The American Tobacco Co., Luhrman & Wilbern Tobacco Co., were located at this plant, but were run as a separate business.

Q. 6. Will you name the brands of tobacco which are manufactured at this P. Lorillard Co., Middletown Branch?

A. Polar Bear, Honest Scrap, Beech Nut, Old Nut, Scrap Iron, Bag Pipe.

Q. 7. How long have you known the Beech Nut brand of tobacco to be manufactured here at this factory at Middletown?

A. Since 1904 if I remember right.

Q. 8. Has it been manufactured every year since that date?

A. No, I think there were four or five or maybe six years when it was not manufactured.

Q. 9. Do you recollect in what years this Beech Nut brand of tobacco was not manufactured?

A. I think it was 1909, 10, 11 and 12, somewhere along in there, I would not be positive.

Q. 10. Do you know why this Beech Nut Tobacco was not manufactured here during that time?

A. Simply for the lack of orders.

Q. 11. Presuming an order had been received, what would you have done?

A. We would have made it.

Q. 12. State whether or not you had on hand at that time the materials necessary for making this Beech Nut tobacco?

A. We did.

Q. 13. What did you have on hand for this purpose?

A. We had the bags, the formula for making the tobacco.

Q. 14. Could you make Beech Nut Tobacco out of formula and bags?

A. Of course we had the tobacco.

Q. 15. I hand you herewith a package which has been introduced in this case as P. Lorillard Co. Exhibit 17 and ask you if you can identify it, and if so tell me what it is?

A. Yes, I identify it as the Beech Nut we made in those days.

Q. 16. Who made it?

A. The Luhrman & Wilbern Tobacco Co.

Q. 17. When you use the expression those days, just exactly when do you mean?

A. The Revenue Stamp showed 1905.

Q. 18. Where was tobacco like this package made?

A. Right here in this factory at Middletown.

Q. 19. How do you know that packages of tobacco like this Exhibit 17 were made here in the factory at Middletown?

A. By the cancellation of the stamp.

Q. 20. Do you personally know that tobacco like that was made here?

A. I could not swear to that, tobacco was made here, but we have every reason to believe it, the cancellation is a Luhrman & Wilbern cancellation.

Q. 21. Were you connected with this factory in 1905?

A. Yes.

Q. 22. What tobacco was made at this factory in 1905?

A. Polar Bear, Beech Nut, Bag Pipe I think was made here.

Q. 23. How was the Beech Nut packed in 1905?

A. In 2½ oz. bags similar to this Exhibit 17, that you have there.

Q. 24. How do you know that Beech Nut Tobacco at that time was packed or put up like Exhibit 17?

A. Because by seeing it manufactured.

Q. 25. How long have you known of Beech Nut Tobacco?

A. I heard of it during Harry Weissinger's time in 1900.

Q. 26. Can you give us a general idea of the amount of Beech Nut Tobacco manufactured and shipped from this Middletown factory at the present time?

A. We have made as much as 150,000 pounds daily, we have also shipped this much and more per day.

Q. 27. State if you can what concern is recognized in the tobacco industry today as the manufacturer of Beech Nut Tobacco?

A. Middletown Branch, P. Lorillard Co.

Q. 28. What company is recognized as the manufacturer of Beech Nut Tobacco?

A. P. Lorillard Company.

(Direct examination closed.)

CROSS-EXAMINATION.

By MR. HINTON:

XQ. 29. Will you please describe what you meant when you said in answer to question 5 that Luhrman & Wilbern Tobacco Co. was run as a separate business?

A. They were bought by the American Tobacco Co. from the Luhrman & Wilbern Tob. Co., Cincinnati, Ohio, and moved to this building, I think, in 1901, and run as a separate business. And under that name for several years after the purchase by the P. Lorillard Company, which was in 1911.

XQ. 30. Do you mean that for several years after P. Lorillard Co. purchased Luhrman & Wilbern Co., P. Lorillard Co. continued to run Luhrman & Wilbern Co. as a separate business?

A. Well, I could not say how they run it.

XQ. 31. You said in your direct examination that the Luhrman & Wilbern Tob. Co. was run as a separate business, I am not interested in question of ownership, of stock or the like, I am interested in the manner in which the Luhrman & Wilbern business was run

at this factory. Will you please explain with reference solely to the operations at this factory, how the Luhrman & Wilbern business was run as a separate business?

A. The business was run separately, all under the management of one company, which at that time was The Continental Tobacco Co.

XQ. 32. Who was manager in 1902?

A. Mr. George Schaefer.

XQ. 33. When did you become manager?

A. In 1911.

XQ. 34. Was the advertising of the brands put out by Luhrman & Wilbern distinct from the other brands made here?

A. Not that I know of.

XQ. 35. Did the placards or posters if there were any circulated to advertise the Luhrman & Wilbern brand contain the name Luhrman & Wilbern?

A. Anything they put out had their name.

XQ. 36. The books were kept separate?

A. Yes.

XQ. 37. Correspondence was kept separate?

A. Yes.

XQ. 38. Was there a special force here in the office and the factory looking after the Luhrman & Wilbern business?

A. Yes.

XQ. 39. Was there a special part of the factory devoted to the manufacture of Luhrman & Wilbern products?

A. Yes, there was, they paid regular rent to the American Tob. Co.

XQ. 40. What was your capacity in this place during the years 1909, 1911 when you began managing?

A. I was superintendent.

XQ. 41. I suppose from the period of 1909 to 1914, inclusive, you received many thousands of orders did you not?

A. I could not answer that question.

XQ. 42. Don't you know as a fact that you did?

A. No.

XQ. 43. How much personal contact in the years 1909 to 1914 did you have with the orders which came in here?

A. I did not see the orders at all.

XQ. 44. What do you base your statement that there were no orders received during this period or part of it for the Beech Nut Tobacco similar to P. Lorillard Exhibit No. 17?

A. Our books will show if we shipped during that time.

XQ. 45. If books would show whether you shipped any, but your books would not show whether any orders were received would they?

A. No.

XQ. 46. May I ask you again then upon what you base your statement that no orders were received for Beech Nut Tobacco, similar to P. Lorillard Exhibit No. 17?

A. We did not manufacture any at that time.

XQ. 47. What was the course of the orders received at this factory?

A. Addressed to the firm and anyone designated to open the mail, the orders come in triplicate and from then it goes to the order man.

XQ. 48. Did such orders ever come to your personal attention in the years 1909 to 1914?

A. Yes, but I do not remember any particular order.

XQ. 49. In how large a batch was this Beech Nut Tobacco subsequently packed to correspond to P. Lorillard Exhibit No. 17, manufactured at this factory during the years 1909 and 1914?

A. There was not any during that time.

XQ. 50. When it was being manufactured, I suppose it was manufactured in batches, was it not?

A. Yes.

XQ. 51. How large were those batches?

A. That depended on the size of the order, from 100 lbs. up.

XQ. 52. Was 100 lbs. the smallest batch?

A. That would be the smallest.

XQ. 53. How much of a stock of bags similar to P. Lorillard Exhibit 17 did you have on hand here after 1909, do you recollect?

A. I could not answer that question, we usually have several million bags.

XQ. 54. Do you mean at the present time?

A. We usually have a millon or so of bags on hand of most any brand.

XQ. 55. Did you ever have occasion to investigate how many bags, corresponding to Lorillard Exhibit No. 17 you had on hand during 1909 and 1914?

A. No.

XQ. 56. I notice that on plaintiff's Exhibit No. 17 Luhrman & Wilbern Tob. Co. are indicated to be the successor of Harry Weissinger Tob. Co., in your knowledge of tobacco sales what was the reason for this statement appearing on this?

A. I cannot answer this question.

XQ. 57. Do you suppose it would have any influence on the sales of the tobacco?

A. I would think that would be the reason.

XQ. 58. In order that customers recognizing the package put out by Harry Weissinger Tobacco Co., P. Lorillard Exhibit No. 14 and would recognize P. Lorillard Exhibit No. 17 as being the same stuff? Would that be the reason?

A. I would think so.

XQ. 59. What becomes of correspondence from jobbers and dealers received at this factory?

A. We keep them so long, and then destroy them.

XQ. 60. How long do you keep them?

A. I do not know.

XQ. 61. Do you follow the same practice with orders?

A. I could not answer this question.

XQ. 62. As far as you know you then still have, except for individual accidents, all the orders which have been received at this factory?

A. I do not know, our bookkeeper could answer those questions.

XQ. 63. I call your attention to a bag of tobacco, P. Lorillard Exhibit No. 16, where was this and similar bags made?

A. All made by the Western Paper Goods Co.

XQ. 64. Where are they located?

A. Cincinnati, Ohio.

XQ. 65. Who got up this bag?

A. I do not know.

XQ. 66. Did you have anything to do with it?

A. Not a thing.

XQ. 67. Where was it gotten up?

A. I do not know that.

XQ. 68. Do you know whether it was gotten up here at Middletown?

A. I know it was not.

XQ. 69. Now Mr. Boykin in what form did you receive instructions then being manager of this factory, to manufacture Scrap Tobacco pack it in bags similar to P. Lorillard Exhibit No. 16, ship it or sell it?

A. They sent Mr. Thomas Smith here to instruct myself how to manufacture this particular brand, we then received orders in the regular way for shipment to different customers.

XQ. 70. Who is Mr. Thomas Smith?

A. Manager of the Marion Branch of the P. Lorillard Co.

XQ. 71. And he told you how to put together the ingredients of this tobacco and pack it similarly to Lorillard Exhibit No. 16?

A. That was his business.

XQ. 72. Then you did not follow the same formula by which you had previously made the tobacco package in P. Lorillard Exhibit No. 17?

A. Neither in tobacco nor package.

XQ. 73. Did you circulate from this factory through the trade, advertising or posters, placards or the like for the purpose of advertising the tobacco package similarly to P. Lorillard Exhibit No. 16.

A. No advertising done that I know of from this factory.

XQ. 74. Did you see any such advertising?

A. Whatever I seen in stores.

XQ. 75. Can you describe it?

A. A girl holding a package, occasionally I see empty cartons in a window.

XQ. 76. Would you say that this tobacco P. L. Exhibit No. 16 was extensively advertised or not?

A. I do not think it needed advertising, the quality of the tobacco was sufficient.

XQ. 77. It became immediately popular did it?

A. Wherever the chewer got a hold of it.

XQ. 78. Coming back to your instructions the manufacturer of this tobacco P. L. Exhibit No. 16 in 1915, were any of these instructions given you in writing?

A. They were from Mr. Thomas Smith.

XQ. 79. I suppose he gave you a new formula in writing and that you subsequently had in addition thereto other correspondence?

A. I had no other correspondence, except I received the formula from Mr. Thos. Smith in writing.

XQ. 80. The bags you got sent here on order originating elsewhere?

A. Yes.

XQ. 81. Mr. Boykin, have you absolutely no idea whatever as to who got up the bag P. L. Exhibit No. 16?

A. I do not know.

XQ. 82. Did you ever hear any talk about that?

A. No.

XQ. 83. Did you ever hear anybody connected with your company make a guess as to why this particular design was selected?

A. I never heard anything.

By Mr. Cavanagh: While counsel for P. Lorillard Co. is glad to give counsel for Beech Nut Packing Co. every latitude in cross-examination, it is not seen that such questions as XQ. 83 are within the scope of a proper cross-examination of this witness. At the time of opening depositions in this case on or about May 19, 1920, Mr. Offield, a partner of Mr. Hinton, and counsel for the Beech Nut Packing Co. was in the P. Lorillard Co. general offices in New York City, when the stipu-

lations covering advertising and the like of the Lorillard Beech Nut brand were entered into, and had he deemed it necessary he could have obtained first named all of the information now sought from this witness, as to the design of the bag, advertising and the like. P. Lorillard Co. has absolutely nothing to conceal in this respect, and if counsel for Beech Nut Packing Co. desires such information, counsel for the P. Lorillard Co. now informs him that upon return to New York he will be glad to obtain this information and furnish it to counsel of Beech Nut when available.

By Mr. Hinton: Mr. Offield is not present, it is therefore requested that such remarks as he may wish to make in this connection may be inserted here in the record. I personally was not in the New York conference nor have I seen or otherwise obtained knowledge of any stipulations such as referred to, immediately above.

XQ. 84. Do you keep here at this factory a museum or collection of all kinds of packages of Scrap Tobacco which have been on the market?

A. No we do not.

XQ. 85. Do you know where there is such a collection?

A. No, I do not, I do not think there is such a one.

By Mr. Hinton: In view of the witness' answers to XQ. 43, 44, 45, 46, 47 and 62, the witness' answer to Q. 10 of the direct examination is objected to as not the best evidence based on hearsay and as being a mere conclusion of the witness.

(Cross-examination closed.)

By Mr. Cavanagh: In reply to Mr. Hinton's statement counsel for Lorillard Co. would say

that obviously the witness properly referred book record matters to the bookkeeper here, and such old records as are available will be produced at the witness Mr. Bowman, and the present witness' testimony from the manufacturing end at the factory appears to be competent.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 87. Both P. Lorillard's Exhibit 17 and P. Lorillard Exhibit No. 16 are made up of Scrap Tobacco, are they not?

A. Yes.

RDQ. 88. Who has charge of the actual tobacco manufacturing of this factory?

A. I have.

(No cross-examination.)

(Deposition closed.)

HERBERT C. BOYKIN.

Middletown, Ohio, June 11, 1920.

Met pursuant to adjournment, parties present as before.

RALPH BOWMAN,

a witness called on behalf of P. Lorillard Co. being first duly sworn deposes and says in answer to questions asked him by Mr. Cavanagh as follows, formal notice of the production of this witness being waived.

Q. 1. State your name, age, residence and occupation?

A. Ralph Bowman, 36 years, No. 601 Tytus Ave., bookkeeper and cost clerk, assistant cashier of P. Lorillard Co., Middletown Branch, Middletown, Ohio.

Q. 2. In what business is P. Lorillard Co. engaged and what does it manufacture here?

A. Manufacturers of Scrap Tobacco, we manufacture Beech Nut, Honest Scrap, Polar Bear, Old Nut, Bag Pipe, Pan Handle, Scrap Iron and Natural Leaf at this factory here in Middletown.

Q. 3. Just what are your duties here at the factory?

A. My duties are to take care of all records.

Q. 4. How long have you been connected with this factory here at Middletown?

A. I have been connected with the factory here at Middletown for the past twelve years, I came to work here about 1908, and at that time the factory was known as the Luhrman & Wilbern Tobacco Co., since about 1911 it has been changed to the P. Lorillard Co., Middletown Branch.

Q. 5. How long to your knowledge has Beech Nut Tobacco been made and shipped from this factory?

A. Beech Nut has been manufactured and shipped from this factory since 1904 to the present time, with the exception of four years, 1911, 12, 13, 14.

Q. 6. Can you produce any books or records or other documentary evidence in connection with your last answer?

A. Yes, I produce books which were kept by our factory Superintendent, Mr. Willer, showing the pounds manufactured for the period from 1904 to 1910, inclusive. The book which I have marked with the letter "A" in red pencil is a stamp record book, which is a book in which a record is kept of the revenue

stamps which are used upon the packages of the various brands of tobacco. For example, in connection with Beech Nut Tobacco I refer to page 88 where the entry Beech Nut 1960 LBS. 15 oz. appears and opposite which I have placed a red check mark. This entry appears under the date of March, 1904. On page 187 appear entries for Beech Nut, under August, 1906, this being one of the last pages of this book. Other entries appear throughout the book intermediate these pages, which will be seen from an examination thereof. The entries in this book "A" extend down to August, 1906. I also produce a stamp record book, which I have marked "B" in red pencil and which begins in September, 1906, and extends down to June, 1910. This is a continuation of book "A." On page 2 of this book "B" I have checked in red pencil an entry referring to "Beech Nut" which appears under the heading date of September, 1906, and on page 270 of this book "B" I have placed a red check opposite an entry relating to Beech Nut which appears under the heading date of April, 1910. Other entries relating to Beech Nut appear throughout this book "B" intermediate this page. I also produce six sheets which were kept in our order department representing the shipments by months and the totals for the year of our various brands. I have fastened all of these sheets together with a brass tag, and have marked the letter "C" thereon, in red pencil, as well as numbering the pages in red pencil. For example will be seen that Beech Nut is shown on page 2 beginning with 1904 to page 4 for 1910.

I also produce a small record book which I have marked "D" in red pencil, and which is a record of shipments. The entries in this small book "D" begin

on the last page and run forward. It will be seen that the book begins with entries about 1901. So far as "Beech Nut" is concerned, on the sixth page from the back of the book, under the date of 1904, appear entries relating to this brand and on the page covering the dates for years 1909 and 1910, and through which I have run a brass tag, appears entries under the name Beech Nut.

Q. 7. In whose handwriting do the entries in these records appear, if you know? In answering this question I wish you would take up these records in the order in which you have produced the same, you may simply refer to these records by the letter by which you have designated them?

A. Book "A" was kept by our Superintendent Mr. Willer, book "B" was also kept by Mr. Willer, the handwriting with which I am familiar. Sheets marked "C" were kept by one of the clerks in our Order Department and I am not familiar with the handwriting. The records shown in book marked "D" were kept by Mr. E. A. Stahl, Mr. Weishaar and Mr. Hall, I am familiar with all these handwritings.

Q. 8. I hand you herewith a package which has been introduced as evidence in this case as P. Lorillard Exhibit 17, and will have to ask you if you can identify the same, and if so tell us what it is?

A. I identify this package of Beech Nut Scrap Tobacco as packed by us during the period from 1904 to 1910.

Q. 9. I hand you herewith package which is in this case as P. Lorillard Co. Exhibit 16, and ask you if you can identify the same and if so tell me what it is?

A. I identify this package of Beech Nut Tobacco as the package which we are now using for this brand,

we have been using this style package since 1915 to the present time.

Q. 10. I hand you a package of sheets which I have fastened together for convenience and marked with the letter "E" in red pencil, and ask if you can tell me what they represent?

A. The package of sheets marked "E" represent copies of invoices to our various customers, referring to Beech Nut brands.

Q. 11. What became of the original of these invoices?

A. The original invoices were forwarded to the customers on date of shipment.

Q. 12. From the standpoint of prominence and volume of sales how does Beech Nut brand, at the present time compare with the other brands which you make and ship from this Middletown factory?

A. We produce more Beech Nut than all of the other brands manufactured here, and the demand is much greater than our production and it is very hard for us to keep up with our orders for this brand.

By Mr. Cavanagh: The books "A," "B" sales sheets "C" and small book "D" and invoice sheets "E" are now offered in evidence, and are marked P. Lorillard Co. Exhibits No. "A," "B," "C," "D," and "E," respectively.

(Direct examination closed.)

Cross-Examination.

By Mr. Hinton:

XQ. 13. In examining the sheets "C" large which you have produced, I notice reference to Beech Nut tobacco, can you say of your own personal knowledge without reference to these sheets that Beech Nut to-

bacco packages corresponding to P. Lorillard Exhibit No. 17 was made at this factory prior to 1911?

A. Yes.

XQ. 14. You have a distinct recollection of this package Exhibit No. 17?

A. Yes.

XQ. 15. At that time a certain part of the factory was devoted to the manufacture of Luhrman & Wilbern Tobacco products, was it not?

A. Yes.

XQ. 16. How long did a special separate part of the factory continue to be devoted to the manufacture of Luhrman & Wilbern products?

A. Until 1911.

XQ. 17. What happened then?

A. The name was changed then to the Middletown Branch, P. Lorillard Co.

XQ. 18. I notice in these sheets that you have produced and marked "C" with reference to Polar Bear, Old Nut, Bag Pipe and Scrap Iron, were these Luhrman & Wilbern products?

A. Yes.

XQ. 19. Is P. Lorillard Co. still manufacturing and selling the four brands just referred to?

A. Yes.

XQ. 20. I purchased last night a bag of Polar Bear Tobacco; you handed me this morning an identical empty bag, is this the bag in which P. Lorillard Co. sells Polar Bear Tobacco?

A. Yes.

XQ. 21. This same tobacco was sold prior to the purchase of Luhrman & Wilbern by P. Lorillard, by the former company, was it not?

A. Yes.

XQ. 22. I wish you would examine the empty bag you have just identified and state how it compares with the bag in which Polar Bear Tobacco was sold by Luhrman & Wilbern?

A. The empty bag used for packing Polar Bear Scrap Tobacco was used by Luhrman & Wilbern Tob. Co. printed the same with exception the words P. Lorillard Co., successor.

By Mr. Hinton: The bag referred to by the witness is produced, offered and introduced into evidence as Beech Nut X-Exhibit No. 1.

XQ. 23. Can you and will you produce at this session a specimen of the Polar Bear bag used by Luhrman & Wilbern Tobacco Co. prior to the acquisition of that company by P. Lorillard Co?

A. We have none of these bags on hand at this time.

By Mr. Hinton: Counsel for P. Lorillard Co. is requested to furnish counsel for Beech Nut Packing Co. with specimens of the bags in which Luhrman & Wilbern sold Polar Bear, Scrap Iron, Old Nut and Bag Pipe.

By Mr. Cavanagh: Counsel for Lorillard Co. will be very glad, indeed, to furnish counsel for Beech Nut Packing Co. with any and all of the above specimens, if the latter are obtainable. On his return to New York he will have a search made and if the specimens turn up we will gladly furnish to counsel.

XQ. 24. I hand you a bag and ask if this is the bag in which P. Lorillard Co. at the present marketing Scrap Iron Tobacco?

A. Yes.

By Mr. Hinton: The bag identified by witness is produced, introduced and offered in evidence as Beech Nut X-Exhibit No. 2.

XQ. 25. How does this bag compare with the bag in which Luhrman & Wilbern offered Scrap Iron Tobacco?

A. I cannot recall whether this bag is made up in the same manner as that used by Luhrman & Wilbern Tobacco Co.

XQ. 26. I am not interested in the fine type concerning the factory No. and notice at the bottom of the bag to which you referred just prior to your answer to XQ. 25 as it appears on the record. Can you not state excluding this fine type whether or not that bag is the same except for the printing P. Lorillard Co. successors, to that bag in which Luhrman & Wilbern offered Scrap Iron Tobacco?

A. If I remember correctly the bag was printed in different colors than now used and did not show P. Lorillard Co. as successors.

XQ. 27. In what colors was the Luhrman & Wilbern Scrap Iron bag printed?

A. I do not remember just what colors these bags were printed in at that time.

XQ. 28. You apparently have a very clear recollection of exactly the kind of packages in which Beech Nut Tobacco was packaged by Luhrman & Wilbern, according to these sheets "C" and other records appears that Scrap Iron sold considerably in excess of Beech Nut. How do you account for the fact that your recollection of the old Scrap Iron label is so vague and that of Beech Nut so clear?

Mr. Cavanagh now hands the witness the

large sheets "C" and he is instructed that he may examine these sheets in connection with XQ. 28 and ascertain if the statement of what those records show, as set forth by the counsel of the Beech Nut Co. is correct.

A. I recall the style of the Beech Nut bag as being the one used at that time, the only difference in the Scrap Iron bag is the colors used in printing.

XQ. 29. What were those colors?

A. I do not remember what the colors were.

XQ. 30. You have not available here any of those Old Scrap Iron bags used by Luhrman & Wilbern?

A. Not to my knowledge.

XQ. 31. Will you please investigate and see if you can find any counsel for P. Lorillard having expressed his willingness to have these produced?

A. Yes.

XQ. 32. Coming to a bag which bears the name Old Nut, is this the bag in which P. Lorillard is now selling Old Nut tobacco?

A. Yes.

(The bag identified by the witness is produced, introduced and offered as Beech Nut X-Exhibit No. 3.)

XQ. 32a. You have just produced a bag marked Polar Bear, is this the bag in which Luhrman & Wilbern Tobacco Co. sold this tobacco?

A. Yes.

(The bag identified by the witness is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 1-A.)

XQ. 33. You have just handed me a bag marked Scrap Iron Scrap which is substantially larger than

Beech Nut Exhibit No. 2. Will you please state what the bag referred to is?

A. This bag was used first in the manufacture of Scrap Iron Scrap tobacco by Luhrman & Wilbern Tobacco Co., and was later changed to the different style in printing.

(The bag identified by the witness is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 2-A.)

XQ. 34. According to your recollection did not Luhrman & Wilbern put out Scrap Iron tobacco in a package containing the name Luhrman & Wilbern prior to the time P. Lorillard put out the package X Exhibit No. 2?

A. There was a bag used with the Luhrman & Wilbern Tobacco Co. name thereon with the exception of P. Lorillard Co. successors, at that time it was printed stock owned by P. Lorillard Co.

XQ. 35. This last bag to which you have just referred was otherwise identical except possibly for the fine type referring to the Factory No. and so on, with Beech Nut X Exhibit No. 2, was it not?

A. Yes.

XQ. 36. Now what I want to know is was there not a bag substantially identical with X Exhibit No. 2 except that it did not contain the name P. Lorillard Co.

A. Yes.

XQ. 37. And this last bag which you have described in answer to XQ. 36 immediately preceded on the market Beech Nut X Exhibit No. 2. Did it not?

A. Yes.

XQ. 38. You have stated that Beech Nut X Exhibit No. 3 is a bag in which P. Lorillard puts up Old

Nut tobacco; I understand that you have been unable to locate a specimen of the bag in which Luhrman & Wilbern put up this brand of tobacco. Is this correct?

A. Yes.

XQ. 39. Will you please state how the bag in which Luhrman & Wilbern put out Old Nut tobacco compared with the bag X Exhibit No. 3?

A. To the best of my knowledge Luhrman & Wilbern used the same bag which we are now using.

XQ. 40. I hand you a bag marked Bag Pipe, and ask you to state whether or not this is the bag in which P. Lorillard is now selling Bag Pipe tobacco?

A. Yes it is.

XQ. 41. I understand that you have been unable to find a specimen of the bag in which Luhrman & Wilbern put out Bag Pipe tobacco, is this correct?

A. Yes.

XQ. 42. Will you please state how the bag in which Luhrman & Wilbern put out Bag Pipe Tobacco compared with the bag you have just identified and which is produced, introduced and offered in evidence as Beech Nut X Exhibit No. 4?

A. To the best of my knowledge this is the same bag used by the Luhrman & Wilbern Tob. Co.

XQ. 43. To sum this up therefore, we have five brands altogether in which P. Lorillard is claimed to have succeeded Luhrman & Wilbern as follows: Polar Bear, Scrap Iron, Old Nut, Bag Pipe and Beech Nut. With respect to Polar Bear, Old Nut, Bag Pipe, and Scrap Iron P. Lorillard used the same bag as immediately prior to the change in the business by Luhrman & Wilbern except that where the old bag bore the name Luhrman & Wilbern, the name P. Lorillard was added thereto as successor.

With respect to Beech Nut the old package P. Lorillard Exhibit No. 17 was dropped and the package P. Lorillard Exhibit No. 16, adopted, is that correct?

By Mr. Cavanagh: The question is objected to as indefinite in the use of the word "dropped" if counsel is referring to the general dress of the package then he is asked to state so.

A. Yes.

XQ. 45. I understand that Beech Nut, Polar Bear, Scrap Iron, Bag Pipe and Old Nut were all the Luhrman & Wilbern Scrap Tobaccos manufactured at this factory, is that correct?

A. Yes.

XQ. 46. What other brands of Scrap Tobacco were manufactured at this factory prior to the acquisition of Luhrman & Wilbern by P. Lorillard Co.?

A. Honest Scrap, Natural Leaf, Pan Handle.

XQ. 47. To whom did those brands belong prior to the time that P. Lorillard Co. acquired Luhrman & Wilbern?

A. I do not know.

XQ. 48. Were any of these three brands owned by P. Lorillard before the acquisition of Luhrman & Wilbern by P. Lorillard?

A. Not to my knowledge.

XQ. 49. They were owned then by some company other than Luhrman & Wilbern or P. Lorillard?

A. Yes.

XQ. 50. Was any change made in the Honest Scrap package at the time of the acquisition by P. Lorillard of this brand?

A. Not to my knowledge.

XQ. 51. Honest Scrap was always a big seller, was it not, since your connection with the business?

A. Yes.

XQ. 52. Have you not as definite a recollection of the Honest Scrap packages as you have exhibited with respect to Bag Pipe, Polar Bear, Scrap Iron and Old Nut?

A. Yes, but cannot recall all the printing as shown on the bags.

XQ. 53. You mean the fine type referring to the factory number and manufacturer's notice, if so let us disregard this entirely?

A. I do not refer just to the manufacturer's caution on these, but all of the printing on the bag.

XQ. 54. As a matter of fact, you are quite sure, are you not, that at the time P. Lorillard acquired Honest Scrap no substantial change was made in the packing?

A. Not to my knowledge.

XQ. 55. Is the same true of Pan Handle?

A. Yes.

XQ. 56. And Natural Leaf?

A. Yes.

XQ. 57. Mr. Boykin referred yesterday to a bookkeeper who was expected to testify today; are you the bookkeeper?

A. Yes.

XQ. 58. Do you know whether the bags for Bag Pipe, Polar Bear, Old Nut and Scrap Iron were ordered from this factory after P. Lorillard acquired these brands, or were they ordered from New York?

A. Our requisitions are forwarded to our Supply Dept. for execution in New York City.

XQ. 59. Did you have anything whatever to do with getting up the package P. Lorillard Exhibit No. 16?

A. No.

XQ. 60. Did you ever hear any statement made by your business associates as to why this particular package was selected?

A. No.

XQ. 61. We have discussed a total of eight brands of tobacco; how many brands altogether do you make at this factory?

A. Eight brands—Beech Nut, Honest Scrap, Polar Bear, Bag Pipe, Pan Handle, Scrap Iron, Old Nut and Natural Leaf.

XQ. 62. You have nothing to do with the actual manufacture of tobacco, have you?

A. No.

XQ. 63. Do you know whether the formulas of Bag Pipe, Polar Bear, Old Nut and Scrap Iron or any of these was changed when P. Lorillard acquired these brands?

A. Not to my knowledge.

By Mr. Cavanagh: Question objected to as incompetent, because the witness stated that he had nothing to do with the manufacture of these brands; it is immaterial and irrelevant because it does not relate to this issue, which is on the trademark "Beech Nut" in an opposition, and furthermore it is not proper cross-examination because it is without the scope of the direct examination.

By Mr. Hinton: In answer to Q. 5, Q. 8 and other questions of the direct examination the witness has testified his direct personal knowledge of the fact of manufacture, without reference to

records, and furthermore from the witness' intimate associations with this business he unquestionably has knowledge of many details of the business, besides those over which he has direct personal supervision.

XQ. 64. As a matter of fact, if there had been any change in the formulas of Bag Pipe, Old Nut, Scrap Iron and Polar Bear, at the time P. Lorillard acquired those brands, you would through your general familiarity with this business have known about it, would you not?

A. No.

XQ. 65. Have you ever heard anything during your association with this business, which has made you believe that the formulas of the four brands just referred to were changed at the time of their acquisition by P. Lorillard?

A. No.

By Mr. Cavanagh: Same objection as to XQ. 63 and it is stipulated that this objection will stand as to all similar questions along this line.

XQ. 66. In answer to XQ. 58 you said that your requisitions are forwarded to the Supply Dept. in New York, how long has this practice been carried out?

A. Ever since I have been employed here.

XQ. 67. And when P. Lorillard acquired the eight brands you have named in answer to XQ. 61, were all these brands except Beech Nut you simply continued to requisition bags as you had before; is that correct?

A. Yes.

XQ. 68. And with respect to Beech Nut, all you know about it in this connection is that when instructions were received in 1915 to make and sell or ship this tobacco, the bags similar to P. Lorillard Exhibit

No. 16 were sent from New York or on order originating in New York with which you had nothing to do; is that correct?

A. This is a peculiar question. Our requisitions are forwarded to our Supply Dept. for execution regardless of the style material, as we order only by the name and brand, specifying what kind of material.

XQ. 69. What do you mean by material?

A. So many Beech Nut bags, cartons or containers.

XQ. 70. Do you happen to remember whether your first order or lot of bags corresponding to P. Lorillard Exhibit 16 (the present Beech Nut package) were received here on a requisition for Beech Nut bags sent by you to New York, or whether the first order or shipment of these bags came to you without requisition?

A. I do not remember.

(Counsel for P. Lorillard Co. states that during the noon recess he had the witness make a search for old bags to comply with the request made in the morning by counsel for Beech Nut Co.; that after search the witness produced the Scrap Iron bag, Beech Nut Exhibit No. 2-A, and he now produces two additional bags which counsel for P. Lorillard will hand to counsel for Beech Nut Packing Co. with the statement that before resuming his deposition, just after the recess the witness showed these two additional bags to P. Lorillard's counsel, who glancing at the same casually saw that they both had printed thereon the name P. Lorillard Co., and presuming that they were merely substantial duplicates of X-Exhibit No. 2, did not consider them to be any more

than repetitions. However, in view of the subsequent cross-examination he has called the counsel of Beech Nut attention to these two bags and now hands them to him for such use as he may desire.)

By Mr. Hinton: The two bags just referred to are produced, introduced and offered in evidence as X-Exhibit No. 2-C, and Beech Nut X-Exhibit No. 2-D, Beech Nut X-Exhibit No. 2-C, bearing the name Luhrman & Wilbern Tob. Co., with a rubber stamp thereon reading "Stock owned by P. Lorillard Co."; X-Exhibit No. 2-D having the same legend printed thereon.

XQ. 71. Your attention being invited to Beech Nut X Exhibit No. 2 C, is it not a fact that this is the package in which Luhrman & Wilbern sold Scrap Iron tobacco, except that X-Exhibit No. 2-C bears a rubber stamp notice "Stock owned by P. Lorillard Co." prior to the acquisition by P. Lorillard of that stock—I mean immediately prior to that acquisition?

A. Yes, it is.

XQ. 72. Then to get this thing straight, Luhrman & Wilbern first sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-A; they next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-B, without the rubber stamp; then Lorillard sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-C, Lorillard next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2-D, Lorillard next sold Scrap Iron in a package like Beech Nut X-Exhibit No. 2, which is the present style of package; is this correct?

A. Yes.

XQ. 73. At the beginning of your cross-examination XQ. 24 and following you testified that the package of Scrap Iron tobacco sold by Luhrman & Wilbern

was, you believed, of different coloring from that of Beech Nut X-Exhibit No. 2, the present Scrap Iron package. You were asked to look for the old labels in order to refresh your recollection during the recess, and when we convened you produced Beech Nut X-Exhibit No. 2-A, which is not colored differently from Beech Nut X-Exhibit No. 2; at the end of your cross-examination you produced Beech Nut X-Exhibit No. 2-C and 2-D which have the same coloring as Beech Nut X-Exhibit No. 2. This prompts me to ask you if in the search you made during the recess you found any old bags used for Bag Pipe, Polar Bear or Old Nut, which you did not produce when we convened?

A. During my search I found Polar Bear bags which were used by Luhrman & Wilbern Tob. Co., but did not find any Bag Pipe or Old Nut bags. The Polar Bear bags were handed to Mr. Hinton.

(No redirect examination.)

(Deposition closed.)

RALPH BOWMAN.

By MR. HINTON: Counsel for P. Lorillard is requested to furnish counsel for Beech Nut the specimens of the bags used for Honest Scrap, Natural Leaf, and Pan Handle tobaccos prior to and after the acquisition of these brands by P. Lorillard.

By MR. CAVANAGH: While not acknowledging the right of counsel for Beech Nut Co. to make this request, as all this appears to be immaterial to the present issue, counsel for P. Lorillard Co. assures counsel for Beech Nut Co. that he will be glad to oblige him in this or any similar request if it is within his power to do so.

(Adjourned subject to notice.)

IN THE UNITED STATES PATENT OFFICE.

The P. Lorillard Company, Contestant,

v.

Beech-Nut Packing Company, Contestee.

Trade-Mark Opposition No. 2805.
"Beech Nut."

NOTARY'S CERTIFICATE.

STATE OF OHIO,
COUNTY OF BUTLER, } *ss.:*

I, J. V. Bunnell, a Notary Public, in and for the County of Butler, State of Ohio, do hereby certify that the foregoing depositions of Herbert C. Boykin and Ralph Bowman were taken on behalf of P. Lorillard Company pursuant to agreement, and by consent, before me, at the factory of P. Lorillard Company, Middletown Branch, in Middletown, County of Butler, State of Ohio, on the 10th and 11th days of June, 1920; that the said witnesses were by me each duly sworn, before the commencement of his testimony; that the testimony of each one was written out by a typist, Miss McMahon, in my presence; that the opposing party was represented by counsel during the taking of said testimony; that said testimony was taken at Middletown, Ohio, and was commenced at 2 o'clock on the 10th day of June, 1920, and was concluded on the 11th day of June, 1920; that the deposition was read by or

to each witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, or interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Middletown, County of Butler, State of Ohio, this 10th day of July, 1920.

J. V. BUNNELL,
Notary Public.

(Seal.)

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

DEPOSITIONS OF WITNESSES.

Depositions taken on behalf of the contestant, The P. Lorillard Company, pursuant to notice, before Clarence E. Walker, a Notary Public within and for the County of Jefferson and State of Kentucky, at the office of the Franklin Printing Company, No. 416 West Main Street, Louisville, Jefferson County, Kentucky, beginning on the 15th day of June, 1920, at 10 o'clock A. M.

Present: R. B. CAVANAGH, for Meyers, Cavanagh and Hyde;
CHARLES G. MIDDLETON, for Humphrey, Crawford & Middleton, attorneys for contestant, The P. Lorillard Company;
SEBASTIAN HINTON, for Offield, Poole & Hinton, attorneys for contestee, Beech Nut Packing Company.

WADE SHELTMAN,

called on behalf of the contestant, The P. Lorillard Company, being first duly sworn, in answer to questions propounded to him by Mr. R. B. Cavanagh, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Wade Sheltman; I am in my sixty-second year; I reside at No. 2227 Alta Avenue, Louisville, Kentucky; I am a printer.

Q. 2. With what concern are you connected?

A. The Franklin Printing Company.

Q. 3. In what capacity?

A. I am President and Treasurer now.

Q. 4. How long have you been connected with the Franklin Printing Company, of Louisville, Kentucky?

A. I think it is twenty-eight years. The concern has been incorporated twenty-seven years. We ran a year or two before incorporating.

Q. 5. Can you state whether or not your concern, the Franklin Printing Company, of Louisville, Kentucky, ever did any printing for The Harry Weissinger Tobacco Company, of Louisville?

A. We did.

Q. 6. Can you produce any books or records in

support of or in connection with your last answer, and by this question I have particular reference to any printing in connection with the Beech Nut brand of the Harry Weissinger Tobacco Company?

A. I can. (The witness here produced a large Sales Journal).

Q. 7. What is this book?

A. This is a Sales Journal.

Q. 8. What dates or period does this Sales Journal cover?

A. Commencing June 15, 1896, and ending with October 30, 1897.

Q. 9. Is this a book of original entry?

A. It is.

Q. 10. Was it kept in the regular order of business?

A. Yes.

Q. 11. Does it form a part of the regular records of this company?

A. It is a part of the regular records of this company.

Q. 12. Will you turn to this record and read into your deposition any entries you may find therein referring to printing done for The Harry Weissinger Tobacco Company in connection with the Beech Nut brand?

A. (Reading).

April 7, 97. H. W. Tobacco Co. 10 M. Beech Nut wrappers 7.50 — 7.50

June 15, 97. H. W. Tob. Co. 5000 blue caps for — 7.50

25000 Three States Mixture Slips — 4.00

5000 yellow price lists	7.50	
1200 typewriter letters	2.00	
2500 Beech Nut wrappers	3.00	24.00

June 28, 97. H. W. Tob. Co. 10 M. salmon numbers 3.20
1 pck 10 M. Beech Nut wrappers 5.00 8.20

July 9, 97. 2000 labels Fig. 4 (Beech Nut boxes)
2000 labels Fig. 2 (Beech Nut boxes) 1.00 1.00

August 9, 97. H. W. Tob. Co.
10 M. Beech Nut Wrappers 2 oz 5.00 5.

It is stipulated by and between counsel for the respective parties hereto that the above is a true copy of the entries appearing in the book produced by the witness; and the production of the original book in evidence is waived.

Q. 13. Please state, if you can, what "H. W. Tob. Co." means?

A. Harry Weissinger Tobacco Company.

Q. 14. Where was that concern, The Harry Weissinger Tobacco Company, located?

A. It was located in Louisville, Kentucky, on Floyd Street, between Breckinridge and Caldwell Streets.

Q. 15. Will you please look at the entries in the original book, which you have read into the record, and state in whose handwriting those entries appear?

A. The entry of April 7, 97, is in the handwriting of my sister, Miss Ethel Sheltman, who was our book-

keeper at that time. The entry of June 15, 97, looks like my handwriting. The entry of June 28, 97, looks like mine.

The entry of July 9th, 97, is my sister, Ethel's, writing.

The entry of August 9, 97, I think is my handwriting.

Q. 16. To the best of your knowledge were those goods or this printing delivered to the Harry Weissing Tobacco Company?

A. Yes.

CROSS-EXAMINED BY MR. SEBASTIAN HINTON FOR THE BEECH NUT PACKING COMPANY.

XQ. 17. According to your records the sale of these printed wrappers stopped in 1897; did it? I mean the Beech Nut wrappers such as appear in the entries above read into the record?

A. Yes, sir.

XQ. 18. What does "wrapper" mean?

A. I don't know exactly how they used it, but it was to enclose tobacco. It means just what the word expresses. If you were to go down to one of these tobacco stores you would find a package of tobacco put up in a wrapper and when the wrappers were originally printed they were flat sheets and in some way they fold them up into a package and paste the ends together and there is a tight package of tobacco. I don't know how they do it, but I know they do it.

XQ. 19. You have no personal recollection of and had no personal connection with the actual sale of Beech Nut Tobacco, did you?

A. No, sir; none at all.

(No redirect examination.)

WADE SHELTMAN.

(The further taking of these depositions was then adjourned by consent to the office of The Al Gans Tobacco Co., Sixth Street, between Main and Market Streets, Louisville, Ky.)

ALBERT P. GANS,

a witness called on behalf of The P. Lorillard Company, being first duly sworn, in answer to questions propounded to him by Mr. R. B. Cavanagh, deposes as follows:

Q. 1. Please state your name, age, residence and occupation.

A. My name is Albert P. Gans; my age is forty-eight; my residence is 119 West Oak Street, Louisville, Kentucky; my occupation, President of the Al Gans Cigar and Tobacco Company.

Q. 2. How long have you been in the tobacco business?

A. Steadily for thirty-three years.

Q. 3. With what concern were you connected?

A. The C. C. Bickel Company up until March 31, 1920, and from that time to the present, here.

Q. 4. For how long a time were you with the C. C. Bickel Company?

A. For thirty-three years.

Q. 5. In what line of business was the C. C. Bickel Company?

A. They were manufacturers of cigars and jobbers of tobacco.

Q. 6. Did you know of the concern, The Harry Weissinger Tobacco Company of Louisville?

A. I did. We bought goods from them.

Q. 7. Can you name some of the brands of goods you bought from the Harry Weissinger Tobacco Company?

A. Yes. "Hold Fast," "Burr Oak," "Weissinger Special," lots of odd brands and various smoking tobaccos. Those were the standard brands and sometimes there were brands that we bought only very little of.

Q. 8. Can you recall any other brand that you bought from them?

A. Yes; there was one called Curly Cut tobacco or thread cut called Burr Oak—no, Burr Oak was a plug —that was Beech Nut.

Q. 9. Will you please state in your own way just what you recall of this brand and what you recall of the circumstances of purchasing Beech Nut tobacco from Harry Weissinger Tobacco Company?

A. There was only one lot of Beech Nut tobacco that I remember we ever bought and that was away back there. That was about 1897, I think. It was merely a lot they wanted to introduce around town. I think they must have just started it. They sold it around town and I purchased one gross.

Q. 10. Who sold it around town?

A. Their man, David Bell.

Q. 11. What was David Bell's occupation?

A. He was a salesman for the Weissinger Tobacco Company.

Q. 12. Do you know what became of David Bell?

A. Dead. He died several years ago.

Q. 13. How do you fix this date of purchase as about 1897?

A. From personalities, you might say. I was married in 1900 and I married a young lady who was with the Weissinger Tobacco Company and this was about three years prior to that.

Q. 14. Can you describe how this thread cut tobacco was packaged?

A. My recollection is that it was a rolled package; it was a long thin cut tobacco known then as thread cut. It was not in a bag, but it was rolled with a string around it and the stamp was pasted over the string. There is some tobacco on the market now and, in fact, was then that is similar, called Five Bros.

Q. 15. I show you a package marked "Five Bros. Pipe Smoking Tobacco, John Finzer and Bros., Louisville, Ky." Is that the Five Bros. package to which you refer as being similar to Beech Nut?

A. Yes, sir.

Q. 16. I hand you herewith a piece of paper which I have marked for identification "P. Lorillard Company, Exhibit F." Do you recognize this sheet and if you do, let us know what you think about it?

A. I would say that is about the style of sheet used in rolling this tobacco. It is not a bag. They just use paper and they roll it up in a tight package as you can see here. It is very evident that this was the kind of paper they used. My recollection is that this is about the style of paper that was on that. I do not know what was the marking, but my recollection is it had a squirrel over the top. That may have been torn off—it does not show here.

Q. 17. How was that package folded—can you show me with the piece you have in your hand?

A. It would fold over so that the printing would

show on the various sides. The ends turned in this way and there was a string placed around it with a stamp covering the string and the ends so as to make it a sealed package.

Q. 18. What became of this Beech Nut special cut tobacco that you purchased from the Harry Weissinger Tobacco Company for Bickel?

A. It was sold here in town.

Q. 19. You sold it?

A. Yes, sir. There was only one little lot that we bought and that was sold here in the city. There was very little of this thread cut tobacco sold here in the city. The majority of it was sold around mining camps. It did not prove successful in the general market of Louisville.

Q. 20. Why was that?

A. It was the style of the tobacco—the thread cut. It never has been popular and is not today—there is very little of it sold locally.

Q. 21. Where is it sold?

A. Principally around the mining sections—that is where we sell it—around the Hazard and the Lynch mines. The city trade buys very little of it.

Q. 22. What is such thread cut tobacco used for?

A. Pipe smoking.

Q. 23. Do they ever chew it?

A. I doubt it. It is put up for and intended for pipe smoking.

Q. 24. Did you ever hear why Weissinger put out this Beech Nut thread cut tobacco?

A. It was said at that time it was in competition with Five Bros.

MR. HINTON: We object to this as hearsay.

CROSS-EXAMINED BY MR. SEBASTIAN HINTON FOR THE BEECH NUT PACKING COMPANY.

XQ. 25. Do you know what happened to that old Beech Nut brand that you have been describing?

A. No, sir; I do not.

XQ. 26. Did it continue on the market?

A. I don't know.

XQ. 27. You were in the tobacco business for many years after 1896 in Louisville, were you not?

A. Yes, sir; up until the present time continuously.

XQ. 28. Did you continue to sell this old Beech Nut tobacco?

A. Of that style—no.

XQ. 29. Did you continue to sell any other style of Beech Nut tobacco?

A. Not until the—I believe it was—the Lorillard came out after that with a Beech Nut Scrap of an entirely different style.

XQ. 30. Who made this Beech Nut Scrap?

A. The one that I can recollect now is Lorillard, but there was some one prior to that, one of their factories; I don't know under what name, but Lorillard is one that I recollect of making Beech Nut Scrap.

XQ. 31. The only Beech Nut Scrap you remember is the Lorillard Beech Nut Scrap?

A. As scrap tobacco. The other was a different style. It was what was known as thread cut.

XQ. 32. How is that Lorillard Beech Nut Scrap packaged?

A. In a regular bag.

XQ. 33. Would you say that that bag was in any

way similar to this Lorillard Exhibit F about which you have testified?

A. Similar to that? No.

XQ. 34. Was there to your knowledge any connection between the Lorillard Beech Nut Scrap and the Harry Weissinger brand?

A. Nothing more than that the Weissinger Company was taken over by the American Tobacco Company which controlled the Lorillard Company.

XQ. 35. How long has this Beech Nut tobacco been off the market in this territory?

A. I did not know that it was off the market. It did not sell in the local trade.

XQ. 36. I am speaking now about your personal recollection. You have testified that this Beech Nut tobacco, Exhibit F, was sold in Louisville for your store and that subsequently there appeared a Lorillard Beech Nut Scrap.

A. Not at that time; no.

XQ. 37. How long was that interval between those two sales about which you testified?

A. I would say several years elapsed between those times.

XQ. 38. Do you know of any other brand which was previously manufactured by any other manufacturer which was taken over by Lorillard subsequently?

A. Other brands?

XQ. 39. Were there other brands previously manufactured by other manufacturers taken over by Lorillard?

A. Do you mean any specific brand; a particular style of tobacco?

XQ. 40. Yes; any name of tobacco.

A. That was taken over by Lorillard?

XQ. 41. Yes.

A. I don't know whether it was taken over by Lorillard. They were all taken over by the American Tobacco Company. They took in all the brands of Finzer Bros. and of the National Tobacco Works and of Weissinger and also the old Monarch Tobacco Company. They took over all of them. Some of them may have been continued and some of them may have been discontinued. I don't know about that.

XQ. 42. Have you a definite recollection of the packages in which various brands with which you are familiar were offered to the public? In other words, can you remember what kind of packages these old brands were offered to the public in?

A. What brand?

XQ. 43. Polar Bear.

A. Polar Bear was in a package like it is today, but possibly more weight to it.

XQ. 44. The description of the package was the same?

A. Yes; that is my recollection.

XQ. 45. How about Scrap Iron?

A. I don't know anything about that.

XQ. 46. Old Nut?

A. It does not sell and never has.

XQ. 47. How about Big Pipe?

A. That is not sold.

XQ. 48. How about Honest Scrap?

A. That is about the same style of package—a red package—red bag.

XQ. 49. In other words, the bag was not changed in its printing or description?

A. Honest Scrap has only been on this market a few years.

XQ. 50. How long?

A. Oh, I would say about five or six years.

XQ. 51. Are you familiar with Pan Handle?

A. No, sir.

XQ. 52. Natural Leaf?

A. No, sir.

XQ. 53. The Murad Cigarettes were taken over by Lorillard?

A. No, sir; I think that was a creation of Lorillards.

MR. CAVANAGH: This is objected to as not being proper cross-examination, it being beyond the scope of anything testified to on the direct examination and it is stipulated that this objection may stand to all similar questions.

MR. HINTON: It is certainly proper for counsel to test the recollection of a witness who has been called in direct to testify about a package of which there was a very small sale of tobacco in 1896 and 1897.

MR. CAVANAGH: Counsel is certainly entitled to cross-examine the witness to test his recollection on anything relating to anything to which he has testified on direct but not upon any matter which the direct examination has not shown him to be familiar with.

XQ. 54. How about Egyptian Deities?

A. I think that was also one of their original brands.

XQ. 55. Will you, for the purpose of refreshing your recollection, be kind enough to examine those

posters which are immediately behind you and look at the pictures of Murad and Egyptian Deities which are on those posters. Look at them and see if they refresh your recollection?

A. What do you want to know about them?

XQ. 56. Did you see on those posters which you have examined the name of S. Anargyros?

A. Yes, which was a part of Lorillard.

XQ. 57. Underneath that "Capital stock owned by Lorillard."

A. Yes. S. Anargyros was one of the branches of Lorillard at the time and is still run that way. They are billed under the Anargyros but the bills are paid to Lorillard. They have always kept them that way.

XQ. 58. You mean there never was any S. Anargyros?

A. Oh, yes.

XQ. 59. Independent of Lorillard?

A. Originally a number of years ago. "Deities" was one of their brands, but I think "Murad" was created afterwards. "Deities" was one of the old Anargyros brands.

XQ. 60. If "Deities" was one of the old Anargyros brands and if it was subsequently taken over by Lorillard and when it was taken over the same style of package was used by Lorillard as had been used by Anargyros with the exception of the words "Capital stock owned by Lorillard" could the difference be distinguished?

A. That would be impossible except for some one who manufactured it or handled it and was distinctly familiar with it. I am taking it in a general way as it comes to me. Some incident may bring our attention

to a particular thing and impress it on our memory when generally it may look alike and we might not take in the difference.

XQ. 61. But so far as you know it was the same package?

A. There might be a little difference in the color but generally——

XQ. 62. But generally it was the same package?

A. Yes.

XQ. 63. I show you two bags "Beech Nut Cross Exhibit No. 1 and Beech Nut Cross Exhibit No. 1a" used for Polar Bear tobacco and I call your attention to the fact that these bags are identical except that Cross Exhibit No. 1 contains at the bottom of the panel "P. Lorillard Company, Successor." That is true, is it not?

A. That is one of Luhrman & Wilbern's old brands. Now, what about this?

XQ. 64. Why do you suppose that same bag was used by the Lorillard Company when the brand was taken over from Luhrman & Wilbern?

MR. CAVANAGH: Objected to as calling for an opinion on the part of the witness who is not connected with Lorillard & Company and is not presumed to be within the scope of his knowledge.

MR. HINTON: The witness is familiar with the tobacco business.

A. There may have been various reasons for that. So far as the differences in the packages, there may be a little difference. A firm putting up scrap will sometimes get out some bags that are years back. While the general form is the same if you put the bags together you will find a difference in every one.

XQ. 65. Why do you preserve the same general form?

A. Why?

XQ. 66. Yes?

A. When you establish a thing you want to keep it before the public.

MR. CAVANAGH: That is objected to for the same reason as heretofore.

MR. HINTON: I will stipulate that that same objection will be made to all similar questions.

XQ. 67. Would you say offhand that that is the reason that these two polar bear bags are somewhat similar for the reasons you have just given—for advertising purposes?

A. I would not say because I don't know what their reasons were.

XQ. 68. But your reason, so far as you are concerned, for keeping to the same style package is that you want the customers who like the brand in question to be able to get continuously the same general style of package?

A. That is so in many instances. In other instances where there is a certain thing that does not take, we change the style of package entirely but may still use the same name. That often happens. We have done that on cigars.

XQ. 69. But in general if you want to continue the reputation and good will of any brand, you will preserve the old style of package—generally speaking?

A. Generally speaking.

XQ. 70. Can you call to mind as the result of the study you have given the subject this last few minutes any other brands taken over by P. Lorillard Company

from other manufacturers in addition to those we have mentioned?

A. I could not as to the P. Lorillard Company because it was all taken over by the American Tobacco Company and afterwards the American divided up the brands and some brand of some one manufacturer might be divided among three companies.

XQ. 71. About what time, according to your recollection, was the change made from Beech Nut Thread tobacco to Beech Nut Scrap—have you any recollection as to that?

A. I don't know anything about that.

XQ. 71. In your experience as a retail salesman, have you sold other products than tobacco—products of various kinds?

A. I would not be a tobacco salesman if I had not sold any.

XQ. 72. I mean tobacco products generally—pipes and things?

A. I don't get your question.

XQ. 73. Have you sold groceries?

A. No, sir.

XQ. 74. You have never sold anything but what would come under the head of a tobacco salesman?

A. I have not been a salesman generally. I have been more of a buyer.

XQ. 75. You did not have very much to do with selling over the counter?

A. No, sir; I was a buyer mostly.

XQ. 76. You are familiar, of course, with the present Beech Nut Scrap tobacco put out by the P. Lorillard Company?

A. Yes, sir.

XQ. 77. Can you tell me to what extent this tobacco has been advertised in this territory?

A. Very extensively.

XQ. 78. In what form?

A. In the way of signs and window displays. They had men here working. They had quite a crew here several times placing it in several forms in the different stores. It has become one of the biggest sellers in scrap tobacco here.

XQ. 79. Has there been any particular periodical advertising in the newspapers that you are familiar with?

A. I don't remember of seeing anything in the newspapers. It was on signs and window displays and posters and things of that sort.

MR. CAVANAGH: Counsel for P. Lorillard Company now introduces in evidence a package of Five Bros. tobacco produced during the examination of this witness and the Notary is asked to mark same Exhibit G.

(No re-examination.)

MR. HINTON: One more question:

XQ. 80. I notice that Exhibit G has on it "John Finzer & Brothers" and underneath "The American Tobacco Company, Successor." Can you state from your recollection whether the preceding Five Bros. Tobacco was the same general character of package but without the "The American Tobacco Company, Successor" underneath?

A. In general appearance, yes. The carton was marked different from what it is today because the original Five Bros. showed the portraits of the five Fizer Brothers and now they have five Horses Heads.

The general appearance was about the same though I think the original package was a little tighter rolled and somewhat round whereas this is more flat.

XQ. 81. I am talking mainly about the package.

A. The printed matter?

XQ. 82. No, I am talking about the package that immediately preceded this one?

A. I don't know about "immediately preceding" because the last few years there has been so much change in tobacco that I hardly think God Almighty knows what all has been.

(No re-examination.)

(Deposition closed.)

ALBERT P. GANS.

CERTIFICATE.

STATE OF KENTUCKY,
COUNTY OF JEFFERSON, } *ss.:*

I, Clarence E. Walker, a Notary Public within and for the County of Jefferson and State of Kentucky, my commission as such expiring January 10, 1924, do hereby certify that the foregoing depositions of Wade Sheltman and Albert P. Gans were taken on behalf of P. Lorillard Company pursuant to agreement and by consent, before me, at Louisville, Jefferson County, Kentucky, on the 15th day of June, 1920; that each of the said witnesses was by me duly sworn before the commencement of his testimony; that the testimony of said witnesses was written out by me; that the opposing party, Beech Nut Packing Company, was represented by counsel during the taking of said testimony; that said testimony was taken at Louisville, Kentucky, and was commenced at 10 o'clock A. M. on the 15th day of June, 1920, and was concluded on the same day; that his deposition was read by each of said witnesses before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office at Louisville, in said County of Jefferson, State of Kentucky, this 5th day of July, 1920.

(Seal.)

CLARENCE E. WALKER,
Notary Public,
Jefferson County, Kentucky.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company
v.
Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

DEPOSITIONS OF WITNESSES.

Testimony taken at Maysville, Kentucky, on behalf of P. Lorillard Company this 16th day of June, 1920, before R. B. Adair, Notary Public and acting as Examiner by consent.

Present: R. B. CAVANAGH, for P. Lorillard Company; and
SEBASTIAN HINTON, for Beech-Nut Packing Company.

JAMES F. SUMMERS,

a witness called on behalf of P. Lorillard Company, being first duly sworn deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh as follows; formal notice of the production of this witness being waived.

DIRECT EXAMINATION.

By R. B. CAVANAGH:

Q. 1. Please state your name, age, residence and occupation?

A. James F. Summers; age 52; residence, Maysville, Kentucky; and I am engaged in the bottling business.

Q. 2. Were you ever connected with the Harry Weissinger Tobacco Company of Louisville, Kentucky?

A. I was, I went with them in the year 1884, when it was known as Weissinger & Bates, which composed the Harry Weissinger Tobacco Company. About the year 1887 or 1888 it formed the Harry Weissinger Tobacco Company.

Q. 3. How long were you with them?

A. From about along in May or June, 1884, until 1902. It was along in 1902 the Continental Tobacco Company took it over.

Q. 4. When did you come to Maysville, Kentucky?

A. In 1904, in August.

Q. 5. In what line of business was the Harry Weissinger Tobacco Company engaged?

A. Manufacture of Tobacco.

Q. 6. What position did you occupy with the Harry Weissinger Tobacco Company of Louisville, Kentucky, during your connection with them?

A. I started in as a boy knocking around the place and I worked myself up to foreman. Along in 1894 I was appointed Assistant Superintendent under Mr. Frank E. Phillips.

Q. 7. How long did you remain in that position?

A. Until January 1st, 1903.

Q. 8. What position did Mr. Frank E. Phillips occupy?

A. He was General Superintendent.

Q. 9. How long did you retain the position of Assistant Superintendent with the Harry Weissinger Tobacco Company?

A. Until it was transferred to the Continental Tobacco Company, 1903.

2355

2356

Q. 10. Do you know what has become of Mr. Frank E. Phillips?

A. He has been dead about six years I think; no it has not been that long, yes, it has been longer, it has been about eight years.

Q. 11. While you were Assistant Superintendent of the Harry Weissinger Tobacco Company were you familiar with the tobacco brands manufactured and marketed by them, and if so can you enumerate them?

A. In fact I had full charge of the factory when I was appointed Assistant Superintendent. I had to take charge of the whole thing on account of the bad health of Mr. Frank E. Phillips; therefore I had charge of everything in the factory. We manufactured Old Kentucky, Hold Fast, Prune Nuggett and Burr Oak. These are all the plug tobaccos. Now smoking tobaccos—Three States, Our Flag, First Cabin, Beechnut Thread Cut and Scrap, and generally we had, no we did not have any granulated.

Q. 12. Were you with Harry Weissinger Tobacco Company when the Beechnut brand of tobacco was adopted by them and if so will you state the circumstances as you recall them?

A. I was. Along in the winter, I don't remember now, 1896 or the early part of 1897, Arthur Hegan of Pittsburgh had written to the firm, I mean Harry Weissinger Tobacco Company, at Louisville, to get out a brand to compete with the Finnzer Bros., brand called Five Brothers, so I proceeded to get out a brand which at the time was made out of what is known as Green River leaf and called Beechnut.

Q. 13. Who got up the formula for this Beechnut?

A. Frank Phillips and myself, virtually I got it up.

Q. 14. Can you produce any record of, or documentary evidence showing this Beechnut formula as you got it up in the year 1897?

A. Yes, sir, I can and do. (Witness produces a book bearing on the outside the words "Harry Weissinger Tobacco Company, James F. Summers.")

Q. 15. What is that book?

A. It is a book I kept my formulas in when I was working for the Harry Weissinger Tobacco Company.

Q. 16. Will you show us the Beechnut formula in this book?

A. Yes, sir, there it is.

(Witness refers to a page in the book in which a metal tag has been inserted.)

Q. 17. When did you write that formula in that book?

A. I don't know, along about the time I got the brand up, I generally put them down after we decided to use them, I don't know exactly when it was I put it down, maybe two months after we decided to use it.

Q. 18. Did you make and put upon the market any of this Beechnut Tobacco?

A. Yes, sir.

Q. 19. When did you first put it upon the market?

A. In the winter of 1896 or early part of 1897, I am not positive which.

Q. 20. I hand you a slip of paper which has been marked for identification in this case as P. Lorillard Company Exhibit "F," and ask you if you can identify it and if so, tell us what it is?

A. That is a piece of the original package of the first Beechnut made.

Q. 21. What kind of tobacco was it?

A. Thread cut, it is a good deal like the FIVE BROTHERS BRAND put out by Finzer Bros., of Louisville, Ky.

Q. 22. Is this a type of Finzer Bros. tobacco to which you refer?

(Shows package to witness.)

A. Yes, sir.

Q. 23. I now show you P. Lorillard Company Exhibit "G." and ask you if that is the Five Bros. package to which you have referred?

A. Yes, sir; this is not the weight, it was about two ounces, and this is 1 7/8, they made about two ounce packages.

By MR. CAVANAGH: The piece of paper offered in evidence as Exhibit "F." is a brown strip of paper with the words "Beechnut" thereon and is now offered in evidence and marked P. Lorillard Exhibit "F."

Q. 24. Do you know where this exhibit "F." came from?

A. Well, yes; we used that package in the latter part of 1896 or 1897, then after we changed the brand to scrap, we used that paper to mark down things on to keep our memory fresh.

Q. 25. Has this paper been in your possession?

A. It has been in my possession ever since 1903, February 16th.

Q. 26. About what year did the Harry Weissinger Tobacco Company change over the Beechnut brand from thread cut to scrap tobacco?

A. Along about 1897. They did not make that thread cut long; they never made much of it at all. I guess they made it about three or four months. I can tell you one reason why they did not make it long be-

cause Finzer, Five Bros., was a union brand and Beechnut thread cut was not, and they could not sell it, and that is the reason they changed it to scrap tobacco. They could not sell it among the mining districts.

Q. 27. How do you fix the latter part of 1896 or the early part of 1897 as the date when the Harry Weissinger Tobacco Company began to put out Beechnut brand of tobacco?

A. The only way is anything I know I have got in my mind, and I can keep it.

Q. 28. What I am asking you is there any circumstance that would enable you to fix 1896 or 1897 as the date when the Harry Weissinger Tobacco Company first put out the Beechnut brand?

A. Well, it was along about the time that Finzer Brothers sold out to the Continental Tobacco Company. I think they sold out about the middle of 1898.

Q. 29. How long before Finzer Brothers sold out to the Continental Tobacco Company did Harry Weissinger Tobacco Company put out Beechnut brand of tobacco?

A. A little over a year.

Q. 30. Did Harry Weissinger Tobacco Company to your personal knowledge sell Beechnut Thread Cut tobacco?

A. They did; yes, sir.

Q. 31. Was it wrapped in wrappers like this? (Shows witness Exhibit "F.")

A. It was.

Q. 32. I hand you herewith a package which is in this case as P. Lorillard Company Exhibit (14), and ask you if you can identify such a package and tell us what you know about it?

A. This is a Beechnut package that we used to put up the original scrap in.

Q. 33. Who?

A. Harry Weissinger Tobacco Company.

Q. 34. When?

A. I suppose we put that out in 1897; I know we did.

Q. 35. For what period ot time did you put that out?

A. They put it out until they sold out to the Continental Tobacco Company, along in 1903. Everything pertaining to Beechnut was shipped away from Louisville, and if I am not mistaken it was shipped to Middletown, Ohio. Some things were shipped to different parts of the country, but I think everything pertaining to Beechnut was shipped to Middletown, Ohio. I am positive about that.

Q. 36. Can you state whether the Harry Weissinger Tobacco Co. sold tobacco like this? (Attorney shows package of tobacco, Lorillard Exhibit 14, to witness).

A. Yes, sir; they did.

Q. 37. Where did they sell such tobacco?

A. A good deal in Louisville; in fact, over a good part of the United States; some of it in Pennsylvania; they chewed and smoked it both in Pennsylvania.

By Mr. Cavanagh: The formula book, produced by the witness is now offered in evidence, and the Notary is requested to mark the same for P. Lorillard Company Exhibit "H."

Q. 38. I hand you herewith a slip of paper upon the back of which is stamped the date, January 12th-1903, and I merely mention this to identify the paper,

and ask you if you can tell me whose handwriting appears on that slip in pencil, and what it means?

A. The handwriting is that of Harry Weissinger, and was handed to me to instruct me how to pack Beechnut that was left on hand at that time, January 12th-1903.

By Mr. Cavanagh: This slip of paper is offered in evidence and the Notary is requested to mark same for identification P. Lorillard Company, Exhibit "I."

Q. 39. I hand you herewith two letters written on the letter paper heads of Harry Weissinger Tobacco Company, one dated February 6th-1903, and the other December 11th-1903, and ask you if you can tell me what these are?

A. These are copies of letters sent me from the Continental Tobacco Company, New York, notifying the Harry Weissinger Tobacco Company what disposition to make of things that were there in the Harry Weissinger Tobacco Company at Louisville, Kentucky. One, the other is from Mr. R. K. Smith notifying us what to do with different things. R. K. Smith had charge of the leaf department of the Continental Tobacco Company, Louisville, Kentucky. They were copies handed to me because I had charge of attending to all such work.

By Mr. Cavanagh: The two letters (copies) are pinned together to form one exhibit, and are offered in evidence and the Notary is requested to mark the same P. Lorillard Company Exhibit "J."

Q. 40. I hand you herewith a slip of paper having typewritten thereon, the heading "Harry Weissinger

Tobacco Company Marked Boxes, and ask you to tell us, if you know, what this is, and what you know about it, giving dates.

A. This is a record of all boxes used in what was known as the Harry Weissinger Tobacco Company in the smoking department. This is a list of the size of the boxes given to me by Mr. Jarboe of the C. C. Mengel Box Company, Louisville, Kentucky. It might have been given to me in 1893, of course, they would add to it as we would have different size boxes made.

Q. 41. Are there any additions on that there?

A. Yes, sir; a good many.

Q. 42. How are the additions noted?

A. Beechnut in three different shapes and size boxes.

Q. 43. Why do the additions appear in pencil and the other in typewriting?

A. The reason this was done was in case boxes would come to the factory and upon examination they were found not to be up to the standard, I would have redress against the Box Company, and from then on as I would put in orders for different size boxes I would enter it with a led pencil, or the party that ordered them.

By Mr. Cavanagh: The marked "Box" list produced by witness, I now offer in evidence and the Notary is requested to make the same P. Lorillard Company Exhibit "K."

Q. 44. Did you personally, while with the Harry Weissinger Tobacco Company, supervise the preparation of Beechnut tobacco?

A. I did, for several years, from the time it was gotten up until it was disposed of to the Continental Tobacco Company, from 1897 to 1903.

Q. 45. Can you state of your own personal knowledge whether or not this Beechnut tobacco was continuously sold during this period that you have just stated?

A. It was.

Q. 46. How do you know?

A. I manufactured it; I put it out; I was with it day in and day out, years in and years out, and I had supervision of the manufacture of it.

Q. 47. Can you state whether or not you know it was sold from the factory?

A. Yes, sir; I have seen it go out in loads; I have seen it on the market in Louisville, and I have seen it on the market in Madison, Indiana, because I bought a package there myself.

Q. 48. About when was that?

A. I could not tell you that; it was in the summer time; I was there on a boat excursion.

Q. 49. How many years ago?

A. Around twenty-four or twenty-five years ago. They used to have a customer there that handled a good deal of that; I. Nicklows was the name of the man that handled it there.

Q. 50. I hand you herewith a book and ask you if you can identify it and if so, tell us what it is?

A. Yes, sir; it is Connorton's Tobacco Brand Directory of the United States, 1903. The manufacturers of tobacco whenever they would adopt a name for a brand of tobacco they would have it registered in said directory.

Q. 51. Do you recall how often this book was issued?

A. One every year.

Q. 52. About what time of the year?

A. They would generally get it out about the middle of January, if I am not mistaken; no, they usually got it out about the first of January.

Q. 54. This was the last one that was sent to the Harry Weissinger Tobacco Company?

A. Yes, sir, I guess it was; it was the last one I saw.

Q. 55. Mr. Summers, will you look in that book and tell us whether or not you can find Beechnut Tobacco Brand registered therein?

A. Yes, sir; on page 328, of Connorton's Tobacco Directory, 1903, you will find registered Beechnut (Scrap), Harry Weissinger Tobacco Company, Louisville, Kentucky.

Q. 56. Did you ever know a man by the name of Dave Bell?

A. Yes, sir; he was City Salesman for the Harry Weissinger Tobacco Company in Louisville, and also traveled in other parts of Kentucky.

Q. 57. Now, Mr. Summers, you have produced here and offered in evidence certain documentary matters, such as P. Lorillard Company, Exhibit F, G, H, I, J and K, and you have also referred to the old Connorton's Tobacco Brand Directory, will you just tell us in your own words how long you have had these documents in your possession and how you happened to come to have them in your possession for the length of time that you have had them?

A. Well, along in the fall of 1902, in December, we began to dispose of everything that was sold to the Continental Tobacco Company by the Harry Weissinger Tobacco Company. We had their letters mailed to the Harry Weissinger Tobacco Company notifying them what disposition to make of things at the Weis-

singer factory. There was a copy given to me, some bearing the name of Frank E. Phillips and some Jas. F. Summers. After disposing of said things enumerated I filed all of these copies and kept them. Some time I wanted to see them or something might come up about the disposition of said things, and I would have them in evidence for my personal protection. After the deal was closed out, these papers being filed by me and in the office I took the whole bunch and put them in my trunk, and when I moved to Maysville in 1904, I brought the papers along with me. I have a lot more of them which are still up home with other things. I had a lot of papers damaged during the flood of 1913, here in Maysville, Kentucky, and I threw them away. I never thought I would have any use for them as I had them for about ten years.

Q. 58. Now to your personal knowledge the Harry Weissinger Tobacco was making and selling Beechnut Tobacco along in the last part of the year 1896 or the spring of 1897?

A. Yes, sir.

Q. 59. How long did the Harry Weissenger Tobacco Company continue to so make and sell this Beechnut tobacco?

A. Until it was disposed of to the Continental Tobacco Company.

Q. 60. Until what was disposed of to the Continental Tobacco Company?

A. Until the Harry Weissenger Tobacco Company was disposed of and sold to the Continental Tobacco Company.

(Mr. Cavanagh announced that the direct examination of the witness was closed.)

CROSS-EXAMINATION.

By SEBASTIAN HINTON:

XQ. 1. What happened to the Old Kentucky Brand, Mr. Summers?

A. I think that was sent to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 2. What happened to the Three States tobacco brand?

A. That was sent to 18th and Broadway, the Continental Tobacco Company, Louisville, Kentucky.

XQ. 3. How long did they continue on the market, do you know?

A. I could not tell you, I was not with them.

XQ. 4. What happened to the Hold Fast Brand?

A. That went to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 5. What happened to Prune Nugget Brand?

A. They sent that to 18th and Broadway, Continental Tobacco Company, Louisville, Kentucky.

XQ. 6. When did you cease your connection with the tobacco business?

A. Along about the 31st day of July, 1904.

XQ. 7. That was after the transfer to the Continental Tobacco Company of the Beechnut brand?

A. Yes, sir.

XQ. 8. That was in Louisville, Kentucky?

A. Yes, sir.

XQ. 9. What sort of reputation did the Harry Weissinger Tobacco Company have amongst its trade?

A. It had the reputation of putting out as good tobacco as was in the United States.

XQ. 10. The name Harry Weissinger Tobacco Company on a package of tobacco was an indication of good quality?

A. Yes, sir.

XQ. 11. I show you a Beechnut package of tobacco which I believe is in evidence as P. Lorillard Company Exhibit No. 17, which bears the name Harry Weissinger Tobacco Campany, and underneath that Luhrman & Wilbern Tobacco Co., successors, that pack is the same with the exception of that addition, as your old Beechnut, is it not?

A. Yes, sir, with that exception.

XQ. 12. From your knowledge of the tobacco industry why was it that this same sort of tobacco was preserved by them?

A. Because of the trade they had on the market.

XQ. 13. Now, Mr. Summers, you have testified about this directory as issued in 1903, and which has not been introduced into evidence. You testified here that the Harry Weissinger Tobacco Company registered Beechnut Brand in this book?

A. Yes, sir.

XQ. 14. The book shows that fact?

A. Yes, sir.

XQ. 15. Aside from the book have you any definite recollection of having received a certificate of registration for Beechnut brand?

A. Being connected with the factory and not with the office force such things as these were kept locked up in the safe in the office.

XQ. 15. On page 328 of this directory there appears this entry, Beechnut Brand (Scrap) Harry Weissinger Tobacco Company, Louisville, Kentucky. Does this mean that Harry Weissinger Tobacco Company was the manufacturer?

A. Yes, sir.

XQ. 16. How old is this directory?

A. Published in 1903.

XQ. 17. Is this the last one you have seen?

A. Yes, sir, the Harry Weissinger Tobacco Company had gone out of business and this is the last one they received.

XQ. 18. I notice underneath Beechnut Scrap are three brands upon page 328 located by a star, and this star appears frequently in other places on this and other pages throughout the book, and I notice also in the introduction on page five of the book the following notice: "*Our records* are now the *most complete* in the United States, and we can give very *valuable information* in relation to Brands. We have in our possession the name (unpublished) of about (15000) fifteen thousand brands of tobacco that have become obsolete by virtue of *abandonment, disuse, or firms retiring from business.* When application is made for registration, be sure and specify as to class of tobacco on which brand is to be used. A star (*) is prefixed to all brands registered with us, which signifies incontestible ownership; and if any such brand are infringed upon, we notify the rightful owner immediately upon our receiving the information." Now as I read that paragraph it seems to mean to me that if the brand is properly or formerly registered with Connorton's directory which is prefixed in the book preceded by a star, indicates that it has been so registered, is that what it means to you?

A. No, sir, it is not. There were two fees for registration, one fee was merely for registering the brand, then an additional fee for guaranteeing that no one else was using said name, then this was preceded by a star which guaranteed it to be incontestible. To the best of my knowledge the fee for merely registering the brand was $2.00 and the fee for guaranteeing there was no other brand by that name being used was $10.00. How I know this after taking charge of The

Green River Tobacco Company at Maysville, Kentucky, I got up two or three brands and had them registered and that was the fees charged as I remember.

XQ. 19. They charged you one fee for registering and one fee for guaranteeing there was no other person using that brand?

A. Yes, sir.

XQ. 20. They say here where we search the records and no registration results we charge fifty cents each, what does that mean?

A. The way I take that is this, you see for instance you write them asking if there is a brand under a name you have selected, and they search the records and write you in regard to it and charge you fifty cents for looking through the book for the name.

Mr. Hinton asks that page five be copied in this deposition, and is as follows:

"Since January 1st, 1895, we have had a bureau of registration and information in connection with our directory. To such as so desire we issue certificates of registration charging therefor the nominal price of $1.00 each, payable upon application. When we search our records and no registration results, we charge fifty cents each. It would be well for manufacturers and jobbers before adopting any new brand, to consult us, asking us if the brand is in existence.

"Our records are now the most complete in the United States, and we can give very valuable information in relation to Brands. We have in our possession the names (unpublished) of about Fifteen Thousand (15,000) brands of tobacco that have become obsolete, by virtue of abandonment, disuse, or firms retiring from business. When application is made for registration, be sure and specify as to class, of tobacco on which brand is to be used. A star (*) is prefixed to all brands

registered with us, which signifies incontestible ownership; and if any such brand are infringed upon, we notify the rightful owner immediately upon our receiving the information."

That reads as if they issue a certificate of registration for $1.00, and if they search their records and find they could not register they charged fifty cents and down farther they state that a star is prefixed to the brand registered by them, I gather from that if they find that any person had the exclusive right in their opinion to use the name they would issue a certificate of registration for $1.00 and put a star in front of it, and if they found that several people were using the same name, they would carry the name in the book for the benefit of other manufacturers, and would not put a star in front of it, as for instance I find on page 80 five Gold Leaf brands made by different manufacturers and three Gold Medal brands by different manufacturers, whereas every place the star appears there seems to be only one brand by that name, is that the result of your investigation?

By Mr. Cavanagh: All this line of cross-examination is objected to on the ground that the witness has not testified that he was familiar with the manner and methods of the publication of Connorton's Tobacco Directory, and this is not within the scope of his direct examination.

By Mr. Hinton: The witness has testified on direct examination that the brand Beechnut was registered in this book, and I simply want to find out whether or not registration means what it appears to mean from the prefix of the book or whether in fact it means something else and is misleading.

(By the witness, Mr. Summers.)

A. The star indicated ownership, proven and incontestible.

XQ. 21. Now I notice on page seventeen, Connorton's Directory brand Beechnut Walsh, Boyle & Company, Chicago, Illinois, what does that mean?

A. It means that Walsh, Boyle & Company of Chicago, Illinois, is putting up a plug or twist under the name of Beechnut, it is just the same as if you would put out a hat and call it a name and I would put out a piece of tobacco and call it the same name, we could both use that name.

XQ. 22. You tell us that from your experience in the tobacco business?

A. Yes, sir.

XQ. 23. Then speaking from your experience in the tobacco business would you say that plug and twist would not be the same as scrap tobacco?

A. No, sir.

XQ. 24. Entirely different class of goods?

A. Yes; sir.

By Mr. Cavanagh: The question is objected to as it is a matter dealing with a judicial question and the witness is not competent or qualified to answer.

XQ. 25. Did you ever see this Beechnut tobacco put out by this Chicago firm?

A. No, sir, I did not.

XQ. 26. You don't know anything about the style of package in which it was put out?

A. No, sir.

XQ. 27. How long were you in the tobacco business?

A. 1884 to 1906.

XQ. 28. Do you know in what states Beechnut de-

scribed as P. Lorillard Exhibit No. 14 was sold by the Harry Weissinger Tobacco Co.?

A. Most all over the country.

XQ. 29. Did you ever have any dealings with Connorton's Directory?

A. Only after I came to Maysville in 1905.

XQ. 29a. Were you in the tobacco business then?

A. Yes, sir.

XQ. 29b. Where?

A. Here in Maysville.

XQ. 30. Who were you with?

A. Green River Tobacco Company.

XQ. 31. And you registered certain brands for the Green River Tobacco Co.?

A. Yes, sir, Kentucky Colonel and Proper Thing.

XQ. 29. You did not get a certificate of ownership, proven and incontestible?

A. No, sir.

XQ. 30. You just registered the brand and the fee was $2.00?

A. Yes, sir, to the best of my knowledge, that was the fee.

XQ. 31. That is your best recollection?

A. Yes, sir.

RE-DIRECT EXAMINATION.

By MR. CAVANAGH:

RDQ. 1. What is plug tobacco used for?

A. Some for chewing and some for smoking.

RDQ. 2. What is scrap tobacco used for?

A. For chewing and smoking.

RDQ. 3. Both of them are tobacco products are they not?

A. Yes, sir, they are both tobacco.

RDQ. 4. I call your attention to the Beechnut registered by Walsh, Boyle & Company, Chicago, Illinois, appearing on page seventeen of Connorton's Directory for 1903, and ask you if you can find any star in front of that brand?

A. No, sir, I do not.

By Mr. Cavanagh: Connorton's Directory for 1903 produced by the witness is offered in evidence and the Notary is requested to mark the same P. Lorillard Company Exhibit "L."

(Re-Direct Examination closed.)

Re-Cross-Examination.

By Mr. Hinton:

RXQ. 1. What is indicated to you by the fact that neither of the two Beechnut brands appearing in 1903 Connorton's Directory in connection with two different manufacturers has no star in front of them?

A. It shows that they have merely been registered and no fee has been paid for a guarantee.

RXQ. 2. Do you mean that every name appearing in that would be there because some one had paid one dollar?

A. Well it had to be paid or it would not have been registered.

RXQ. 3. The book does not contain a complete list of all brands upon the market.

A. I don't know, I cannot say as to that.

RXQ. 4. Would you say that was a complete list?

A. I don't know, things like that never bothered me.

RXQ. 5. Is that what it was supposed to be among manufacturers?

A. Yes, sir.

RXQ. 6. You don't believe, do you, that there was $1.00 paid for every brand of tobacco in the United States?

A. I don't know, I could not say as to that.

RXQ. 7. Don't you believe that every name that appears in that Directory was put there because the manufacturer paid $1.00 for that purpose?

A. Yes, sir, I think that.

RXQ. 8. As a matter of fact coming down to it, have you concluded as a result of your thought within the last five minutes, that Connorton's Directory published all the brands that were on the market, and they put a star in front if they searched that brand in the directory at the request of the manufacturer and found no conflict in the name they issued a certificate.

A. It may have been that way, I won't say.

By Mr. Cavanagh: All this line of examination is obpected to because the book speaks for itself, and the book also has a key, and is not within the scope of his direct examination.

By Mr. Hinton: The witness testified on direct examination as to this book and what it means.

J. F. Summers.

It is hereby stipulated by and between counsel that the exhibits in this case may be retained in the custody of the respective counsel until final hearing, subject to call for inspection by the parties, and each party agrees to furnish the other with copies of such of the exhibits of which it may be possible to make ordinary copies.

NOTARY'S CERTIFICATE.

STATE OF KENTUCKY, }
COUNTY OF MASON, } *ss.:*

I, R. B. Adair, a Notary Public within and for the County of Mason and State of Kentucky, do hereby certify that the foregoing deposition of James F. Summers was taken on behalf of P. Lorillard Company, pursuant to agreement, and by consent, before me, at my office in Maysville, Mason County, Kentucky, on the 16th day of June, 1920; that the said witness was by me duly sworn before the commencement of his testimony; that the testimony of said witness was written out by me; that the opposing party, Beech-Nut Packing Company, was represented by counsel during the taking of said testimony; that said testimony was taken at my office, Maysville, Mason County, Kentucky, and was commenced at 10 o'clock A. M., on the 16th day of June, 1920, and was concluded on the same day; that the deposition was read by said witness before the witness signed the same; that I am not connected by blood or marriage with either of said parties, nor interested directly or indirectly in the matter in controversy.

In testimony whereof I have hereunto set my hand and affixed my seal of office at Maysville, in said County of Mason, State of Kentucky, this 16th day of June, 1920.

R. B. ADAIR,
(Seal.) *Notary Public.*

My commission expires January 12, 1922.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company
v.
Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

NOTICE.

New York, N. Y., February 4th, 1921.

Messrs. Offield, Poole & Hinton,
38 South Dearborn Street,
Chicago, Ill.

Please take notice that on Wednesday, February 9th, 1921, we shall proceed to take testimony in rebuttal in the above-entitled cause, pursuant to the Rules and Statutes in such cases made and provided, at the office of Meyers, Cavanagh & Hyde, 200 Fifth Avenue, New York City, beginning at 11 o'clock A. M.

The following witness will be examined:

JACOB LEVY, 22, 4th Avenue, New York City, and perhaps others.

You are invited to attend and cross-examine.

MEYERS, CAVANAGH & HYDE,
Attorneys for P. Lorillard Co.

Due and timely service acknowledged this 8th day of February, 1921.

OFFIELD, POOLE & HINTON,
Attorneys for Beech-Nut Packing Co.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company

v.

Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

REBUTTAL TESTIMONY.

Rebuttal testimony taken on behalf of P. Lorillard Company, before A. F. Breslin, and pursuant to notice, at New York City, beginning this 9th day of February, 1921.

Present: R. B. CAVANAGH, ESQ., counsel for P. Lorillard Company;
SEBASTIAN HINTON, ESQ., counsel for Beech-Nut Packing Company.

By agreement between counsel the taking of the rebuttal testimony of Jacob Levy, a witness for the P. Lorillard Company is hereby adjourned until tomorrow, February 10th, 1921, and it is further agreed that the testimony of said witness Levy may be taken at the offices of the Metropolitan Tobacco Company, 22 Fourth Avenue, New York City, instead of at the offices of Meyers, Cavanagh & Hyde, 200 Fifth Avenue, New York City, as named in the notice.

Thursday, February 10th, 1921.

Met pursuant to adjournment, at the offices of the Metropolitan Tobacco Company, 22 Fourth Avenue, New York City.

Parties present as before.

JACOB LEVY,

witness called on behalf of the P. Lorillard Company, in rebuttal, being first duly sworn, deposes and says in answer to interrogatories propounded to him by Mr. Cavanagh, as follows:

Q. 1. Please state your name, residence and occupation?

A. Jacob Levy, 22 Fourth Avenue, N. Y., purchasing agent for the Metropolitan Tobacco Company.

Q. 2. How long have you been connected with the Metropolitan Tobacco Company?

A. Since November, 1893.

Q. 3. Has the Metropolitan Tobacco Company any connection with the New Jersey Tobacco Company?

A. Yes, sir.

Q. 4. What is the connection?

A. Well, it has a controlling interest in the stock of the New Jersey Company.

Q. 5. During the taking of testimony on behalf of the Beech-Nut Packing Company in this Opposition, and at the conclusion of the deposition of one Guy W. Sharpe, there was placed and read into the record of the case an invoice from The American Tobacco Company dated July 12th, 1919, Order No. 19,122, showing certain shipments of "Beech Nut" cigarettes from the Kinney-Duke Branch on behalf of the Beech-Nut

Packing Company, and which invoice reads in essential parts as follows:

"Entered 7/11, Order of 7/11.

	Gro.	Price.	Total.
2060 Beech-Nut Cigarettes 10s	2060	5.75M	11.85

Net cash.

Shipped to the following:

B. Arkell, Equitable Bldg.,
120 Broadway, New York.

James R. Offield,
1223 Monadnock Bldg.,
Chicago, Ill.

New Jersey Tobacco Co.,
Jersey City Branch,
Jersey City, N. J.

Do you know anything of the result or anything in connection with the said shipment of Beech-Nut cigarettes by the Beech-Nut Packing Company to the New Jersey Tobacco Company?

A. Yes, sir.

Q. 6. Will you please state in your own language just what you know about this matter?

A. Without our knowledge a shipment of Beech-Nut Company's cigarettes was shipped to the Jersey City Branch of the New Jersey Tobacco Company, and Mr. Adolph Tonn, the manager of that branch, on receiving this shipment, 'phoned to ask me what it was about or what it was for. I informed him not to use any of these cigarettes as we would not put them out on the market, as this brand was being manufactured by the P. Lorillard Company, and I personally saw the

cigarettes at their office, that is the Beech Nut cigarettes of the Lorillard Company. I 'phoned him to hold them, and I would give him shipping instructions in a day or so.

Q. 7. What did you do then?

A. I had the matter up with Mr. Arkell (I think that's the man's name) of the Beech-Nut Packing Company, downtown, and furthermore, I wrote Mr. Arkell of this Company, but I cannot find a copy of the letter, and we received word from them to ship them the cigarettes, which we did, to their New York Office.

Q. 8. So as I understand it, you did not place these cigarettes upon the market, but you returned them to the Beech-Nut Packing Company?

A. Yes, sir.

Q. 9. To the New York Office?

A. Yes, we did not sell one package of these cigarettes; the reason for not doing so was because I personally saw at Lorillard's their Beech Nut cigarettes some time before this brand was shipped to us by the Beech-Nut Company. The goods we received from the Beech-Nut Packing Company was a plain ordinary cardboard package with ten cigarettes, with the name Beech-Nut printed on the front of the box. It was a plain white box with the name printed on.

Q. 10. You say you never sold a package of these Beech-Nut Company's cigarettes?

A. Never sold one package of these 10 cigarettes.

Q. 11. As I understand from your testimony, you did not order the Beech-Nut cigarettes of the Beech-Nut Packing Company?

A. Correct, sir.

(Direct examination closed.)

CROSS-EXAMINATION.

By MR. HINTON:

The deposition of this witness is objected to as not the best evidence, consisting largely of hearsay.

XQ. 1. Without waiver of objection. Is the New Jersey Tobacco Company a branch of the Metropolitan Tobacco Company?

A. No, sir, a separate corporation. The New Jersey Tobacco Company is a New Jersey Corporation; the Metropolitan Tobacco Company is a New York Corporation.

XQ. 2. Does the New Jersey Tobacco Company buy things on its own account?

A. No, sir. All requisitions, no matter for what it is, must first come through here—through the New Jersey's office which is situated here at 22 Fourth Avenue.

XQ. 3. You are the purchasing agent?

A. Yes, sir.

XQ. 4. Have you made any examination of your records, to show, or to satisfy yourself that no order was ever placed with the Beech-Nut Packing Company for these cigarettes?

A. Yes, sir. And furthermore, Mr. W. H. O'Brien of The American Tobacco Company informed me before shipping these cigarettes, as follows: That he was sending us some cigarettes which he would like to have disposed of as a Trade-Mark brand, and when I received these cigarettes and opened the package and found that the name was "Beech-Nut," I 'phoned him and told him that we could not put this brand on the market as I saw the "Beech Nut" package of cigarettes manufactured by the P. Lorillard Company on Mr. Belt's desk quite some time ago, and I did not

want to get into any trouble with any of the manufacturers, and I was going to take it up with the Beech-Nut people who sent us an invoice for these cigarettes, to relieve us of same, as we would not put them out, and he informed me that it would be all right, and that he would see that it was taken care of.

XQ. 5. Do I understand your testimony that these cigarettes were sent to you on instructions of somebody connected with The American Tobacco Company?

A. Yes, sir, at that time Mr. O'Brien was Vice-President. He is out of there now.

XQ. 6. And how he got them, where he got them, or what happened in that connection you do not know?

A. Who got them? Mr. O'Brien told me he was having some cigarettes sent here which came from the Beech-Nut Packing Company.

XQ. 7. And your reason for not putting them out was that you did not want to get in trouble or difficulty of any kind with P. Lorillard Company?

A. I didn't want to have any trouble because I had seen the brand at P. Lorillard Company's, and Mr. Belt told me he was going to put this cigarette brand on the market, and I know that P. Lorillard Company also had a brand called "Beech Nut Scrap," which was on the market for some time.

XQ. 8. Now where did you see that Lorillard brand of "Beech-Nut" cigarettes?

A. At the P. Lorillard Company, 119 West 40th Street.

XQ. 9. Did you see some packages of cigarettes, or just the envelope?

A. Full packages of cigarettes, sir.

XQ. 10. Where were they?

A. On Mr. Belt's desk at 119 West 40th Street, and he showed me them.

XQ. 11. What is Mr. Belt? Is he an officer of P. Lorillard Company?

A. He is Vice-President of the company.

XQ. 12. I show you an empty foil package of "Beech-Nut" cigarettes. Does that correspond to the package you saw on Mr. Belt's desk?

A. Yes, sir.

(The empty package just referred to is introduced in evidence as "Beech Nut" Cross-Exhibit Lorillard Cigarette Wrapper.)

(A Patent Office copy of Beech Nut Packing Company's registration No. 89,613, of December 31st, 1912, is offered in evidence as "Beech-Nut" Cross-Exhibit Trade-Mark Registration, and it is stipulated that this may have all the force and effect of the original.)

XQ. 13. Now as I understand it, P. Lorillard Company is one of the four big Tobacco Companies, is it not?

A. Yes, sir.

XQ. 14. P. Lorillard Company has from time to time taken over a lot of brands, has it not, of other manufacturers?

A. Oh, I don't know about that, you see——

Objection by MR. CAVANAGH: That question is objected to as immaterial and irrelevant, and furthermore, the witness has not been shown as competent to pass upon P. Lorillard's business in this respect, and furthermore, the question is objected to as beyond the scope of the examination, which was directed simply to the sending of Beech-Nut cigarettes by the Beech-Nut Packing Company to the New Jersey Tobacco Company.

XQ. 15. You buy the Lorillard stuff, don't you?

A. Yes, sir.

XQ. 16. The Anargyros brand is now handled by the Lorillard Company?

A. Yes, sir.

XQ. 17. And a considerable number of other brands that used to be put out by other manufacturers?

A. No, sir. The Anargyros was turned over, as far as I read in the papers, at the time of the disintegration of the American Tobacco Company.

XQ. 18. Lorillard puts out Murads?

A. Yes, sir.

XQ. 19. You remember what the appearance of the retail package was of the various Anargyos brands that were made before those brands were taken up by Lorillard Company.

A. Yes.

By MR. CAVANAGH: This question objected to as immaterial and irrelevant.

XQ. 20. The general appearance of these packages remains the same now, doesn't it?

A. Yes, the coloring may have been changed.

XQ. 21. Would you, as an expert in the tobacco line, would you say that the Lorillard Company maintained the same general appearance?

Objection by MR. CAVANAGH: While perfectly willing to give Counsel for the Beech-Nut Packing Company all latitude in proper cross-examination, objection is made to this line of first attempting to qualify this witness as an expert, when he was simply called upon to testify to the fact of the alleged sale of Beech-Nut cigarettes by the Beech-Nut Packing Company, and no good reason is seen why an attempt should be made to delve into all of the entire tobacco business of the Lorillard Company and other concerns.

By Mr. Hinton: Witness has testified on direct examination without the production of records to various happenings and interrelationships between various tobacco concerns. It is perfectly competent in order to test the reliability of the witness' recollection, to ask him a few general questions concerning the handling of various brands.

(It is stipulated that Mr. Cavanagh's objection may relate to all this line of examination without repetition.)

XQ. 22. As an expert in this line, why do you suppose the Lorillard Company kept the appearance of these packages the same?

A. Why they kept them? Because that was the original brand they put out and they kept the same package.

XQ. 23. In other words, would they take over for instance an Anargyros brand and continue to market that brand and keep the same general appearance?

A. Yes, sir, except the color or lithographing may have been changed.

XQ. 24. The reason for this, of course, was that if these cigarettes or whatever the product was, had a certain good will attached to them, they wanted to get the benefit of that good will.

A. I simply believe they kept the package the same way to show that they were getting the regular brand of cigarettes.

XQ. 25. That's ordinary common sense, isn't it?

A. Yes, sir.

(No redirect examination.)

(Deposition closed.)

Jacob Levy.

STIPULATION.

With relation to the invoice from The American Tobacco Company dated July 12th, 1919, Order No. 19,122, referred to in the rebuttal deposition of the witness, Levy, and copied into the record immediately following the deposition of Guy W. Sharpe, a witness for the Beech-Nut Packing Company, it is hereby stipulated that the B. Arkell, Equitable Building, 120 Broadway, New York City, named in said invoice, is the President of the Applicant, the Beech-Nut Packing Company, and that the James R. Offield, 1223 Monadnock Building, Chicago, Ill., also named in said invoice, is Attorney for the Applicant, the said Beech-Nut Packing Company. Adjourned subject to notice.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company
v.
Beech-Nut Packing Company.

Trade-Mark Opposition No. 2805.
Beech Nut.

CERTIFICATE.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.:*

I, A. F. Breslin, a Notary Public in and for the County of New York, State of New York, do hereby certify that the foregoing deposition of Jacob Levy

was taken in rebuttal on behalf of the P. Lorillard Company, pursuant to agreement and notice, before me, at New York, County of New York, State of New, on the 10th day of February, 1921; that the said witness Jacob Levy was by me duly sworn; that the testimony of said witness was taken by me in shorthand, and thereafter reduced by me to typewriting; that the foregoing pages contain a true and accurate transcript of my stenographic notes; that the opposing party was represented by counsel, Sebastian Hinton, Esq., during the taking of said testimony; that the said testimony was taken at 22 Fourth Avenue, New York City; and was commenced at 9.30 A. M. on the 10th day of February, 1921, and was concluded on the same day; that the deposition of said witness was read to or by said witness before he signed the same; and that I am not connected by blood or marriage with either of said parties or interested directly or indirectly in the matter in controversy.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at New York City, County of New York, State of New York, this 11th day of February, 1921.

AGATHA F. BRESLIN,
(Seal.) *Notary Public.*

Bronx County, County Clerk's No. 88. Certificate filed in N. Y. County Clerk's No. 633.

Term expires March 30, 1921.

Vol. V

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1926

No. 240

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

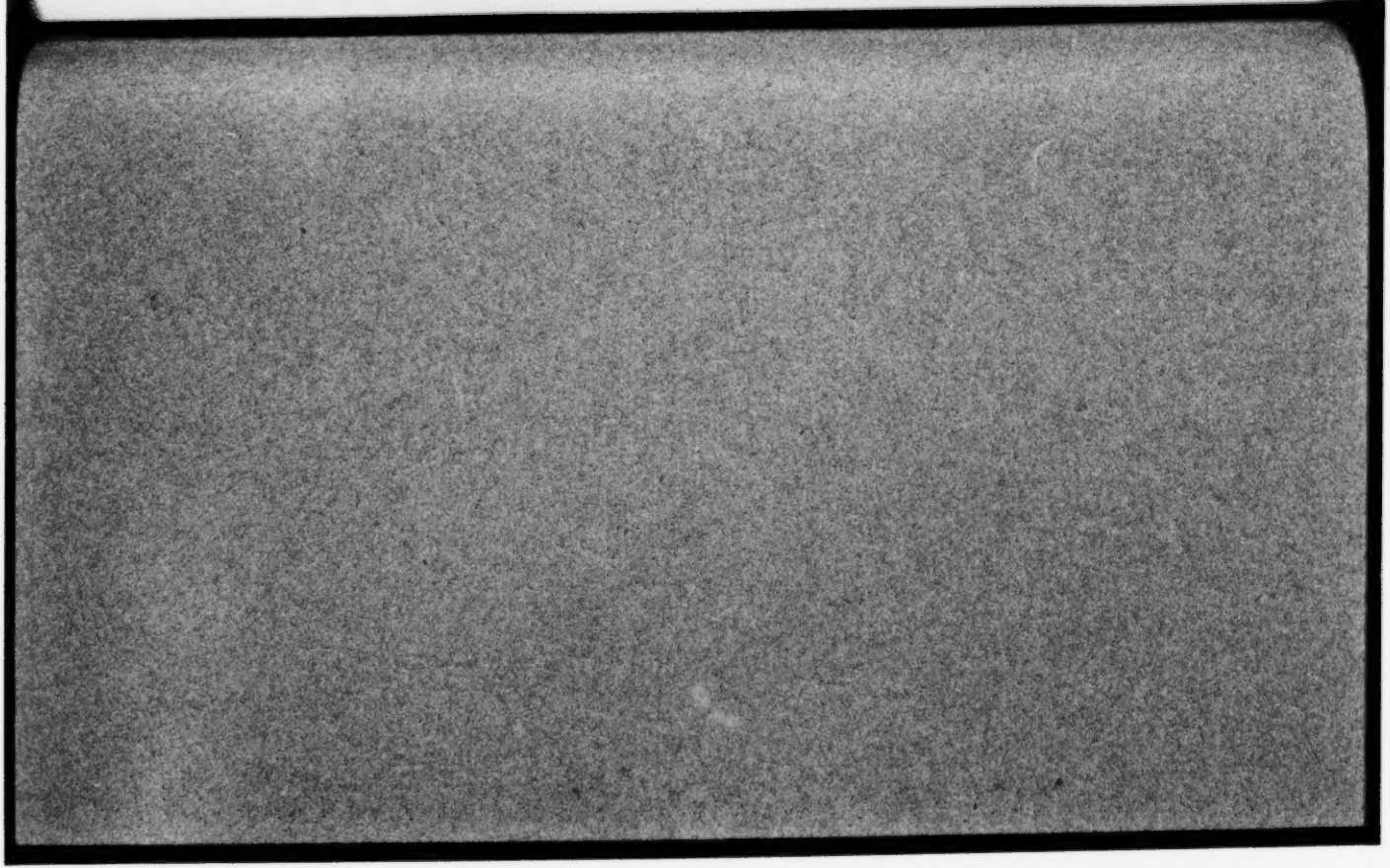
P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1926

CERTIORARI GRANTED JANUARY 31, 1927

(31,567)



(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

VOLUME V

Colloquy between court and counsel..... 2388
Statement of evidence..... 2445
Testimony of John M. Halter..... 2445
William H. Maichle..... 2451
Lawrence R. Atkinson, Jr..... 2458
William A. Charles..... 2464
William L. Miller..... 2468
Norman S. Berry..... 2478
James F. Masterson..... 2483
G. Frank Disbrow..... 2491
Frank Arnold, Jr..... 2499
Colloquy between court and counsel..... 2502
Stipulation re certain exhibits..... 2505
Colloquy between court and counsel..... 2507
Stipulation re facts, etc..... 2510

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

	Page
Testimony of Richard J. Boylan (stipulated)	2512
Edwin Clark Brenn (stipulated)	2515
George T. Minnigerode (stipulated)	2516
Offers in evidence	2517
Testimony of James T. Newton	2518
Howard C. Bailey	2524
William R. Perkins	2528
Hugh Peters	2539
Philip V. R. Van Wirth	2549
David H. Ball	2553
Benjamin Lloyd Belt	2586
Thomas J. Maloney	2622
William R. Perkins (recalled)	2638
Colloquy between court and counsel	2641
Opinion, Lynch, J	2645
Decree	2676
Assignments of error	2678
Petition for appeal	2683
Order allowing appeal	2684
Bond on appeal	2684
Plaintiff's præcipe for transcript of record	2686
Citation and service	2687
Order waiving equity rule No. 75 and approving transcript	2688
Defendant's præcipe for transcript of record and amendment thereto	2690
Clerk's certificate	2692
Proceedings in United States circuit court of appeals, third circuit	2693
Argument and submission	2693
Opinion, Davis, J	2694
Judgment	2705
Mandate	2705
Clerk's certificate	2707

United States District Court

DISTRICT OF NEW JERSEY.

BEECH-NUT PACKING COMPANY,
Plaintiff,

vs.

P. LORILLARD COMPANY,
Defendant.

In Equity.

No. 3056.

Appearances:

PHILIP B. ADAMS, Esq.
MESSRS. OFFIELD, BULKLEY, POOLE & SCOTT, by
CHARLES C. BULKLEY, Esq.
WALTER A. SCOTT, Esq., and
H. MCCLURE JOHNSON, Esq.
MESSRS. PITNEY, HARDIN & SKINNER, by
E. O. STANLEY, Esq.
For the plaintiff.

MESSRS. TREACY & MILTON, by
JOHN MILTON, Esq.
MESSRS. GIFFORD & BULL, by
LIVINGSTON GIFFORD, Esq.
T. GRANVILLE MEYERS, Esq., and
RICHARD B. CAVANAGH, Esq.
For the defendant.

Tried before Hon. Charles F. Lynch, Judge, at the Chamber of Commerce Building in Newark, N. J., on Tuesday, October 30, 1923, at ten-thirty A. M.

Mr. Stanley: May it please the Court, counsel in this case are members of the Chicago Bar, and I should like to present Mr. Charles C. Bulkley, Mr. Walter A. Scott

and Mr. H. McClure Johnson, all of the Chicago Bar, who will actively participate in the trial.

Mr. Scott opens for the plaintiff as follows:

This case, your Honor, is a trademark suit and unfair competition case. I think the easiest entrance into the situation is to briefly glance at the bill of complaint which appears at the opening of plaintiff's record. As recited in the first paragraph—(interrupted).

The Court: What page?

Mr. Scott: The first page. Plaintiff is a corporation of New York, the Beech-Nut Packing Company. Defendant is a corporation of New Jersey. The second paragraph of the bill recites the first adoption of the trademark by plaintiff's predecessor in title, the Imperial Packing Company, which adopted this mark as stated about 1892. The paragraph goes on to describe the mark as consisting of the familiar oval border with the word, "Beech-Nut" and the sprig of Beechnuts within. I think we need not dwell upon that paragraph.

The third paragraph and the fourth paragraph together recite the change of the name of the business from Imperial Packing Company to Beech-Nut Packing Company, and the fourth paragraph recites the incorporation of the business in 1899 as the Beech-Nut Packing Company, with the assignment of the assets of the first company to the new company.

The fifth paragraph contains matter that will be interesting to read in a little more detail. The proofs are directed to much that is therein recited. I will read this paragraph:

"Plaintiff's predecessor, Imperial Packing Company, then dealing in certain meat products, shortly after 1891 began a rapid extension of the items of its manufacture; and plaintiff from the time of its acquisition of the business has persistently and rapidly continued that extension. The business of plaintiff by reason of the expendi-

tures, care, skill and industry of plaintiff increased with great rapidity, so that prior to the acts herein complained of, plaintiff's trademark, trade name and distinctive badge and autograph were familiar to and highly regarded by the public, and on sale largely in stores dealing in package consumable products, such as general stores, grocery stores, drug stores, tobacco stores, news stands and the like; its business aggregated many millions of dollars every year, and comprehended a very large number of packaged products of widely varying character such as chewing gum, ham, peanut butter, jellies, and scores of others. Plaintiff has since added many new products to its line, as, for instance, ginger ale and tinfoil, and has always expected and now expects and intends in the rapid expansion of its business to continue so to do, all without reference to specific similarities or differences between the various items included in plaintiff's line. Plaintiff's goods and those of its predecessor have always been identifiable by the trademark, trade name, distinctive badge and autograph (Exhibit A, *supra*)"—which is simply one of the labels attached to the bill and similar to these on this large exhibit board.

The sixth paragraph I think we may read: "Plaintiff's business has for many years prior to the acts herein complained of been in large measure dependent upon the standing in the mind of the public of its trademark 'Beech-Nut' and that of its trade name, badge and autograph (Exhibit A). The aforesaid trade name, badge and autograph, Exhibit A, except for variations in size, name of particular product and other immaterial variations, has been displayed conspicuously by plaintiff upon widely varying kinds of packaged consumable goods, which plaintiff has from time to time put upon the market."

There was an amendment just made in that paragraph so that my wording may be slightly different from what

appears in your Honor's copy. The words "without exception" and "all of the" were taken out, because it appears that some imported articles had been sold, not as the Beech-Nut products, but just as a part of their general activity. That simply was to make the paragraph literally accurate. It has no bearing on the case.

"Plaintiff, in the expansion of its business, has expended more than two millions of dollars in advertising, including substantially every known kind of advertising." The advertising is recited there. Possibly it is not necessary to dwell in detail upon the precise character—billboards and other advertising, and all of the usual means of publicity.

The seventh paragraph recites matters to which the proofs will be largely directed. "By reason of the foregoing, of the care, skill and industry and expenditures of plaintiff; and by reason of the high regard enjoyed by plaintiff's trademark and trade name 'Beech-Nut,' distinctive badge and autograph (Exhibit A) it came about (long prior to the beginning of the acts herein complained of) that the trade and public of the United States recognized the label Exhibit A as plaintiff's distinctive badge and as plaintiff's personal autograph; and as indicating that any consumable packaged product bearing aforesaid badge, trademark and trade name and appearing upon the shelves of a retailer alongside other products bearing the same badge, was of the same origin as those other products and of the same high standard of excellence."

The proofs will be very largely to that point. "Each new product so marked was long prior to 1915, and thereafter, and is now, received with immediate and marked favor by the public, * * *." The significance in there is the word "new." Each *new* product is so received immediately "* * * by reason of the public's gratification and satisfaction with the previous products, simi-

larly identified, by reason of the high regard the public had for plaintiff, and without such sales resistance as meets the ordinary merchandizing of a new product."

There is another significant expression "without such sales resistance as meets the ordinary merchandizing of a new product."

The proofs will be directed toward the proposition, which is amply established, that these new products went into vogue, into use, upon the reputation of their predecessors, notwithstanding that that particular article had not previously been put out by the Beech-Nut Packing Company. "By maintaining its standards of quality, at the cost of the most indefatigable and zealous effort, plaintiff has been and is enabled to maintain a large and growing demand for the goods of its manufacture, identified as of its manufacture by the trademark, badge and autograph, Exhibit A."

This next paragraph recites an application for registration of this trademark upon sixty-seven products, which was granted by the Patent Office in 1912. Of course, the rights of the company exist quite independently of any registration, but as a matter of fact they did register the mark for sixty-seven products in 1912.

I think the reading of that paragraph is unnecessary. What I have stated is the substance of it.

The ninth paragraph recites the charge:

"Defendant, well knowing the premises, and contriving to injure plaintiff, to cramp the legitimate expansion of its business, and divert from its profits, gains"—(it should be "from *it* profits, gains") "* * * and advantages which otherwise would accrue to plaintiff, to the irreparable and vast damage of plaintiff has infringed plaintiff's trademark, appropriated plaintiff's trade name and forged plaintiff's autograph; and has been guilty of unfair competition in trade against plaintiff."

And the following sentence recites the threat to continue so to do in the usual formal language.

We come here in the tenth paragraph to one of the particular charges upon which the proof is based.

The Tenth Paragraph: "Thus defendant in the District of New Jersey, and elsewhere throughout the United States, without leave or license from plaintiff and against its protest," and about that protest in 1915 much of the evidence and discussion in this case will hinge "has been and is engaged in the manufacture and sale (in commerce among the several states) of a product known as 'Beech-Nut' scrap tobacco, a cheap tobacco made of 'scrap' for tobacco chewing—" the word "cheap" there will receive some attention in the evidence—"upon which product, as packaged for the consumer and the retailer, is prominently displayed a fraudulent imitation of the distinctive label of plaintiff (Exhibit A); a specimen of said imitative label appears affixed hereto as Exhibit B."

I think your Honor will find that pasted in the record following the bill, that Exhibit B. It is not in my book, but I think it is in the book before your Honor. It has the radiating marks around the oval, that is the one (indicating). That is the label which the Lorillard people put on scrap tobacco in 1915, and which gave rise to the conditions that are mentioned at this point.

"—a specimen of said imitative label appears affixed hereto as Exhibit B; to the confusion of the trade and the public, who are likely to, and in fact have generally believed that the so-called 'Beech-Nut' Scrap Tobacco is another extension of plaintiff's line—" At this point I might, by way of anticipation, ask your Honor's attention to that expression, "is another extension of plaintiff's line," the exact words are used by witnesses, as we shall prove, that when they saw the new products come out, having seen a great many of the preceding Beech-Nut products, they thought them another extension of the line—"and a product made by plaintiff. Defendant in so doing, and in its sales effort with respect to the so-called 'Beech-Nut' Scrap Tobacco has been guilty of

trademark infringement and of unfair competition in trade and has promoted and caused confusion in the trade to its own illegitimate profit and to the vast and irreparable loss, damage and injury of plaintiff."

This eleventh paragraph recites the high reputation of plaintiff, and the evidence will show that the facts set forth in this paragraph are the result of the studied policy of the company.

"Plaintiff (and its predecessor) by thirty years of cumulative, persistent, indefatigable effort of an organization now numbering many hundreds of individuals, and by the expenditure of more than two millions of dollars in advertising, has established its label, Exhibit A, as indicating plaintiff's manufacture wherever it appears, thereby denoting the highest quality that can be obtained" —on that word "quality" we will prove the attitude and impression of the public and their expectation when they buy an article with the Beech-Nut label upon it—"highest quality that can be obtained, with respect to cleanliness and general supreme desirability of any consumable product bearing that label. This reputation of plaintiff, associated with the aforesaid label, is nowhere better established than among the most refined and prosperous of the female members of the public." That sentence will have some bearing on the evidence which will be put before the Court, "the female members of the public," and their attitude toward the production of chewing tobacco and cigarettes and the consideration that was given to them by the Beech-Nut Company, and why it refrained from dealing in tobacco products.

"Among these persons, as well as to a substantial extent among the public in general, chewing tobacco is regarded with disfavor. Recognition as a manufacturer of chewing tobacco (particularly a cheap scrap tobacco) is not compatible with the standing plaintiff has achieved, either in the minds of its female customers or in the minds of the public."

While possibly none of us in this room is burdened with that prejudice regarding tobacco, it will be quite surprising when we come to the evidence in this case to find what a very considerable number of people were led to criticize and to think less of the Beech-Nut Company when they saw these products.

"Yet such recognition of plaintiff as a manufacturer of 'cheap' chewing tobacco has been and will be the inevitable result of defendant's imitation of plaintiff's label, Exhibit A. Furthermore, such recognition has and will jeopardize plaintiff's standing with a considerable body of plaintiff's trade," something that the evidence abundantly proves (*i. e.*, retailers and jobbers), both through prejudice, among members of that trade, against chewing tobacco, and also through a lowered respect for plaintiff's intelligence, which has been and will be the result of plaintiff's being believed in its trade to have embarked on the manufacture of cheap chewing tobacco * * *."

In the twelfth paragraph there is recited the injury which has come about by the poster and billboard advertising which the Lorillard Company has done. There are one or two witnesses in particular whose testimony will be placed before the Court, one instance showing the case of a man riding in his automobile, who saw this sign and went home and told his wife not to buy any more Beech-Nut products, and who went around and told all his friends not to, as we shall prove. The existence of those people, regardless of our sympathy or non-sympathy, must be taken into account by the business man, a man conducting a great business enterprise.

The thirteenth paragraph recites: "Defendant further aggravating its injury hereinabove complained of and desiring still further wrongfully to exploit the good-will of the purchasing public toward any packaged consumable product bearing plaintiff's trademark, trade name and autograph, without leave or license from plaintiff, but over its protest and against its will intends, is prepared,

and threatens to flood the market (and engage in commerce among the several states) with a so-called 'Beech-Nut' cigarette."

This bill was filed just when the putting out of that cigarette was under preparation.

The fourteenth paragraph recites the widespread recognition of "Beech-Nut Quality" which has been built up by the advertising and general publicity efforts of the Beech-Nut Packing Company.

The fifteenth paragraph recites a detail seeming to show not only the effort to appropriate the trade name in its essence, but to appropriate the little accompanying incidents, so that there might be no mistake in the public mind.

"Defendant," in paragraph fifteen, "desirous still further of promoting confusion in the trade and of illegitimately converting to its own uses the good-will and reputation of plaintiff, has caused to be printed upon its imitative cigarette wrapper, approximately a million of which defendant has had printed and is ready to launch on to the market (Exhibit C), a panel containing the inscription: 'Cigarettes of Beech-Nut Quality have never before been offered to the Public.' * * *"

That particular label was changed before the cigarettes were put out, as the evidence will show, and the reasons for the change will be made clear by the evidence.

The remaining paragraphs are devoted to the conversion of the profits, the prayer for relief—I think we have pretty well covered the substance of the bill of complaint, and now I shall, if I may, outline briefly the facts which will be shown by the evidence. A good deal of this evidence has been taken by depositions. There will be some witnesses on both sides, and without a pretty full opening statement on each side, the order of development will be so interfered with that the Court possibly would not get the force of the testimony as readily as with opening statements, and I believe it has been agreed

by both sides that we shall present our case to the Court in that way before we put on our witnesses, and if the Court approves we will go ahead in that way.

This business of the Beech-Nut Packing Company was established by individuals along about the year 1890. At first, as one of the witnesses says, the hams were cured in a cellar and smoked in a barrel behind the barn, and along about 1892 they incorporated as the Imperial Packing Company.

During the years following 1890 or 1889, I don't know that the date is precisely fixed, when the first hams and bacon were put out, the business was confined, I think, to those products. As the years went by various conserves were added to the products, and the business gradually increased along through the 90's, but as to the precise figures and volume of its business, we can't produce any figures on account of the fact that no records are extant prior to 1903, when there was a fire; but the business grew, according to the testimony of the witnesses, during those years, and in 1899 the management of the company, finding that its greatest asset in a business way was the word "Beech-Nut" itself, and the recognition by the public of that mark, decided to reincorporate under a new name, so they incorporated as the Beech-Nut Packing Company. The word "Beech-Nut" thus becoming both the corporate name and the trademark of the company, the business went on.

In the year 1903 we shall show that the business of the company had increased as to variety of articles, so that it included ham and bacon in bulk, and sliced bacon, sliced beef, and chopped beef, and three kinds of jam. There were eight products they were making in 1903. The business increased year by year after 1903, with some additions each year, until we come down to the year 1915. In 1909 there were fifty-three products put out under this label, including the conserves, the candies, the meats and

the various products. In 1911 chewing gum was added, and so by 1915 there were fifty or sixty products, and this trademark had received wide recognition, as the evidence will show.

The label board—as I understand it, this label board has been stipulated in as correctly showing our labels year by year with the dates above them.

Mr Cavanagh: Yes.

Mr. Scott: And that board outlines what will be, what is, shown in the case.

Going back to the years 1900 to 1905, your Honor will observe a comparatively small number of products, the increase from 1905 to 1910, and so on in these various columns. It gives a graphic illustration of the growth of the business and the increase in the number of products. The increase in the number of products is something that we wish to emphasize independently of the volume of the business. That has a bearing independently of the volume of the business as a whole, the variety of products. The volume of the business as a whole is shown in a tabulated statement in the farthermost part of the record, upon page 868, about three or four pages from the last page in the book. We have a statement of the volume of the business, which begins in 1903, on account of there being no records before that; and, as your Honor will see, in 1903 the comparatively small number of products then made, as shown in that column, 1900 to 1905, had a sale of over half a million dollars, and by running down this column we find a gradual and steady increase to 1921, when the sales amounted to twelve million dollars.

Now, that briefly outlines what we shall prove in regard to the founding and the growth of this business.

I will next state to the Court what we shall prove with regard to the policy of this company, and I shall then state what we shall prove in regard to the success of that policy and its effect upon this suit.

Mr. Francis E Barbour is the Vice-President of this company and has been since the year 1910. His testimony will be to the effect that it is the studied and designed policy of the company to increase its business by increasing the number of products put out as distinguished from the policy of concentrating upon a single thing. Of course, the two avenues of progress are open to any business enterprise, concentration upon one thing or increase in the variety of products.

The policy of the Beech-Nut Packing Company was the increased variety of articles. Now, as will be shown from Mr. Barbour's testimony, such a policy involved this inherent difficulty, that every one of these new products that are put upon the market appears in competition with a vast number of other makes of a similar product, and unless there is some force behind it, each new product must await a long period of publicity and advertising before it acquires that recognition by the public necessary to make it profitable.

As Mr. Barbour will explain, they wanted to adopt a policy which would get around that difficulty, to overcome this resistance to the sale of a new product. These are all staple articles which the Beech-Nut Packing Company sells, articles of which a dozen other brands may be bought, and when they put out a Beech-Nut brand of some article not previously made it was only adding one to a line of a dozen brands on the grocers' shelves. They had to study out some way to individualize that product and take it out of that class which the people consider just another kind of jam, or just another this or that; so, as Mr. Barbour's testimony will show, they adopted the policy of paving the way for each new product by the high quality of all of the products they put out That sounds very obvious and very simple, but when we consider the vast number of products put out by this company and the pains to which this company went to em-

phasize the mere attribute of quality to such an extent that it would individualize this company, we see that that was really a very important and difficult thing to bring about. And they went to this extreme, as Mr. Barbour says, they decided that they would not put an article on the market which was not in their opinion better than any article of that kind put out by any other company, and that it must, at least in their opinion, be better or they would not put it out, and they have pursued that policy, and we shall have testimony to their efforts on one of these products, an article seemingly as simple as salted peanuts. Mr. Barbour will show the Court that there are several brands of this article on the market, selling profitably to the makers, but he says there is not one of them they consider good enough to put out under the Beech-Nut label, and that they have spent six or seven years in their laboratories investigating salted peanuts, and they have not found one yet they consider good enough to put out under the Beech-Nut brand. Therefore, when Mr. Barbour speaks of emphasizing this matter of quality it is not a mere idle advertising slogan; it is something that runs to the very heart of this company's policy and governs its activities.

We shall show by a witness the conditions necessary in the Beech-Nut plant to bring about this condition of affairs—the immaculate cleanliness, the sanitation, the invitation that is extended to the public to inspect this plant, the provision of guides to take the people through—I think even the posting of signs on the roads inviting automobilists to visit the plant for that purpose.

Now, I dwell upon the anticipated proof on those points for the purpose of showing the back-ground upon which this competition of which we complain was precipitated. The management of a company of this kind is peculiarly dependent upon the maintenance of this policy when once started, because there are sixty-seven products. The tes-

timony will show that they are all lumped in the public's mind, that the public have a classification of Beech-Nut products in which they include all these widely varying articles, and if they find one or two of those products bad, the thing carries over to all the rest. Whatever affects the reputation of one of these products, affects the reputation of all. The eggs are all in one basket. If there is one rotten one, they all are thought to be rotten.

Now, in the year 1915, after the establishment of the conditions I have recited, by the painstaking methods I have recited, there appeared upon the market Lorillard Scrap tobacco. The evidence of the deception of the public immediately began to accumulate.

The Court: Had your company handled tobacco prior to that time?

Mr. Scott: It never did, and I will come to the proof upon that point as we go along, and explain to your Honor the ground upon which this suit is based. Your Honor is probably familiar with some of the litigation, some in this Circuit, in the Overland case. Your Honor is probably familiar with that, and with the Aunt Jemima case and others of that kind, in which the Courts deal with that precise point, and in which your Honor's inquiry can be answered in the words of a Court, more forcibly than in mine, and more persuasively. Immediately upon the appearance of this Scrap Tobacco, orders began to come to Canajoharie, where the plant of the Beech-Nut Company is, for this Scrap Tobacco, and the extent of this deception, I think, will surprise your Honor, as it did even counsel themselves who were collecting the evidence, the deception which resulted from putting out this scrap tobacco. The Beech-Nut salesmen and retail dealers were assailed with inquiries as to whether the Beech-Nut Packing Company was putting out Scrap Tobacco, and were going to extend their business into scrap tobacco. The attitude of the public is shown here abundantly by

testimony introduced by both sides, showing through the testimony of retailers the comments made to them by their own customers, and also by the testimony of the consumers themselves. A surprising fact, which will be shown to your Honor as this testimony develops, is that in the case of many of these witnesses who were deceived as to this scrap tobacco, who thought it was a Beech-Nut product, their deception continued for years, and in some instances it continued until either just before they were examined as witnesses and in some cases it continued until they found out while on the witness stand that the Beech-Nut Company did not make this product. In one instance a witness never has found out, I believe. He was put on the stand without telling him. His state of mind was ascertained, and he was examined, and it was shown that he was under this misapprehension, and upon cross examination counsel for the Lorillard Company asked some questions which seemed to imply that the tobacco was not made by the Beech-Nut Packing Company, and the witness seemed to resent it. He seemed to think counsel was misleading him, and he said, "Put me right, who does make this?" There was a man whose deception continued, and is continuing yet for all I know. But these witnesses go by dozens and scores and hundreds. It isn't a matter of individual instances. There is no possibility of these things having occurred by accident or by careful selection. As your Honor hears the testimony, you will hear not only the testimony of our witnesses who testify to this deception, you will be presented with the testimony of hundreds of witnesses for the other side, a very considerable proportion of whom testify to exactly what I am telling the Court, namely, to this deception, showing the utter impossibility even of counsel interested in finding witnesses who are not deceived—the impossibility of their going out among a hundred million people and finding two or three hundred for witnesses, without drawing a very considerable num-

ber, probably twenty or thirty, who were deceived. That is the strongest kind of evidence. We show that people are deceived. The evidence for the defense will show that it is impossible to get any considerable number of people collected without including a very large proportion who are laboring under this very deception. It is wide-spread and national.

Now, in the year 1915, your Honor, when that scrap tobacco appeared upon the market, Mr. Barbour, the vice-president of the Beech-Nut Packing Company, wrote a letter, as the evidence will show, directly to the Lorillard Company, complaining of this conduct, protesting against it, and asking that it cease. In reply to that letter Mr. Barbour was informed by letter from the Lorillard Company that the Lorillard Company and its predecessors in title had continuously used this trademark on tobacco since 1898, "as shown by the records of our company." Now, I would ask your Honor to bear that statement in mind. It is going to come up again, and the form of it. It is a representation of fact in terms so distinct and so clear, that the most ingenious imagination cannot conjure up any explanation or any theory that they meant anything other than precisely what they said. "The Lorillard Company and its predecessors in title have used this trademark upon tobacco continuously since 1898, as shown by the records of our company."

They did not even leave a loophole in which to say that they had spoken from memory, and that it was a mistake. They said, "as shown by the records of our company," a representation bearing upon its face every indication of certainty, and of care, and of the intention of the party making the allegation to stand by it, and that it was true. Mr. Barbour received this letter and he wrote back asking them to send him samples of their product showing the manner in which they had been using the word "Beech-Nut" since 1898. The Lorillard Company enclosed him some old price lists, and also sent him the two labels which

the Court will see in the upper left-hand corner, where your Honor will see two labels bearing the word "Beechnut" and under the word "Beechnut," the picture of a squirrel. That is what they had been using since 1898.

Now, for the purpose of making the force of this representation, which will be proved, clear to the Court, we have put upon that card, under those two "squirrel labels," as I will call them for clearness, we have put the standard Beech-Nut oval label. These are all so much alike that one is representative of all. At the right-hand of that card, your Honor will find the Beech-Nut Scrap Tobacco label, under which the Lorillard Company put out this scrap tobacco in the year 1915. The representation carried with it inevitably and infalliably the thought that the Lorillard Company, having owned this mark since 1898 was continuing the business under that label which your Honor sees at the right. Without anticipating the evidence, I will merely ask your Honor to form his own impression regarding the proposition whether that label at the right of that card evinces an intention to continue the reputation built up by that squirrel label, or an intention to purloin the reputation which had been built up by that oval label. To accentuate that point, I will state to your Honor that in this correspondence which took place between Mr. Barbour in 1915 and the Lorillard Company, Mr. Barbour told the Lorillard Company that that tobacco was sailing under the Beech-Nut colors and was being understood to be a Beech-Nut product. The Lorillard Company wrote back to Mr. Barbour saying to him that that was ridiculous, using that word, and saying "If anybody thought that our scrap tobacco was a product of the Beech-Nut Packing Company it would be a detriment to us."

Now, I ask if any reasonable person can look at that card and think that the corporation that put out that trademark at the right, as your Honor holds it, was trying to avoid the evil which would flow from being iden-

tified with the oval mark in the lower left-hand corner, trying to avoid that detriment to their reputation and to benefit by the reputation that would come from the squirrel. The proposition is so inherently ridiculous, so inherently unbelievable that evidence is hardly necessary to support further the proposition that there was design and intent in the adoption of that label on the right, to repudiate that squirrel label and to pretend identity with the product appearing under that standard Beech-Nut label. But the evidence will illuminate that point still farther.

There is another point that I might state to your Honor in this connection, but I will defer it until I explain some further proof that we are going to introduce. This representation being made to the Beech-Nut Packing Company, we must pause to consider the bearing of this evidence and other evidence upon the attitude of the Beech-Nut Packing Company at this time. The inquiry which the Court made a few moments ago as to whether the Beech-Nut Packing Company had ever used this mark upon tobacco comes in at this point very pertinently and I deferred a discussion of it until now because at this point it illuminates the discussion a little more clearly. The Beech-Nut Packing Company never used this trademark upon tobacco except later upon ten or twelve dollars' worth that they sold to qualify for a Patent Office registration, which we will talk about later. But as a business proposition, they never sold any tobacco products under this label. They are not asking for any relief in this Court upon any proposition of that kind. The relief which they ask in this Court is based upon the proposition that the significance attached to this trademark by the public as indicating that any commodity bearing that trademark, especially a packaged commodity bearing that trademark, and sold in grocery stores, tobacco stores, drug stores, and so forth, is a product of the Beech-Nut Packing Company. That is the theory upon which this prayer for relief is

based. I will not, of course, in this opening statement, discuss the law, but briefly we may state that in the Overland case, the sale of a tire was held to infringe the Overland trademark or trade name upon an automobile. No man could buy a tire thinking it was an automobile or vice versa, but the proposition was that here is an invasion of another's reputation. Here the tire man appropriates and profits by the business reputation of the automobile man. Here the tire man saddles upon the automobile man, the responsibility for the quality of the tire and for the fair dealing of the man who sells the tire, and it is wrong that the maker of an automobile should have this responsibility imposed upon him. It is wrong that the reputation which he has built up by advertising and by expensive publicity of all kinds should be diverted from him. There is an infinity of trademarks to select from. Why should this man select Overland for his tires? That is the tenor of these cases upon which we shall rely. We shall show by the evidence that this reputation of this wide-spread extent which would cause people to accept a tobacco product as the product of the Beech-Nut Packing Company, did not exist in 1898. In 1898, we admit that we had no such cause of action. The business of the Beech-Nut Packing Company was a small business then, five or six products, and there was no reason in 1898 why the trademark "Beech-Nut" upon bacon and ham on the one hand, and upon tobacco, on the other hand, should not proceed along perfectly peacebly and innocently by both parties. Neither party's reputation was such at that time that any one would think that the Beechnut tobacco was made by this comparatively small packing house in Canajoharie, New York, it being a comparatively small business at that time. It was not until, by the growth of their business their reputation had so extended as to cause the public to attach this significance to their trademark, that is the significance of believing any product bearing that name was theirs—it was not until their business had grown

to that extent that any cause of action could exist. The cause of action here is the existence of that widespread reputation built up by painstaking and expensive efforts and until that reputation existed to that broad extent there was no cause of action. There was no cause of action in 1898, therefore, since which year the Lorillard Company represented to the Beech-Nut Packing Company that they had continuously used this trademark upon scrap tobacco. It appeared to the Beech-Nut Packing Company, upon consideration, that they had no cause of action. They did not admit and never will admit that this trademark prestige of theirs does not extend over all of this vast field of goods which are handled in stores of this kind, but it seemed that there was an exception which must be carved out of it, that while they were building up this vast field of trademark publicity and appropriating this field in this way, that before they had accomplished that purpose the Lorillard Company, according to their representation had acquired an indefeasible right in this word "Beech-Nut" for that one article, scrap tobacco, and therefore, there was nothing for the Beech-Nut Packing Company to do but abide by the result. This condition seemed to have come about innocently. When the Beech-Nut Packing Company adopted this trademark it adopted it rightfully, and when the assignor of the Lorillard Company in 1898 used this trademark upon scrap tobacco, he was doing so innocently. The two businesses were small, and the general theory, the old theory, of the law is perfectly correct—we don't ask for any modification of it—the same trademark may be used upon baby carriages that is used upon lumber without conflict. There are hundreds, thousands, of cases to that effect, and that was the condition which existed in 1898, when the assignor of the Lorillard Company put this trademark upon scrap tobacco, perfectly rightfully, no reason why he shouldn't, knowing it would cause, and could conceivably cause, no confusion. At that time, the Beech-Nut Packing Company did not

even know of the existence of the tobacco. The tobacco was out in Kentucky and doubtless quite likely—the record does not show it, but quite likely the tobacco man did not know anything about the Beech-Nut Packing Company. But even if he did, that does not make any difference—there was no conflict. The situation was perfectly legal.

Now, the Beech-Nut Packing Company, in pursuance of its adopted policy built up its business so that its reputation expanded to such an extent that it overlapped that scrap tobacco Their design was to build up this reputation unimpaired by anything, to have its reputation for all of this class of goods. But they were so unfortunate as to find that as to an individual product the field had already been appropriated. Therefore, in 1915, as the evidence will show, these letters of protest came to an end. The correspondence extended from June to September, and then the Beech-Nut Packing Company was inactive, took no further steps to stop the Lorillard Company, and there was no reason why they should. Here was this representation as to facts peculiarly within the knowledge of the Lorillard Company facts, inaccessible to the Beech-Nut Packing Company, which upon its face gave the Lorillard Company the indefeasible right to go on with the scrap tobacco. It was an unfortunate situation, it created a conflict, but it seemed to be founded in the strict letter of the law, and the Beech-Nut Packing Company thought itself helpless, and the situation proceeded in that way to the year 1919. The Beech-Nut Packing Company was inactive as to any protest from the years 1915 to 1919. Their inactivity followed, and as we shall see, was the absolute result, the direct result of this representation.

In 1919, the Lorillard Company made plans to put out a Beech-Nut cigarette with which the public is quite familiar at this time. There ensued negotiations between the Beech-Nut Packing Company and the Lorillard Company. The Beech-Nut Packing Company protested. They

had a meeting and the Lorillard Company agreed to make some sort of alterations in its package. The package had originally had on it, "Cigarettes of Beech-Nut quality." I don't think that was ever put on the market, but the wrapper was shown to the Beech-Nut Packing Company. That is an old slogan of the Beech-Nut Packing Company, "Beech-Nut quality," and that was put on the wrapper. They offered to take that off, and I think that has never appeared, and they offered to make a change in the color, the red color, they offered to change to some other color but it does not appear of record what it was. And these negotiations went on through correspondence for some months. They did not arrive at any agreement. The Beech-Nut Packing Company offered to accept any reasonable changes that they would make. Of course, the Beech-Nut Packing Company did not feel in a very strong position. They were there trying to protect their trademark, to get these people to make some change, but they did not have any very heavy club to wield over them. They did not have any club at all, because in their understanding, instilled into their mind by the Lorillard Company, the Lorillard Company had an indefeasible right to use this mark upon tobacco since 1898. And after more or less discussion, the Lorillard Company, as the evidence will show, offered to make a few slight changes in the wrapper before they put the cigarette out, if the Beech-Nut Company would pay them some money, $10,000, I think, to pay for the original wrappers which they would have to destroy. That seems to have been the last straw, and the negotiations were broken off, and the Lorillard Company put out the Beech-Nut cigarettes.

In the meantime and during or shortly before these negotiations wherein the Beech-Nut Packing Company rather helplessly, and without much hope of success, was trying to induce the Lorillard Company to avoid this precise facsimile, as one might almost say, of their trademark—

during those negotiations, the Beech-Nut Packing Company filed an application in the Patent Office for registration of its trademark. And they had the American Tobacco Company make them up about twenty-five or fifty dollars' worth of cigarettes with the word "Beech-Nut" printed on the boxes. It is necessary to go through that formality, and they sent some to their lawyer of record, and one or two other people, so that they could make the qualifying affidavit and say they sold some of these cigarettes in interstate commerce. The filing of this application seems to have been based partly upon desperation and partly upon the theory that while the Beech-Nut Packing Company, under the facts as represented by the Lorillard Company, must grant that the Lorillard Company had a perfect right to put out scrap tobacco under the Beech-Nut trademark, the theory appears sound that that right, based upon scrap tobacco from 1898, creating as it did, great confusion in the market and in the mind of the public and imposing a hardship upon the Beech-Nut Packing Company, would afford no warrant for the Lorillard Company to extend that right to cigarettes.

Although we hear much in Patent Office discussions of trademark questions about the use of a trademark upon one article in a class giving right to its extension to other articles in its class, that is simply a matter of interpreting a statute which has no effect beyond the regulation of registration in the Patent Office. Here was a case in which special circumstances existed, and the application was filed for registration of the trademark on cigarettes by the Beech-Nut Packing Company. This application was known to the Lorillard Company, during the negotiations as the evidence will show when it comes before your Honor, and, I think, just before the termination of the negotiations, the publication in the Patent Office Gazette, that this application had been examined

and was about to be registered appeared. The publication in the Patent Office Gazette is to enable anyone who considers his rights violated to oppose the registration. There is a statutory proceeding called an "Opposition," and the Lorillard Company, seeing the publication of the intention of the Patent Office to register the cigarette trademark for the Beech-Nut Packing Company, filed this notice of opposition.

Now, that leads to a trial in the Patent Office conducted in general the same as litigation is before any tribunal. The Patent Office acts in a rather judicial capacity in those matters. The evidence is taken by deposition, and the cases are argued. Now, this opposition led to the taking of evidence in the Patent Office by both parties, and that record in the Patent Office is incorporated in the record of this case by stipulation, and the testimony presented to the Patent Office is before your Honor by stipulation as if taken in this case. That testimony taken in the Patent Office shows facts which I ask your Honor to compare with the representation made by the Lorillard Company to the Beech-Nut Packing Company in the year 1915. In the Patent Office proceeding, your Honor, an official of the Lorillard Company testified that that old squirrel tobacco, represented by that mark in the upper left-hand corner of that board—that the sale of the goods upon which that trademark appeared decreased year by year until 1910, mind you, your Honor, 1910—it had been decreasing long before 1910—had decreased year by year until in 1910, only 25 pounds were sold, and that in the years 1911, 1912, 1913 and 1914, not an ounce was sold or in existence in the possession of the Lorillard Company, so far as the evidence shows.

The superintendent of the factory of the Lorillard Company, where that squirrel tobacco was made, testified that its manufacture was discontinued not only for those four years from 1911 to 1914, but probably for six years.

Now, as this evidence comes before the Court, I would ask your Honor to contrast that statement with the representation made to the Beech-Nut Packing Company by the Lorillard Company in the summer of 1915, wherein the Lorillard Company said to the Beech-Nut Packing Company, "We have used this squirrel trademark upon tobacco continuously—we and our predecessors—continuously since the year 1898, as shown by the records of our company." And what did their records show, if they had any? These men remembered and testified, and they were officers and employees of the Lorillard Company, they testified that that mark was absolutely discontinued for four years, both as to manufacture and sale, and the superintendent of their factory said that the manufacture of those goods was discontinued for probably six years

Now, all of this, as the case progresses, will be directed toward our proposition that that mark was abandoned; it was so held by the Patent Office, that it was abandoned in 1915. There was no continuity. Every act showed an intention to abandon. The intention to abandon can be read from that placard which is before the Court; looking at this label at the right, no one can conceive that it was not the intention to abandon whatever prestige attached after these years of disuse to that squirrel label, and to substitute for it the prestige of the similar Beech-Nut label. It isn't consonant with any intention or desire to continue with that old squirrel brand, to produce that oval trademark, so similar to the Beech-Nut trademark. A further point bearing upon abandonment is this: Your Honor, if a smoker, and if not, as a matter of general knowledge, will know that most of us are quite particular about the flavor of our tobacco. We like a certain cigarette or cigar and will walk two or three extra blocks to get it. And when we are accustomed to buy a brand and the flavor changes, we quite resent it. We don't consider it as the same goods any more. We

look around for a different one and start over, buying something else we like. Now, in the case of this tobacco which had been manufactured under that squirrel mark, and of which the Lorillard Company claims their present goods are a continuation, that scrap tobacco that was made and put on the market under that squirrel label has never been made by the Lorillard Company since the year 1910 to this day. They have put out a different product under that label at the right hand of the card before your Honor, they put out a different mixture, as stated by their own superintendent of the factory where they made it. There was no continuity as to the product. They changed the flavor of the product, as will be brought to your Honor's attention. Several witnesses testified, the testimony is hardly necessary, to the fact that the preservation of the blend and the flavor—they testified rather indirectly—they say that everyone is particular. One man likes one flavor and another man another—that's the way they testified, which is, in effect, the same proposition that I advance, that it is important to preserve the continuity of the compound of tobacco. Otherwise, if you change it, one man being particular in liking this, and another liking that, their trade is lost. That is another matter to which we will call your Honor's attention as the case progresses upon this question of abandonment. The evidence which we shall produce will be directed to showing your Honor that that statement made by the Lorillard Company to the Beech-Nut Company in 1915 was an absolutely flat, intentional and fraudulent misrepresentation, wherein they stated to the Beech-Nut Packing Company, "We and our predecessors have used this mark continuously upon tobacco since the year 1898, as shown by our records."

Now, it is proved, beyond the possibility of dispute, that if they had looked at their records, and told us honestly what the records showed, they would have

found and told us that it had been discontinued for four years. They would have found that the tobacco itself which had previously been made under that squirrel label had never again been made and is not being made today.

Therefore, the case takes on quite a different aspect from that which it seemed to have to the officials of the Beech-Nut Packing Company in 1915. These later developments have shown that the Lorillard Company had no rights, dating from 1898. Therefore, immediately after these facts developed in the Patent Office, this plaintiff came promptly before this Court and filed its bill, for the first time knowing that it had a right of action against the Lorillard Company upon this Beech-Nut Scrap Tobacco.

Previous to the time of these proceedings in the Patent Office, plaintiff had been deliberately misled, led to believe that the Lorillard Company had an indefeasible right to this trademark on scrap tobacco since 1898. In the Patent Office they found that the Lorillard Company had abandoned the mark and that the Patent Office had so held. The Patent Office and the inquiry will come into your Honor's mind as to what they did then with that application—the Patent Office in matters of trademark registration acts under a very narrow and restrictive statute. Your Honor, undoubtedly, understands that the registration of a mark in the Patent Office confers no rights upon anyone. The rights, of course, are common law rights, and it is merely a question of registering so that an action can be brought in the United States Court even when there is not diversity of citizenship, and it enables a citizen of this country to register abroad. Many foreign countries won't register your trademark unless you register it in your own country. Now, in this matter of registration, the Patent Office, by statute, is directed to name certain classes of goods—to constitute certain classes of goods—I cannot accurately state the names of them, but illustratively, I can bring the point out—they

have a class, I will say, of tobacco, a class of groceries, a class of hardware. Now, the law says that when a man applies for registration of a trademark he can have for one fee and upon one application registration for as many articles as are included in any one of those classes, but if he wants registration upon an article in another class, he must file another application and pay some more money. In the instant case the Patent Office simply took the ground that they were restricted on the question of registration by the fact that we had never used the mark on tobacco, or at least we had only used it on tobacco in 1919 for that formal sale, and the Lorillard Company had used it in 1915, and, therefore, they would not register it for us. The Patent Office held that they were precluded from going into these questions which we bring before the Court, that they had nothing to do except with the administrative execution of the law, and that was all there was to it. The Patent Office even intimated to us that we should take our grievance somewhere else, namely, to the United States Court, and so that was the way our registration proceedings in the Patent Office terminated, but they had served a purpose in bringing out the truth and removing that misrepresentation.

I stated to your Honor, I think, that it was immediately after the bringing out of these facts in the Patent Office that this pending suit was brought.

The Court: Is it your position that if there was no abandonment, you have no case?

Mr. Scott: No, not on scrap tobacco. And the only case that we conceivably could have would be, not upon the use of the word "Beech-Nut," which, of course, is the important thing, but it is conceivable that if it were worth while, we might have a case upon the use of the oval in connection with the use of the word "Beech-Nut." That is, that while there might not be a case upon the mere use of the word "Beech-Nut"—that they had a right to the use of that—they might not have had a right to use it in

connection with our oval in a way such as to increase the confusion. But, broadly speaking, as to the important issue of the case, as to the word "Beech-Nut," if they had not abandoned it, we never could interfere with them in its use on the scrap tobacco, but it is not so clear to me that we might not have interfered with them on the cigarette, because that was going away from the precise article to which their title pertained, and it is not quite clear to me—

The Court: Chewing and smoking tobacco?

Mr. Scott: Yes, chewing and smoking tobacco. That while ordinarily the right of one company established in one of those articles inures to his benefit in the other, it may well be that in the special circumstances of this case it would not be so, because their right in the scrap tobacco was limited strictly to scrap tobacco by our general right. They had not put the brand on cigarettes until long after we, the Beech-Nut Company, had so expanded our general rights as to cause the public to believe that cigarettes, if produced, would be ours. They allowed our reputation to pre-empt that field before they went into it.

Now, to comment on the general situation a little as to what the evidence will bring out. During all of this period we contend that it was the privilege of the Beech-Nut Packing Company to go into the tobacco business if it wanted to, or to stay out if it wanted to. During the period, say, from 1910 on, after the business had grown big—I am more concerned with that period—after their reputation had grown to this wide extent—it was their privilege to go into the tobacco business, and to take the direct profit which they would get in the tobacco business, if they wanted to, or it was their privilege to stay out of the tobacco business and sacrifice those direct profits for the sake of avoiding that antagonism which they foresaw from that part of the community which is opposed to cigarettes and tobacco. They could do either one. It was

a matter of business policy. As the testimony of Mr. Barbour will show, they saw plainly that cigarettes—tobacco—was a natural line of expansion for their business, and then he comments to the effect that I have explained, that the thing worked both ways, that there would be profit on the tobacco, but on the other hand there would be injury to the rest of the business. They had to choose between the two, and they chose keeping out of the tobacco business and concerned themselves with their general line of business. But what has happened now?

They stayed out of the tobacco business for the express purpose of avoiding this antagonism and injury, which the testimony will show your Honor is real and does exist. They stayed out of it for that purpose, they sacrificed the direct profits which they might have made from tobacco, and what have they accomplished? Nothing. They have not even kept clear of that criticism. The Lorillard Company has come in and taken the direct profits which they sacrificed and has imposed upon the Beech-Nut Packing Company the criticism of that part of the community which is opposed to tobacco or cigarettes, and there is also another part of the community which does not take such extreme views, but the testimony will show that there are some who have no objections to tobacco whatever but who criticize the Beech-Nut Company for putting out tobacco, because they don't think that is in the line of efficiency, putting out tobacco along with food products, and they criticized them on that ground.

So, we arrive at the question of damages in this case. Our prime purpose here is to protect our trademark, but we have to follow the law where it goes. We claim that we have an undeniable and indefeasible right to the protection of this trademark upon this record, as shown by the facts, and as supported by recent cases, some in this Circuit.

Now, the profits which the Lorillard Company has made out of scrap tobacco are profits which the Beech-Nut

Company deliberately sacrificed for the purpose of avoiding antagonism. These profits the Lorillard Company has appropriated, and this antagonism the Lorillard Company has imposed upon the Beech-Nut Packing Company.

Now, I think, your Honor, that with that outline we will be able to approach the case.

Mr. Milton: For the defendant, if your Honor please, appear Mr. Gifford, of the New York Bar, Mr. Cavanagh and Mr. Meyers, together with myself. Mr. Cavanagh will make the opening statement to your Honor.

Mr. Cavanagh: If your Honor please, I have been associated and connected with this Beech-Nut matter practically since its inception.

The Court: In 1870 or 1866?

Mr. Cavanagh: Since the inception of this quarrel, if I may call it that, and I expected in coming here today to ascertain finally what the plaintiff's position is in this case. I have listened very attentively to Mr. Scott's discussion and I must confess I am puzzled and confused. I don't know whether these food products people want to go into the tobacco business or, whether, as they stated, tobacco is such an instrument of evil that it would be detrimental to them, and therefore they want to stay out of it. Do they want to come in or do they want to stay out? So I am afraid that I will have to simply give a brief statement of the situation as I understand it from my intimate connection with this case.

I will try to avoid all argument and stick coldly to the facts.

As Mr. Scott has told you, the Beech-Nut Packing Company is in the food products business. If your Honor will glance at plaintiff's exhibit board, which has been stipulated in here, from 1891 down practically to date you will find that every single one of those products on that board relates to a food product, or it relates to an article

that comes under the Pure Food and Drugs Act. There is not a single article on there that has the slightest thing to do with the tobacco industry, which is a class by itself.

Now, if your Honor please, this Lorillard Company, as you may perhaps well know, and which the record will show, we will prove has never been engaged in anything in its whole career but in the tobacco business, and the history of the Lorillard Company is somewhat of a romance.

It was established in 1760 by old P. Lorillard. It is 160 years old, it is the oldest one and the largest tobacco concern in the industry, as the testimony will show this concern, and in comparison with Beech-Nut I might interpolate here that you have gotten the impression perhaps that this Beech-Nut Company is an enormous concern and that everything in this whole Beech-Nut business, whether tobacco or food, was built up by its efforts. Let us look at the history of what the Lorillard Company is. It is a concern 162 or 163 years of age. Its tobacco products include some of the best known in the world, it has the Murad, the Mogul, the Egyptian Deity, the Helmar, the Egyptian Trophies and the Beech-Nut Cigarettes. It has the famous Climax Chewing Tobacco, it has the Sensation and numberless brands, and the famous Beech-Nut Scrap. It has, according to some of the testimony which will appear in this case, twenty-five branches in twelve different cities, including large branches right here in this district of New Jersey. It employes about 12,000 people, and it manufactures and sells, as the testimony will show, every possible tobacco product, except snuff. That is the kind of a concern that is putting out this Beech-Nut Scrap tobacco and the Beech-Nut cigarettes. Its whole life has been devoted to tobacco, as the record will show; it has nothing whatever to do with food products.

The scrap tobacco package that is in issue here (and I might say it is one of the inducing motives of the quarrel), which your Honor will see—that is a ten-cent package of tobacco (indicating). We propose to show, and the testimony indeed does show, because it is by stipulation and not denied, that at the time of the patent office litigation to which Mr. Scott referred, the Lorillard Company was selling of this ten-cent item $14,000,000 a year, or over 29,000,000 pounds, and that was exactly over $2,000,000, or approximately, I should say, $2,000,000 a year more than the total business of the Beech-Nut Packing Company in all its branches, the bacon, ham and eggs and what-not, the Beech-Nut gums, and matters of that sort. In that ten-cent package, without talking about the famous cigarettes, it was doing $14,000,000 worth of business a year.

The testimony will show that that was the outcome, not of any trespassing or traveling upon the reputation of a food concern, or a bacon concern, or a ginger pop concern, but it was on the reputation of that great Lorillard Company, with its great organization, its hundreds of states' salesmen, district salesmen, city salesmen, and subsalesmen, its whole force back of it. As witness after witness has and will testify, when a Lorillard man went with a new brand—for intance, Beech-Nut tobacco upon the market, and walked into a man's store, he didn't have to go in and say, "This is like the Beech-Nut tobacco," or "This is like the Beech-Nut food products." He went in, as the evidence will show, and said, "I am from P. Lorillard Company, the makers of the famous Moguls, the Helmars, and other brands; we are bringing out a new brand, it will sell like the others because it will sell on Lorillard's reputation," because as is the slogan used by several witnesses in this case, "Lorillard on tobacco is like sterling on silver." And that is the reputation Lorillard has, and that is the kind of concern they accuse of traveling on their bacon and eggs business.

Now, if your Honor please, to get to the history of this. As Mr. Scott has well stated the matter, the evidence will show and develop in this trial that the business of the Beech-Nut Packing Company from 1891, when it was the Imperial Company, down to the incorporation of the Beech-Nut Packing Company and for several years thereafter, was comparatively small. I think one witness testified during that period from 1899 to 1903, that they cured some hams, and that they cut wood in the winter. In any event, the testimony will show they had one small building out in Canajoharie, New York, where they carried on this business.

In 1896, down in Kentucky, there was a large tobacco concern by the name of Harry Weissinger Tobacco Company—

The Court: What years?

Mr. Cavanagh: 1896. This concern was putting out brands some of which are famous today, such as the Burr-Oak, the Three States Mixture, and others, as the evidence will show. In the Patent Office proceeding, to which Mr. Scott has referred, and the evidence of which is in this case, it is admitted, as a fact so far as the early development of this business goes, that with Weissinger there was a man named Somers. In 1896 this Five Brothers Tobacco, which is an exhibit in the Patent Office case, and which was known in those days as a screw cut, or thread cut, was on the market, and Harry Weissinger wanted something to compete with that Five Brothers tobacco, so he brought out a brand of tobacco called Beechnut. There is one of the original Weissinger Beech-Nut labels which this man Somers, who made up the formula for the original tobacco, so far as the blending mixture goes, produced, and it is in evidence in this case.

That was in 1896, and that Beechnut wrapper which you will see there of the Harry Weissinger Company was

right in a package like this (indicating Five Brothers tobacco), but they found out, as the evidence will show, and does show, that because the Five Brothers was a union tobacco and this Beechnut tobacco was a non-union tobacco, the Weissinger thread cut, that it would not sell in the mining districts. So in 1897, or rather, the latter part of 1897—that is correct, in the latter part of 1897, Harry Weissinger brought out what is known as a chewing and smoking tobacco, and in this case you will find the expression "scrap" used very often. This is one of the original packages with Harry Weissinger's name on.

The Court: Is "scrap" used on that?

Mr. Cavanagh: It is was a scrap tobacco.

The Court: Does the word "scrap" appear there?

Mr. Cavanagh: No, it is called chewing and smoking.

The Court: All right.

Mr. Cavanagh: It says on it, "Superior quality, Havana cuttings," but they usually call that a scrap tobacco, it is in small pieces.

He brought out that tobacco in 1898, and it was sold as the evidence shows, and we have the original records of sales to Arbuckle, J. Orrick Co., Allen-Kirkpatrick Ewart Co., and others. This very package was brought in 1919, or at the time of the Patent Office case, from a man in Cumberland, Maryland, who still had it in stock, and it was purchased from J. C. Orrick & Sons, wholesale brokers. The Weissinger Beech-Nut tobacco was sold all through Kentucky, Ohio, Indiana, Pennsylvania, and other places, according to Mr. Somers' testimony.

In 1903, or the latter part of 1902 or 1903, the Harry Weissinger Tobacco Company, as the record will show, was purchased by the Continental Tobacco Company, the Continental being a part at that time or one of the forerunners of the American Tobacco Company, and the brand

after being put up by the Continental, as the record shows, for a short while, was transferred to Luhrmann & Wilbern Tobacco Company, of Middletown, Ohio.

If your Honor will please bear that name in mind—the record in this case shows it is quite important because matters start there.

The Luhrmann & Wilbern Tobacco Company was a subsidiary or one of the affiliated concerns of the American Tobacco Company, of what was commonly called the old combination, subsequently dissolved by the Supreme Court. The Luhrmann & Wilbern Tobacco Company continued to put out and sell this tobacco from 1904 until 1910. Now, litigation in connection with the dissolution of the old American Tobacco Company began about 1908, and it continued until 1911, when the latter part of the year the decree of the Court was made final, partitioning out the various companies, and by that decree this Luhrmann & Wilbern Tobacco Company, as we propose to show, was apportioned out to the P. Lorillard Company, together with all its capital stock and its property, its buildings, its trademarks, and its brands.

In the work of preparing this dissolution, apportioning this matter out and straightening out the mess in general, a list was prepared in 1911 going with the decree and carrying out the purpose of that decree, conveying the various brands of the Luhrmann & Wilbern Company over to the P. Lorillard Company, and upon that list, amongst the other brands, as we propose to show, was this Beechnut brand.

Now, your Honor will understand that the tobacco business is a very peculiar one. It has its rises and its falls, a brand comes up and a brand goes down, and it is necessary for the tobacco manufacturer to keep a constant watch on his market, to push his brand as much as he can and when the public taste changes from a sweet tobacco to a rough tobocca, and vice versa, for instance, he has got to watch that change in the market.

In those days there was a big brand made called "Honest"; it was a tremendous seller, and in proportion, as we propose to show, the sales were just as great—

The Court: The Honest Long Cut?

Mr. Cavanagh: The Honest Scrap, and this Honest Scrap was at that time the reigning king in the market, the same as this Beech-Nut scrap is today. It was sold by millions of pounds, and I think in facts and figures the record will show it was as large as this Beech-Nut. But, as in making the curve of a chart, it has a rise and then as the taste began to change, in tobacco, as in the case with all articles, and the sales began to drop, it became necessary to put up another brand. We propose to show by officials of the Lorillard Company that following their usual practice—and it is the practice of all tobacco men, they went to their reservoir of the brands that they used, their living brands, they went to their lists of brands which had been given to them and which were contained in that decree of the Court, or rather, were apportioned out to them by the decree of the Court, and in looking at the list of scrap tobaccos, they found certain of them were on the market, so they could not select those names, and they selected the Beech-Nut name because it was their own mark. I won't say select it, but simply put that mark on the goods, because it was their own mark. So we propose to show without any argument at this point there was never any abandonment of this mark, that this came from Luhrmann & Wilbern to the Lorillard Company and was used by them in conformity with the decree of that District Court following the decision of the Supreme Court of the United States, dissolving that old combination.

So Lorillard then, in 1916, put out this brand, and they followed, as I have briefly touched upon, and as the evidence will show, they followed the usual procedure in what I might call, in the vulgar parlance of the day, of plugging all their brands with their enormous resources

of their organization, and not paying any attention to any Beech-Nut food products.

On that brand the first year, I think the sales show that it ran about 1916 to 7,000,000 pounds and in 1919, at the time of the Patent Office litigation the sales amounted to 29,000,000 pounds with a value of over $14,000,000. So much for the history of the tobacco. Now, I think we had better at this time, as we perhaps should show, and in fact the Patent Office records of this case does show, how the present situation arose. In 1915, as Mr. Scott has stated, the Beech-Nut Packing Company knew that this Beech-Nut scrap was on the market, it was a big seller, so in June, 1915, they wrote to this Lorillard Company protesting. In order that there may be no sins of commission or omission, with your Honor's permission, I would like to read some of these letters, which both sides admit are genuine.

The Lorillard Company on September 15, 1915, wrote back explaining how they came to have the ownership of this mark, and at that time, September 15, 1915, they notified the Beech-Nut Packing Company that under the decree of the Circuit Court of the United States (this is quoting from the letter), for the Southern District of New York, the so-called tobacco combination, which included the American Tobacco Company, was split up. In this—

The Court: What page?

Mr. Cavanagh: On page ten, if your Honor please, the letter to Mr. Barbour.

The Court: All right.

Mr. Cavanagh: In the second paragraph.

The Court: All right.

Mr. Cavanagh: "In this disintegration proceeding the Luhrmann & Wilbern Tobacco Company, which had always been maintained as a separate entity, was acquired

by P. Lorillard Company. In the meantime some of the brands formerly manufactured by the Weissinger Tobacco Company had been taken over and manufactured in the Luhrmann & Wilbern factory in Middletown, and after the acquisition by our company of the Luhrmann & Wilbern business, including these brands, we continued to operate it as a separate company until about two years ago, when we disssolved it, taking over all of the business and brands directly in our own name."

Now, that shows at least, and the record will, that in 1915 they were notified, the Beech-Nut Packing Company, this plaintiff, was notified of Lorillard's position. That matter was dropped, any discussion of the whole situation was dropped from 1915 until 1919.

Now, in the meantime, as this testimony shows, and as will develop in this trial, during those four years, Lorillard satisfied that this letter had been satisfactory was putting all its tremendous resources in the promotion of all that tobacco, and it grew by the millions of pounds until its business exceeded the Beech-Nut Packing Company's total business, and this Beech-Nut Packing Company stood by and let that business grow. We will show the enormous amount of money we invested in advertising, in machinery, in missionary crews, in the sales department and in all the methods that a great organization like the Lorillard Company uses in promoting the sales of its products; that this was all with the knowledge of the Beech-Nut Packing Company; that they stood by and let that business grow without any further protest until it exceeded their total business, this poor ten cent piece of scrap. That is all in the record.

Now, we will come down. Everything was slumbering peacefully, as the testimony shows, in 1919.

In 1916 (as I think some of the stipulations show), or thereabouts, I am not certain about the date, the Lorillard Company proposed to bring out a cigarette to follow in the footsteps of this Beech-Nut scrap, which was a great

seller. We will show that that is common in the tobacco business, and your Honor knows one of the best examples of it is the Lucky Strike smoking tobacco and the Lucky Strike cigarette. So they proposed to use the same scheme, to have the Beech-Nut cigarette travel along on the reputation of the Beech-Nut Scrap, as a number of witnesses have testified, and as will appear in this case. The Beech-Nut Packing Company, my recollection is, in some way became acquainted with this fact that the Lorillard Company proposed to put out a cigarette and, as these letters will show, the first thing that Lorillard knew was that the Beech-Nut Packing Company was on the market or expected to come on the market with a cigarette. So the Lorillard Company wrote to the Beech-Nut Packing Company, and that letter, your Honor, is very interesting.

The Court: What page?

Mr. Cavanagh: On page 15.

The Court: All right.

Mr. Cavanagh: In that letter the Lorillard Company refers to the correspondence of four years ago about the Beech-Nut Scrap and then goes on to state, "On your part," I will quote from the letter, "there the matter was dropped, you having made no further reply or objection. On our part we have continued the manufacture and sale of tobacco products under the trademark 'Beech-Nut' until today it is one of the leading tobacco trademarks in this country.

"On or about the 17th of this month information came to us of small shipments to two jobbers in this locality of cigarettes bearing the trademark 'Beech-Nut' and your name, but manufactured by The American Tobacco Company. Our counsel immediately by phone took the matter up with Mr. Junius Parker, counsel for the Tobacco Company, and, on being told by Mr. Parker that the Tobacco Company did not claim any title to the trademark, but

was manufacturing cigarettes under it for your account, our counsel asserted our ownership of the trademark for tobacco products and demanded that the Tobacco Company cease making these cigarettes. We now have Mr. Parker's letter dated June 25th, 1919, stating that the Tobacco Company has 'easily and definitely concluded' not to manufacture any tobacco products under the name 'Beech-Nut.' We do not enclose copy of this letter, as we take it for granted that the Tobacco Company has made you fully cognizant.

"We very much hope that further consideration will bring you to a like conclusion, as we must and do insist that you respect our rights and cease using 'Beech-Nut' as a trademark for cigarettes. You have never heretofore used this trademark for tobacco products. Indeed, you have never heretofore manufactured or sold any tobacco products, but always goods of an entirely different class. 'Beech-Nut' has been used by ourselves and our predecessors in title for many, many years as a trademark for tobacco products, and under numerous decisions this gives us ownership of the trademark 'Beech-Nut' for cigarettes."

So it was the Lorillard Company that went after the Beech-Nut Company to cease going into the tobacco business.

Now, Mr Scott has adverted to some negotiations that then took place, about the question of the character of the labels, and we will submit that those negotiations were directed to a question of some minor details of changes in labels, and as Mr. Scott has stated, the question came down to who should pay for the changes in the labels, the $10,000 worth approximately. But while the negotiations were still on the Beech-Nut Packing Company —I hardly know the expression to apply to the actions— without stating anything to Lorillard, put out these fake orders of cigarettes (as the Patent Office decision found it was not a genuine sale), and rushed into the Patent

Office in the attempt to register that trademark for cigarettes, which of course is a tobacco product.

Now, the effect of such a registration, as your Honor is aware, is to give the Registrant *prima facie* evidence of ownership, that is, the right to exclude others, *prima facie* right, at least, and neither the Lorillard Company nor its counsel knew anything about that application for registration until it appeared in the "Official Gazette." The application for registration was filed about July, 1919, and in the meantime we had received or had, shortly after that time, a letter as the record shows, from the Beech-Nut Packing Company, which is very interesting. This was shortly after they filed this application for registration without our knowledge, and while these negotiations were going on. This letter is from B. Arkell, President of the Beech-Nut Packing Company, to Mr. Thomas J. Maloney, President of P. Lorillard Company, page 23, your Honor. He says:

"Dear Mr Maloney:

"I am enclosing letter addressed by our counsel, Mr. Offield, to my son, William Clark Ardell, in reference to the Beech-Nut Stogie Company, thinking that you would be interested in same."

On page 22 appears this letter, and these letters will give you a better idea than anything else of the situation.

"July 22nd, 1919. Mr. W. C. Arkell, care of Beech-Nut Packing Company, Canajoharie, New York. In re Beech-Nut Stogie Company.

"Dear Sir:

"In reply to your letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any bearing upon your right to stop the use by them of your

mark. Of course, the time to have taken the matter up was upon the first shipment but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Company."

That letter was forwarded to us for the purpose of bringing action against the Beech-Nut Stogie Company, and in that connection, and in rapidly passing, your Honor, the record shows that from 1915 on, and with the knowledge of this Beech-Nut Company, the Lorillard Company had stopped others or had caused others to stop putting tobacco products on the market under the name of Beech-Nut.

Now, we are down to the record in this Patent Office case. The testimony in this case is, and there are two volumes about that size (indicating)—the present action is practically a rehash or a continuation along practically the same lines of all that went on in the Patent Office. In other words, I think that this Court is getting installment No. 2 in this case. Testimony was taken, large briefs were filed, and the argument was had, and the decision which has been referred to in this case of the Examiner of Interferences—he held so far as the right to the word "Beech-Nut Tobacco" went, that tobacco was not in the same class of goods, was so radically and diametrically different from food products that there was absolutely no connection between them; and under the decisions in the cases, and under our American law here, and under the law of practically every country, that the Lorillard Company had the right to the mark, and the Beech-Nut Company did not, and therefore the Examiner of Interferences refused to register the mark for the Beech-Nut Packing Company. The Examiner of Interferences did hold, on reasoning which we think is erroneous, but that

is neither here nor there, he held there was an abandonment of this earlier Beech-Nut brand, but his holding was that even our 1915 use gave us the right over anything the Beech-Nut Company ever had, because they were never in the tobacco business. The Beech-Nut Packing Company appealed that case and it went to the Commissioner of Patents. It was intended to be argued out on all points, but the Commissioner of Patents, finding at the start of the case, and the decision is recorded in the Commissioner's decisions for the year 1922, page 9, and the report of it I hold in my hand, he held that as the Beech-Nut Packing Company had never made any use of the mark, such as to entitled them to registration, and that nothing the Beech-Nut Packing Company ever had shown in their old trademark registration was such as to give them any right to register for tobacco, and he affirmed the decision of the lower court, or the Examiner of Interferences, and refused to pass on the other questions, such as questions of abandonment and the like.

I will read a short paragraph of that decision because of its continuity. This case is so heavy that we want the Court to get a bird's-eye view of it, if possible. The Commissioner in his decision said, "Applicant has established" (that is the Beech-Nut Packing Company), "that it was using Beech-Nut as a trademark for a large number of miscellaneous articles, saying: 'The Beech-Nut Company in using its own label on cigarettes was operating within an exclusive right it has always had; this being so, neither the extent nor the method of exploitation of cigarettes is of any legitimate interest to the opposer.'" Then the Commissioner said, "Applicant seems to argue that inasmuch as it was employing a trademark on one class of goods it was free at any time to employ that mark on another class of goods, and that in order to obtain registration in the second class of goods it was not necessary to carry on a business as to the second class of goods.

This argument is not supported by any cases I can find and does not seem sound. A trademark right grows only from use in a business, and the use of a mark in one business does not afford sufficient foundation for registration of the mark for another business."

So that decision affirmed the Examiner of Interferences, and we were through the Patent Office with two decisions in favor of P. Lorillard Company.

There still remained the step of an appeal to the Court of Appeals for the District of Columbia, but no such appeal was taken by the Beech-Nut Packing Company in the Patent Office case. The whole matter was dropped. They did not avail themselves of the right of appeal, and the adjudication of the Patent Office became final. Now, that brings us to this point, if your Honor please, and I can't stress it too much (as the record will show, and as it will develop in this case) of the radically different classes of business, I might say here and pick them off to save time, that in addition to that decision of the Patent Office in favor of Lorillard as to the different class of goods, that it has been stipulated in this case that tobacco does not come under the Pure Food & Drugs Act, tobacco for smoking and chewing, but that chewing gum does, and that tobacco comes under the Internal Revenue Law, but chewing gum does not. It has been held, as we will show and as appears, and I don't like to refer to decisions, but I will simply state briefly it has been held by the courts for years, that tobacco is not a food product, that it is a narcotic, that it is not taken into the stomach to build up the bodily system, but it is liable to be detrimental, if it has any effect at all. Those decisions were rendered in cases and they are referred to in the records, in cases in what I might call the Blue Law or Bluenose States, or whatever they are, where they tried to sell tobacco on Sundays along with drugs, foods condiments and other necessities, candies and confections, and all of those years the courts

have said, "No, you can't sell it, tobacco is a luxury and not a necessity; it is not a food." That is the holding of the Courts.

Then, we have the official classification in the Patent Office, tobacco products are classified in Class 17 as "tobacco products," which includes smoking, chewing tobacco, cigarettes, cigars Tobacco has no genus; it is a thing by itself; you can't name any class it belongs to, because tobacco is tobacco. Food products are classified in the Patent Office, as we will show, under Class 46, "foods and ingredients of foods."

We will further show in this case that every famous tobacco mark has been registered, or practically every famous tobacco mark, or one that will occur offhand to you has been registered time and again for other articles.

We propose to show our own famous Climax tobacco has been registered over 100 times for foods and every staple article under the sun. The same with the Lucky Strike, the Omar—

The Court: Under what classification is chewing gum?

Mr. Cavanagh: Under Class 46, Foods and Ingredients of Foods. It comes under the Pure Food Law. The rulings have been to that effect, and there have been prosecutions in cases where chewing gum has not been what I might call up to standard under the Pure Food & Drug Act.

We propose to show in the case, as I have touched on, that no manufacturer of tobacco ever engaged in the manufacture of food, and no food manufacturer was ever known to engage in the manufacture of tobacco.

We propose further to show that the class of people that use scrap tobacco, chewing tobacco and usually cigarettes are entirely a different class; you don't find an eight-year-old child, as the record will show, or a woman, going in to buy Beech-Nut food products and coming out and coming down the street with a package

of scrap tobacco; you don't find a woman or a child chewing scrap tobacco; it is used by grown-up, red-blooded men. There may be some men that use chewing gum steadily, perhaps to cover up something else. So that all the circumstances indicate that tobacco has nothing to do with food, the two lines are distinct, and one reason we propose to show (and this is going to be very important), by officials of the tobacco company, born and brought up in the business year in and year out, for over a generation, is that this tobacco industry is one of the most highly specialized and technical industries in the world. From the time that the tobacco is sown in the bed, the tender plants transferred to the field, from the time the tobacco is gathered up in the barns and treated, special processes, special machinery and special knowledge are required to successfully make any tobacco products, and a man has got to know that business as he has to know no other in the world. That is the reason, as the Lorillard Company (as mentioned by Mr. Scott), told the Beech-Nut Packing Company that it would be a detriment to the Lorillard Company to ever let the public know or get the idea that a food product concern making jellies and marmalades was making tobacco, because the situation in the two businesses is entirely different.

We propose to show also that in the world at large, in the stock market, tobacco is regarded as entirely different. Pick up the daily papers and you will see a list of stock, steel, oil and tobacco stock—

The Court: Tobacco is way up, I suppose. (Laughter.)

Mr. Cavanagh: So all those factors, court's classification, class of users, and everything else, go to show your Honor there is absolutely no connection between the tobacco and food. If upon attempt to stretch food products to cover tobacco—in doing that you are going to ask for the wreckage of the whole trademark system of this

country, because the minute you do it every tobacco company that has a Climax or an Omar or a Mogul or an Egyptian Deity or a Helmar will go after all the other fellows using that name for other and different products and you will have confusion worse confounded.

We also want to briefly explain to your Honor in regard to these numerous depositions here. I feel we should apologize and, therefore, I am going to endeavor in the trial of this case and preparation of briefs to simply select a few examples. Mr. Scott has spoken about how they all show confusion. Well, we propose to show in this case that by their own witnesses, as the evidence will show, people were absolutely astounded that the Beech-Nut Packing Company should ever consider going into such a widely different line as tobacco, and one witness in particular, or one that I recall, was asked, "Don't you think they are the same line business?" He said, "I consider them diametrically opposite. What do you take me for, a fool?" "You can get along," and I am speaking extemporaneously on this point—"You can get along without your tobacco, you do in the hospitals and jails, but you can't get along without your baked beans, and I am surprised the Beech-Nut Packing Company ever went into such a diametrically opposite line of business."

Mr. Gifford: If your Honor please, I would beg the privilege of reading another portion of this letter that Mr. Cavanagh has not read, apropos of the charge of our adversaries that the Lorillard Company suppressed anything.

The Court: What page is that?

Mr. Gifford: On page 10. In the first letter that the Lorillard Company wrote they stated in a general way that this company and its predecessors in ownership of this brand have used it continuously since prior to 1898, as shown by the records in the office. Now, that was

true, because although there were not orders for it at a certain time, in that period, they were always ready to supply any orders that were received, but the correspondence on that subject did not stop there. In the letter from the Packing Company, on page 8, they asked for a bill of particulars in substance, of what the Lorillard Company professed to have. They said:

"We will greatly appreciate it if you will send us samples of your product showing the manner of use of the word 'Beech-Nut' since the year 1898, copies of advertisements or of letterheads showing your use of this name. We trust you will consider this a fair request as we would like to reach a prompt and friendly termination of the correspondence on this subject."

Now, did the Lorillard suppress anything? In the letter of September 15, 1915, commencing on page 10, the first paragraph is as follows:

"I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco, and enclose them herein. I am also sending you an old package showing the use of the name 'Beech-Nut' and our present package."

There they furnished them with a price list, the old package and the new package. Now follow two paragraphs as to the chain of title by which this thing came down to them, and then they continue, on page 11:

"I give you this history so that you may understand the various price lists in the name of Luhrmann & Wilbern Tobacco Company and the package in the name of Harry Weissinger Tobacco Company. I do not know the exact date of the old package, as the stamp is not legible, but it was prior to 1903.

"The price lists that I send you are dated January 2, 1904; May 6, 1907; July 1, 1910, and November 3, 1910."

Now, that was the evidence that they had. They turned it over to the Beech-Nut Company, and they made a clean breast of the whole matter, and that evidence will be re-

peated or has been repeated on the trial, or in the testimony taken by a commissioner.

Now, then, they go on to say, and this is a disclosure of the case that we made here, practically, for you can take this letter and you can see the defense to this suit at the present time—they say:

"It is difficult for me to see how any one can claim that there is any similarity in our products and yours, or in your label and ours, other than the name 'Beech-Nut.' Your claim that we would not have the right to use the name 'Beech-Nut' on tobacco products must find its basis in the idea that you can appropriate the name 'Beech-Nut' for all products of whatever character.

"That the law does not permit of such a claim is elementary. If your claim were maintainable, then the Lion Brewery in New York could enjoin the manufacture of Lion brand collars, or vice versa. Suppose that the J. B. Williams Company should tomorrow put out a new brand of shaving soap, called 'Beech-Nut.' Do you argue that you could stop it because you have first used the name on hams and bacons? It seems to me that your argument must lead to this conclusion. The law of unfair competition, so far as it assumes to protect the public, assumes to protect the purchaser of average intelligence. It is difficult to believe that a person of average intelligence who enters a store for the purpose of buying 'Beech-Nut' hams or bacon could be deceived into thinking he was getting either if he were handed a package of 'Beech-Nut' chewing tobacco, or that the 'Beech-Nut' chewing tobacco was manufactured by the manufacturer of the hams and bacon. It is no more the custom in this country for a packer to manufacture chewing tobacco than it is for a manufacturer of beer to manufacture collars, and the purchaser of average intelligence perfectly well knows this."

Now, they go on very much to the same effect and quote, even cite cases, and a text book on the subject, so that

the Lorillard Company instead of suppressing anything, here in 1915, made a clean breast of the whole matter, and then the Beech-Nut Company came back with this letter, "Your letter is a very interesting one, and before giving a definite reply to same, desire to review the matter as presented by you so that we can give you an intelligent reply." They never did reply. This letter was the end of the correspondence in 1915, until it was resumed again way on in 1919, and this letter of 1915 continued:

"At this time, however, we may express our agreement with you that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence. So does the name 'Beech-Nut Packing Co.' and we take the view that the increase in sales of Beech-Nut Scrap Tobacco is due to the exploitation of the name 'Beech-Nut' with the oval label, and we cannot help but assume that the general impression is that these goods are manufactured by this Company rather than by Lorillard, at least to a considerable degree, for since writing you last we have another inquiry," and so on.

What I read this for is to refute any impression that your Honor may have that there was any suppression or attempt to suppress the situation on the part of Lorillard. They made a clean breast of it, and when the correspondence stopped there with this letter of the Beech-Nut Company the Lorillard was permitted to build up this enormous business in the manufacture of this Beech-Nut chewing tobacco, which they now attack as an infringement, and which we say they are practically estopped from attacking by reason of the attitude that was assumed in that correspondence.

Mr. Scott: Do I understand the opening statements are concluded?

Mr. Cavanagh: Yes, sir.

Mr. Scott: We didn't anticipate having time for witnesses this morning, but the testimony of a great many of these witnesses which was taken by deposition we wish to present to your Honor, and we can very probably use the remaining part of this session to permit the reading of some of these depositions.

The Court: Do you intend to read all the depositions?

Mr. Scott: No. I have prepared, your Honor, in this pamphlet extracts for the purpose of relieving us from reading this big record, and I thought that possibly it would be of assistance to the Court if I have a copy of this bound up for the Court, containing largely the parts of the testimony, maybe not all of it, that we rely upon, and I can furnish the other side with a copy, and that would relieve us all of a great deal of the burden imposed by that big record.

The Court: How much reading have you got?

Mr. Scott: Well, I could spend an hour or two very profitably presenting this testimony from these depositions.

The Court: You won't have any witnesses here today?

Mr. Scott: Pardon me one moment. (After consultation): About three o'clock was fixed for the earliest witness. There is a great deal of matter which we will have to get before the Court at sometime in the case, and so I would suggest if it is agreeable to the Court that we use this time until we get our witnesses to present some of this testimony which we have here.

(An adjournment was thereupon taken until 1:45 P. M.)

AFTERNOON SESSION.

Mr. Gifford: If your Honor please, I think that we shall object to the other side reading selected excerpts from the depositions. If they want to read particular depositions, I suppose they have a right to do so, but I don't think they have a right to read a portion of the deposition, without reading the whole of it. If they should do so and gain the benefit that I suppose they desire to gain, it would necessitate our reading the whole deposition afterwards, perhaps. It does not seem to me that that is the proper method of procedure. It is, of course, proper to read portions of the depositions in the summing up of the case, but not in presenting the evidence, it seems to me.

Mr. Scott: Then I will await the Court's pleasure on that.

The Court: Why is it necessary to read the depositions at all? I will have to read them all. The fact of your reading them won't help me much. I can't remember them all.

Mr. Scott: No, but presenting these depositions at this time gives more continuity to the whole case.

The Court: Have you abbreviated them very much?

Mr. Scott: I have not paraphrased them a particle. Simply omitted formal questions. I have left out the abundance of questions which are sometimes asked in a vain effort to get nothing; I have left out those, and I have simply copied out, as I conceived the meat of these depositions.

The Court: Well, counsel objects, and I suppose he is entitled to insist that they be read in their entirety or not at all. I am not very much in favor of reading a lot of depositions. It will take two or three days of reading.

Mr. Scott: You would prefer excerpts to be presented as the argument proceeds?

The Court: In the oral argument you are entitled to do that.

Mr. Scott: That would be the natural order. I am only suggesting this as a makeshift to meet the delay in getting our witnesses. That was the only thing that prompted me to suggest it at all. It would have been more fortunate if we had come to that understanding in the morning.

The Court: How many witnesses have you altogether?

Mr. Scott: Probably eight or ten of them.

The Court: And the other side? Have you any idea?

Mr. Cavanagh: We expect to have about seven or eight, if your Honor please.

Mr. Scott: I don't suggest that with any other idea than to fill up this little time. I think it is much the best order that the Court suggests.

The Court: Well, I am willing to wait around for awhile until your witnesses come.

Mr. Scott: Very well.

The Court: They will be here shortly?

Mr. Scott: I hope to have one here before three o'clock.

Mr. Gifford. I might further say, if your Honor please, that defendant makes the general objection to so much of the commission testimony of the plaintiff as is hearsay and incompetent. I don't think it is necessary to go into that specifically. I think it is sufficient to make the general objection.

The Court: I suppose the objection appears through the record?

Mr. Gifford: No. I understand it is proper practice to reserve objections until the depositions are read and

since they are not to be read, the only thing I can do is make the general objection, simply because we don't wish to appear as acquiescing in the admission of hearsay or other incompetent evidence.

Mr. Bulkley: That raises the question, your Honor, as to whether my brother Gifford is right in his proposition as to when the objection should or must be made.

The Court: I am not going to rule on that. Some questions may be relevant, some irrelevant. I cannot tell unless my attention is called to each particular question.

Mr. Bulkley: We would like to be heard as to whether they are too late in making the objection. We think they are.

The Court: You may note a general objection to hearsay testimony. I will overrule it.

Mr. Scott: In that connection, your Honor, this testimony, probably, that Mr. Gifford has in mind is of these witnesses, several hundred on both sides, more upon defendant's side than upon plaintiff's, who were retail dealers, and questions of this nature were asked, almost in the same words, of witness after witness, running into the hundreds: "Did you ever hear your customers make any comments which led you to believe or gave you the impression that those customers were under the impression or belief that the Beech-Nut Scrap Tobacco or the Beech-Nut cigarettes were the products of the Beech-Nut Packing Company?" That is the question undoubtedly that runs in Mr. Gifford's mind in making this objection. Now, that question is addressed in about that form to every one of defendant's witnesses, and of course, if an objection is to be entered, we will enter one simply to save our rights, and I will therefore make this objection here and now to that part of defendant's testimony which consists of hearsay, the objection being general in form, as was the one made on behalf of defendant, and the objection being

made on behalf of plaintiff merely to save its rights and to ensure equal treatment in the disposition of the testimony of the two parties. And I think it might be profitable, as the question will occur to your Honor in reading this record, to discuss that matter to some extent, as to the propriety of those questions. We have assumed all through this case that no objection was to be made, and during the taking of plaintiff's depositions no objection was entered, and then defendant proceeded with about two or three times as many witnesses as plaintiff examined, and he asks precisely the same question, and we, in turn, did not object.

The question at issue here, as it appealed to us while we were taking the depositions, is analogous to a question of reputation—what is thought of a man, not what is the man's character or what is the man's conduct or acts specifically, but what is his reputation, what do people think about him. And analogously, we have here a question what do people think about this trademark, and we without any investigation, none appearing necessary, without any investigation of the law—each party seeming to act upon that theory—these depositions were taken in that form, and it does seem to me by analogy that—without the ability at this moment to cite cases—this should be exempted out of the hearsay rule upon the same theory that testimony about a man's reputation is. It is entirely a question of the state of the public mind.

The Court: I overruled the objection made by the defendant. Do you want me to change it.

Mr. Scott: Well, if your Honor is disposed to overrule it, I will withdraw mine.

The Court: I will overrule his objection. If you want me to overrule yours and give you the same standing—

Mr. Scott: We will all be happy. We expect a witness in a few moments. I will utilize those few moments by reading the deposition of a witness for the plaintiff,

Jefferson D. Hayden, which appears at page 754 of the plaintiff's record.

(Mr. Scott reads deposition.)

Mr. Scott: That deposition is representative of a great many. That was a dealer. Now, here is the testimony of a butcher in Chicago, a man who likes to chew tobacco. A. V. Bobb of Chicago. His deposition is at page 473. I think the first part of it is of interest.

(Mr. Scott reads deposition.)

Mr. Scott: At page 550 of plaintiff's record, there appears the deposition of Carl W. Nemetz, of Milwaukee.

(Mr. Scott reads deposition.)

Mr. Scott: On page 437, deposition of Mr. Arthur E. Fechter, of Chicago.

(Mr. Scott reads deposition.)

Mr. Scott: On page 617 is an example of a witness who was under deception, I think, for six years, if I remember right.

(Mr. Scott reads deposition of Oscar Joseph, of Toledo, Ohio.)

Mr. Scott: Deposition of Adam Sattig, Milford, Connecticut, page 291. He brings in a new element into the situation.

(Mr. Scott reads deposition.)

Mr. Scott: And here follows a long dispute of counsel on the record which I take it my opponents will excuse me from reading. A question was objected to as immaterial and, after an exchange of remarks, the deposition closed.

JOHN M. HATTER, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live?

A. Canajoharie, New York.

Q. By whom are you employed?

A. Beech-Nut Packing Company.

Q. How long have you been employed by that company?

A. Four years the 2nd day of May, 1924.

Q. Tell us briefly what the general nature of your duties is.

A. Partially my duties are in the sales department, but mostly in guide work, I have charge of a number of the guides in the summer time, more in the summer time than in the winter.

Q. About how many in the summer?

A. Probably six or eight in the summer time, and sometimes more. We take some out of the various offices at times so we can get them through.

Q. Where is the factory located with reference to the Mohawk River?

A. Well, the plant itself lays on the south side of the Mohawk River, what is now termed the Barge Canal.

Q. What road is on the opposite or north side?

A. The road leading directly from Albany to Utica, it is right on the straight road.

Q. Is that a main thoroughfare over which the automobilists pass back and forth?

A. Yes, sir; it is.

Q. Is the Beech-Nut plant in sight of these automobilists who are passing up and down that road?

A. Yes, sir; the Beech-Nut is, and it has a big sign on the plant, "Beech-Nut Packing Company."

Q. Have you got a little cottage quite adjacent to that road?

A. Yes, sir.

Q. In which are displayed the Beech-Nut products?

A. Right along that road, it is a very short ways from the Beech-Nut Packing Company.

Q. It is on the north side of the river?

A. It is on the north side of the river? Yes, sir.

Q. And adjacent to this main thoroughfare?

A. Yes, sir.

Q. What is there displayed to the automobilists that causes them to stop and visit this place, an invitation, is there?

A. Yes, sir; there is a sign across the road that reads, "Welcome; The Beech-Nut welcomes you," or something to that effect, asking them to stop, and—

Q. Who is in attendance in this cottage?

A. We have a couple of young ladies in there.

Q. What do they do?

A. There duties are to display and show the people when they come in, the various products that we put out, and explain to them in a measure how they are put up, and the way they are put up, and we have them there also to sell, if they want to buy anything.

Q Do they seek to induce the people to go across the river and visit the plant?

A. Yes, sir; they extend them that invitation to go across the river.

Q. Urge them to go?

A. Urge them to go; yes, sir; they do urge them to go.

Q. Now, when they come over there on the south side and into the factory, what happens?

A. They are, well, when they first come in they approach the telephone desk, what we term the telephone desk or information bureau.

Q. And then they get one of you as a guide?

A. Yes, sir.

Q. Then what do you do?

A. We take them through the plant and show them through.

Q. I wish you would just tell us briefly, I don't want to have you go into too much detail, what do you show them and what do you say to them, particularly in connection with sanitary conditions and cleanliness and quality? What do you show to them and what do you say to them—and before I get to that, let me ask you a question: Do you know whether the company advertises in advertisements and general distribution of advertising matter requests that people stop there?

A. Yes, sir; people.

Q. I have mixed that up with my other question. Tell us just what you inform these people as you take them through, what you show them and what you sell them, particularly in connection with quality of the goods being made and the cleanly sanitary conditions under which they are made and packed for distribution.

A. The first thing we do, we take them into the bacon department, the bacon department where the bacon is smoked. We show them the smoking process and we impress on them the fact that we use hard wood.

Mr. Milton: I move to strike that out, if your Honor please.

The Court: Strike that out, what you impress upon them. Tell us just what you say to them.

Q. You said impress upon them, they asked you to tell what you told them which created that impression.

A. I tell them that the wood we use is hard wood, of beech, hickory and maple, it gives a better flavor than some of the other woods to the bacon, and from there we tell them that the bacon is in there five days until it is thoroughly smoked through. From there we take them to the skinning room where the backs are skinned off; from there we take them to the coolers.

Q. That is, you are showing this all to these people?

A. Just as I am showing a party through the plant.

Q. And telling them these things which you are relating?

A. Yes. We explain to them what the cooling process is —as we take them into the room where the meat is cut, the bacons are cut, we explain to them we have to chill that thoroughly, as these knives go through there at 540 slices a minute, they cut 540 slices a minute. If this was not chilled through they would not cut as evenly and smoothly. Let's see. From there we take them over to where it is packed in the boxes and in the glass and in the meantime we tell them that to insure cleanliness in every way, as far as possible, we have a manicurist there that is paid by the Beech-Nut Packing Company, and every one of the young ladies or young men who comes in contact with the products, any of the products that we put out, must have their finger nails manicured twice a week, and the young lady that attends to the manicuring also sees that everyone of those have their finger nails manicured twice each week.

Then we take them up into the gum wrapping, where the gum is wrapped. We show them the machines that wrap the gum, we explain how the gum is wrapped. From there we take them over to the place where the chicle is. We explain to them that that is the basis of all Beech-Nut gum, and we also explain to them that the dirt is all extracted from the chicle.

Q. Do you explain to them how it is extracted?

A. Yes, we explain—

Q. Tell us what you tell them.

A. Well, we—let's see—we tell them that we are the only manufacturers that remove the dirt from the chicle, and that is worked by means of sieves through a hair, you are hardly able to put a hair through, that the chicle is all squeezed through that and the dirt is left on the outside, and these combs come down and brush it off,

all the dirt, and then we take them down into the hard candy department, and we show them the young men and young ladies all dressed in their white hats and their white coats and aprons, and we tell them that we do up in our own laundries anywhere from forty to fifty thousand pieces of laundry a week.

Q. For how many people?

A. That is between, well, approximately 750 people, and we do up 3,500 towels approximately every day, every working day, and that these changes must be made twice each week, Mondays and Thursdays, the clean aprons and overalls, the coats and pants, they must be changed twice each week.

And after looking that over we show them how the candy is poured, how clean the tables are, after each batch, the tables are cleaned after each batch, so when the next batch comes on there is no contamination whatever, and from then on through to the finish where the hard candies are sugared and wrapped.

And from there we go over into the peanut butter department, we stop at the top floor and we don't allow anyone going through to touch their hands on any of the products whatever, that is, dip in. For instance, we are going through the peanut department, some people might want to dip in and taste the peanuts; we don't allow that at all, and we tell them that to keep things in a sanitary condition we would rather not have them do that.

Q. What do these people see while being told, in connection with sanitary conditions, cleanliness?

Mr. Milton: How can this witness answer that question? It is objected to. He must place himself in their position.

The Court: Yes, reframe the question.

Mr. Bulkley: Question withdrawn.

Q. I interrupted you for the moment there.

Mr. Bulkley: Won't you read the last of the answer?

(Answer repeated by the stenographer.)

A. That was the finish of that.

Q. The conclusion of that?

A. Yes.

Q. What is done in and about the factory to maintain and bring about the cleanliness and sanitation?

A. Well, we have men there especially to clean up at all times of the day, and we have men there at night that do nothing but clean up. The machines are all cleaned up and thoroughly cleansed off after they are used. After they quit work at night the machines are all cleaned up, and not only the bacon machines but every one of the machines are thoroughly scoured with brushes, warm water.

Q. How about the macaroni department, do you take them through there?

A. Yes, sir.

Q. Well, what do you show them there, what do you tell them?

A. We show them the large mixer that mixes the dough and the water together, the flour rather, I should say, the flour and the water together, and slid down this board. There is another thing, this board is cleaned every time a batch comes down through it, the board is practically scoured, so that there will be no contamination on the board when the dough comes down into the big kneaders. After each part has come out of the kneaders, it is placed into a cylinder and from that cylinder there is a die underneath from which the macaroni is pressed out.

Mr. Milton: Now, Mr. Witness, are you describing what you know about this business, or are you telling us what you show and tell these people—which are you doing?

Mr. Bulkley: Answer his question.

The Witness: That is what we explain to the people as we take them through.

Mr. Milton: All right, I have no objection to it.

A. (Continuing.) And from there we show them the young men that handle the macaroni, place it over the sticks for the drying purposes, after which they are taken down into the dry room and dried. Then from there we take them downstairs and show them how it is sawed up in lengths, uniform lengths, and the short ends are placed in a barrel and sold in bulk, and the uniform lengths are taken out, wrapped in paper, and placed in boxes for sale.

Q. Now, did I understand you to say that during the summer time you had at least six men who were constantly and unremittingly engaged in taking people through?

A. Yes, sir; and sometimes more.

Mr. Bulkley: That is all.

Mr. Milton: No questions.

WILLIAM H. MAICHLE, called as a witness in behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your name, please?

A. William H. Maichle, M-a-i-c-h-l-e.

Q. What is your age, please?

A. Forty years old.

Q. Residence?

A. East Orange, New Jersey.

Q. What is your occupation, Mr. Maichle?

A. I am division manager for the Beech-Nut Packing Company in what is known as the Greater New York division.

Q. What is your business address?

A. 29 Ninth avenue, New York City.

Q. How long have you been with the Beech-Nut Packing Company?

A. Since May, 1905.

Q. How many years is that?

A. Going on to nineteen years.

Q. What are your duties as District Manager for Greater New York?

A. Directing sales and the efforts of the retail and jobbing salesmen in the Greater New York territory.

Q. Do you go about among the trade yourself?

A. I do.

Q. What class of trade do you visit?

A. Wholesale, retail, both grocery and confectionery and tobacco, delicatessen stores, in fact, all wholesale and retail dealers handling food products or confectionery products.

Q. About how many dealers have you in the Greater New York district?

A. It is estimated that there are 18,000 retail grocers in the Greater New York district, and we aim to cover all of them, and there are several thousand retail confectionery, cigar and other stores that we aim to cover besides the wholesale grocery and wholesale confectionery and wholesale tobacco people.

Q. Do you visit a large percentage of those, of such dealers yourself?

A. I visit a great many, I am out a good portion of the time with the men, and also alone on the trade.

Q. To what extent do these various classes of dealers that you have mentioned handle both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and the products put out by the Beech-Nut Packing Company?

Mr. Milton: You don't mean that this witness is expected now to testify to what percentage of 18,000 retail grocers, whom he may not possibly have visited—

Q. To what extent, in your observations?

(Question repeated as follows:)

Q. To what extent, in your observation, do these various classes of dealers that you have mentioned handle both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and the products put out by the Beech-Nut Packing Company?

A. I would say that a great majority of them, the retail grocers whom I have visited, and all of the—in fact, all of the cigar and tobacco dealers and news stands, wholesale grocers, and I believe that is all, news stands.

Q. How about the drug stores that you have mentioned?

A. Well, the drug stores also handle both lines, our confectionery products and tobacco products.

Q. I show you a package of Beech-Nut Scrap Tobacco which is an exhibit in this case. Have you ever seen packages of this tobacco before?

A. I have (indicating).

Q. Have you seen it for sale in your district?

A. I have, yes.

Q. For about how long?

A. I should say for three or four years.

Q. As you would go about among the trade, have you heard any inquiries, comments or remarks as to the Beech-Nut Scrap Tobacco and who makes it?

Mr. Milton: Will you answer that yes or no, Mr. Witness, so that I may object to what I assume is coming next.

A. Yes, sir; I have.

Q. Have you heard such inquiries, remarks and comments frequently?

A. Very frequently.

Q. And during what period of time?

A. For all the time I have known the tobacco, three or four years.

Q. And up to how recently?

A. Last week.

Q. What was the nature of such inquiries, comments and remarks?

Mr. Milton: Objected to, sir.

The Court: I sustain that objection.

The Witness: What is that?

The Court: I sustained that objection.

Mr. Milton: The Court means you can't answer that question.

Q. Can you give any particular instance of such inquiries, comments and remarks?

Mr. Milton: Same objection.

The Court: Answer that yes or no.

A. Yes.

Q. Will you please describe briefly such instances as you can remember where you can give the name and place and approximate date of such inquiries, comments and remarks?

Mr. Milton: Objected to on the ground it is obviously hearsay.

The Court: I sustain the objection.

Q. Will you please give the names of such parties who have made inquiries, comments and remarks upon this subject?

Mr. Milton: Objected to.

The Court: I will permit that, just the names.

A. Mr. Wyckoff of Pease & Elliman, Real Estate Corporation in New York City. Others?

Q. Any others?

A. The buyer for R. C. Williams Wholesale Grocery Company in New York City; Mr. Meyer, the promoter for the International Tobacco Shows, that is all I can recall right now, sir.

Q. How recently have you heard such inquiries or comments from the parties you have named?

A. Mr. Meyer's comments were made last week. R. C. Williams & Company's comments were made, I should say, five or six weeks ago. Mr. Wyckoff's remarks were made six months ago.

Q Have you seen the Beech-Nut cigarettes in your district?

A. I have.

Q. Have you heard such inquiries, remarks and comments about the Beech-Nut cigarettes and who makes them?

A. A great many of them.

Q. About how many could you say?

A. I should say hundreds.

Q. And how frequently?

A. At times more frequently than others, sometimes every day, and again once in a month or so, all depending on how often I get out in the trade with the salesmen.

Q. What do you tell these people who ask you these questions and make such remarks?

Mr. Milton: Objected to.

The Court: Sustain the objection.

Q. Have you received orders for either Beech-Nut scrap tobacco or Beech-Nut cigarettes?

A. I have.

Q. How have you received such orders?

A. Largely over the telephone—through the mail.

Q. And what do you tell parties who order Beech-Nut scrap tobacco and cigarettes from you?

Mr. Milton: That is objected to.

The Court: Well, that might be permitted in another form, what his answer has been where an order has come in through the mail. There is one way of proving that, I suppose. You received some orders through the mail; there have been some answers—

Mr. Johnson: Your Honor, we have an exhibit book with something like forty or fifty such orders.

The Court: In the case now?

Mr. Johnson: One of the plaintiff's exhibits, admitted by stipulation.

The Court: Are they in the case now?

Mr. Johnson: Yes, your Honor.

The Court: What is the use of bothering about it?

Q. During the eighteen or nineteen years that you have been with the Beech-Nut Packing Company, have you been selling products put out under labels such as you see on this board, marked Plaintiff's Exhibit No. 28?

A. I have.

Q. Right from the beginning of the time that you entered the employ of the Beech-Nut Packing Company?

A. I have, yes, sir.

Q. In the course of your duties, have you handled the price lists issued by the Beech-Nut Packing Company at frequent intervals?

A. I have; I have handled it continually.

Q. Are you familiar with those price lists?

A. I am very familiar.

Q. Have you in your possession a set of such price lists for some years back?

A. I have.

Q. For what period of years have you a set of such price lists?

A. I have a set of price lists dating from 1902, three years previous to my employment.

Q. And did you handle price lists during any of the period before you entered the Beech-Nut Packing Company?

A. I have; yes, sir, in the capacity of—

Q. Explain how that was.

A. In the capacity of grocery clerk in retail grocery store, where I had charge of the purchasing.

Q. At the request of plaintiff's counsel, have you prepared a summary of the Beech-Nut Packing Company products which you have taken from these price lists, putting it in the form of a list of the products put out for each year?

A. I have, yes, sir.

Q. Have you compared this summary that you have made up with the summary of products already in this case in the Patent Office record, and please state in what manner this summary of yours differs from the one already in the case?

A. The Patent Office list, I believe—shall I go on and answer that question?

Mr. Milton: I beg your pardon, Mr. Maichle, if you will wait just a second. Mr. Cavanagh says this is quite all right.

Mr. Johnson: This summary of products put out by the Beech-Nut Packing Company, identified by this witness is offered in evidence in this case as Plaintiff's Exhibit No. 35.

(Received in evidence and marked Exhibit P. 35.)

Q. As you have gone your rounds, Mr. Maichle, have you found it at any time necessary to explain that Beech-Nut scrap tobacco and Beech-Nut cigarettes are not made by the Beech-Nut Packing Company?

Mr. Milton: Objected to on two grounds. First because it is leading, and secondly, I think, it re-

quires a hearsay answer—one that would not be binding upon us, rather—incompetent.

The Court: I will permit this. I don't think it makes much difference.

A. I have a great many times.

Q. And how recently?

A. Last week.

Q. That is all.

(No cross examination.)

LAWRENCE R. ATKINSON, JR., called and sworn on behalf of the plaintiff, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your age, Mr. Atkinson?

A. Thirty-one.

Q. Residence?

A. Canajoharie, New York.

Q. What is your occupation?

A. I am plant inspector of the Beech-Nut Packing Company and also conduct special investigations occasionally.

Q. How long have you been with the Beech-Nut Packing Company?

A. Going on four years.

Q. What are your duties as plant inspector, Mr. Atkinson?

A. I inspect the plant for safety and fire hazards, and it is my duty to see that the plant is kept in a clean and sanitary condition.

Q. Do you have occasion to go about the plant in carrying out your duties?

A. Yes.

Q. How often?

A. Each day I cover all parts of the plant.

Q. What do you observe, as you make your rounds in the plant?

A. I observe that—well, the plant is in an A-1 condition as far as cleanliness and sanitation is concerned. We try to keep it as safe and fireproof as possible.

Q. What result do you find in regard to the condition that you speak of, as you go through the plant? What result is reached?

A. Well, the result reached? I don't just understand your question.

Mr. Milton: You can lead him on it if you want, Mr. Johnson, I have no objection.

Q. What do you find the conditions to be in the plant?

Mr. Milton: He means from the standpoint of cleanliness and hygiene, doesn't he, and sanitation?

Mr. Johnson: That is it.

A. I find it to be in the best possible condition it can be.

Q. What is it your duty to carry out in those regards?

A. It is my duty to check up each department and see that the cleaners are cleaning thoroughly and not overlooking any corners or machinery.

Q. What degree of success do you have?

A. We have the utmost degree of success.

Q. What do you aim for?

A. Absolute cleanliness and sanitation.

Q. Can you give some detail which it has been your opportunity to observe in the extreme degree to which the Beech-Nut Company goes to ensure cleanliness?

A. Yes. For instance, every night there is a force of night cleaners, and they go to the pains of disassembling all machines that handle food products, so that they can thoroughly clean the inaccessible parts. These machines are assembled again when they are finished.

Q. Is that done every night?

A. That is done nightly.

The Court: Is there a government inspection there?

The Witness: Not for cleanliness.

The Court: What for?

The Witness: Why, the Labor Board inspects for—well, they do for sanitary conditions, safety, and fire inspection.

The Court: You comply with all governmental requirements, I suppose?

The Witness: Yes.

Q. In your employment with the Beech-Nut Packing Company, have you had any occasion to make surveys of different parts of the country for the company?

A. Yes.

Q. Has that taken you through great portions of the United States?

A. It has, through the eastern part and southern.

Q. Have you visited the trade of those portions of the United States?

A. Yes.

Q. What kinds of stores have you visited?

A. Well, I have visited practically all kinds of wholesale and retail grocery, drug and tobacco, and then little cigar stands, that is, subway stands, places like that.

Q. Have you visited all classes of stores, such as you have listed in these various parts of the country?

A. Practically.

Q. To what extent have you found these stores keeping both tobacco products, such as the Beech-Nut cigarettes and scrap tobacco, and such products as are put out by the Beech-Nut Packing Company?

A. Well, I would say in the grocery stores that through the Middle West and South and many places through

Pennsylvania, I would say most of the grocery stores, especially the neighborhood grocer, was carrying tobacco products, also drug stores.

Q. Have you found any large proportion of all kinds of stores that you have mentioned, carrying both products?

A. Yes, I would say eighty per cent.

Q. Have you ever been in Milwaukee, Mr. Atkinson?

A. Yes.

Q. Do you know a man named William Goldstein in Milwaukee?

A. Yes.

Q. What is the business of William Goldstein that you have met in Milwaukee?

A. He told me he was division manager for P. Lorillard & Company in Wisconsin.

Mr. Milton: I move to strike it out.

The Court: Do you know what his business was?

The Witness: I know what he told me.

The Court: I will let that stand.

Q. In whose employ was he, Mr. Atkinson?

A. P. Lorillard & Company's.

Q. Do you know what position he held with them?

A. He was division manager for Wisconsin.

Q. When was it that you met him?

A. It was in October of '21.

Q. The year 1921?

A. 1921, yes.

Q. Please state the circumstances of your acquaintance with Mr. Goldstein?

A. I went into the Loop Tobacco Store with the Beech-Nut division manager for Wisconsin, Mr. E. R. Lewis. This store was the store of Mr. Tuckwell, and in this store was Mr. Goldstein. Mr. Lewis introduced me to

Mr. Goldstein, and as he did, Mr. Goldstein pulled a package of Beech-Nut cigarettes out of his pocket.

Mr. Milton: Now, just a minute, Mr. Witness. Surely, it is not going to be claimed in this case that the division manager of a company which maintains a force of salesman over practically the entire country has a right to bind this company by making statements.

The Court: Is that your purpose?

Mr. Johnson: No, your Honor, the purpose of bringing in these circumstances is in connection with the credibility of this witness, William Goldstein, who has already testified in this case for the defendant. He specifically denied certain statements, and we would like this witness to state the circumstances of his—

Mr. Milton: Has a foundation been laid for this?

The Court: I don't know, where are the statements?

Mr. Johnson: In the Lorillard record, page 463.

The Court: What particular part of his testimony are you referring to?

Mr. Johnson: On page 526, your Honor, cross question 343. "Have people ever asked you if the Beech-Nut tobacco and cigarettes were made by the Beech-Nut Packing Company? A. Never." "Did you ever make the statement that most people took Beech-Nut cigarettes to be a product of the gum people?" (345, that is.) "A Absolutely not." "X-Q. 346. Did you ever make this statement that the Lorillard salesmen could offer cigarettes as the product of the Beech-Nut gum people, that there were no instructions against it? A. Absolutely not." And then all through this wit-

ness' testimony, your Honor, he testifies to instructions that he gave his salesmen every morning before they went out on their routes.

Mr. Milton: If Mr. Johnson is through, in the first place, I don't think that is the kind of a foundation the law contemplates shall be laid for contradicting a witness, and in the second place, isn't this rebuttal testimony? Certainly, on the plaintiff's own case, this witness ought not to be called to say, if he can, that the witness Goldstein has not told the truth?

The Court: The question as it stands would be overruled anyway. You are asking this witness to relate a certain conversation. That is not the way to meet the situation which you desire to meet. I will sustain the objection to the question in its present form. What have you got to say about rebuttal?

Mr. Scott: It seems to be well taken, the objection, on the ground of rebuttal.

Q. That is all.

Mr. Milton: No cross examination.

(At this point an adjournment was taken to Wednesday, October 31, 1923, at ten-thirty A. M.)

Beech-Nut Packing Co.,

vs.

P. Lorillard Company.

Wednesday, October 31, 1923, 10:30 A. M.

(Case continued.)

Appearances as before.

WILLIAM A. CHARLES, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Charles?

A. Mount Vernon, New York.

Q. And what is the nature of your business?

A. I am a member of the corporation of Charles & Company, grocers, New York City.

Q. And what is the location, near the Grand Central Station?

A. Just opposite the Grand Central Station.

Q. And what is the general nature of that business?

A. General line of groceries and fruits, cigars and tobaccos.

Q. Specializing in any particular—

A. Not any more than just a general business in groceries.

Q. Wholesale as well as retail?

A. Yes, sir.

Q. And how long have you been in that business?

A. 75 years this month.

Mr. Milton: Not this witness, of course, Mr. Bulkley, for the record.

Mr. Bulkley: Apparently not.

Q. Do you sell any tobacco in the form of cigarettes or cigars?

A. Yes, sir.

Q. How long have you been selling tobacco in that form?

A. I think as long as the firm has been in existence.

Q. And do you sell cigarettes and cigars under some general name?

A. Yes, sir.

Q. I show you a box of cigarettes with the name of your company upon it. Is this the cigarette which you sell?

A. Yes, sir.

Q. And how long have you been selling that cigarette under that name "Bon Voyage"?

A. Oh, for a matter of, I should say five or ten years.

Q. Does this cigarette bear upon it at any point any other name than that of Charles & Company?

A. No, sir; it does not.

Q. And in connection with cigars, I understand that you sell them under the name of Bon Voyage?

A. Yes, sir; we do.

Q. And that your name only appears in connection with the sale of those cigars?

A. Yes, sir; that is right.

Q. On the boxes or upon the cigars themselves?

A. Yes, sir.

Q. From your own knowledge can you say whether or not it is the general custom among grocers and other dealers to sell tobaccos and cigars and cigarettes under their own name without any connection with the name of the manufacturer?

A. It is a general custom.

Q. Do you make these cigarettes or cigars which you sell?

A. No, sir; we do not.

Q. And who does make them for you?

A. They are made by the manufacturer whose factory number appears on the bottom of the box according to law, and that particular cigarette is made by the firm of Greeks, G. A. Georgopulo & Company. The cigars and tobaccos are made by other firms.

Q. Did you ever seen any cigarettes in a package bearing the name "Beech-Nut" upon the package?

A. Yes, sir; I have.

Q. Have you been selling these products of the Beech-Nut Packing Company?

A. Yes, sir.

Q. To what extent?

A. Very largely. I think we carry a large line of their goods. We sell a good many thousand dollars' worth of their products a year.

Q. And the varied products—

A. Yes, sir.

Q. Of that concern are sold by you?

A. Yes, sir. Possibly 25 or 30 different varities of their products.

Q. What impression was made upon you when you saw this package of cigarettes, as you say you did, with the word "Beech-Nut" upon that package?

A. Well, the first time my attention was called it was either by a display in a window of the cigarettes or by a display on a billboard, I am uncertain of that. And just after seeing it, I mentioned the fact to a demonstrator of the Beech-Nut Company who was then demonstrating goods in our store, saying to her—

Mr. Milton: Objected to.

The Court: Now, not what you said. You are asked your impression and not what you said to somebody.

A. Well, my impression was that the cigarettes were made by the Beech-Nut Company from having seen the word "Beech-Nut."

Q. How long did you remain under that impression?

A. Just for that day.

Q. What removed that impression from your mind?

A. My having been informed by this lady—

Mr. Milton: That is objected to.

The Court: Not what the lady said. Something that you heard from somebody.

The Witness: I heard something, yes, sir, from a certain party.

Q. To what effect?

Mr. Milton: Objected to.

A. That they were not made—

The Court: I will permit that.

A. That the cigarettes were not made by the company she represented.

Q. That as all.

Cross examination by Mr. Milton.

Q. Where was it you saw the sign to which you have referred?

A. Well, I think I said that I was uncertain whether it was a sign or a display in a window. I am under the impression that it was a billboard, but that I would not say positively.

Q. Do you now recall where it was that you saw it?

A. No, I do not.

Q. Do you recall when it was?

A. I should say it may be two years ago.

Q. Prior to that time you had not, I assume, purchased either from P. Lorillard Company or from any of its job-

bers any Beech-Nut cigarettes manufactured by that company?

A. Prior to that time?

Q. Yes.

A. I could not say that, we might have purchased them prior to my seeing the sign.

Q. You don't want us to understand that prior to your seeing this sign you had purchasd Beech-Nut cigarettes from the Lorillard Company, either directly from the company or from jobbers in the tobacco business, and that you afterwards saw this window display or billboard and seeing that, assumed that the Beech-Nut cigarette was the product of the Beech-Nut Packing Company?

A. Yes, sir, I assumed that they were the product of the Beech-Nut Packing Company, but I am uncertain whether Charles & Company had them in stock prior to the time that I saw the window display or the sign. We may have had them in stock but my attention may not have been called to it.

Q. So that it is unlikely, however, that prior to your seeing the sign, you had become acquainted with the fact that your company had the cigarettes in stock?

A. Personally I did not know that we had them in stock, although we might have. The first time my attention was called to the cigarette—

Q. Was the window display?

A. Was seeing this window display or the sign.

Q. Right. That is the first time you ever knew that there was such a cigarette?

A. Yes, sir.

Q. I think that is all.

WILLIAM L. MILLER, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Miller?

A. 515 West 110th street, New York City.

Q. What is your business?

A. Publishing.

Q. How long have you been in the publishing business?

A. Thirty years.

Q. And being in the publishing business, do you have anything to do with the soliciting or obtaining of advertisements for your paper?

A. Yes, sir, that is my portion of the publishing business.

Q. Did you ever see any packages of cigarettes bearing upon that package the word "Beech-Nut"?

A. No, sir.

Q. How did you happen to learn of the use of the word "Beech-Nut," if you did, in connection with tobacco in the form of cigarettes or chewing tobacco?

A. Why, in connection with my duties as advertising manager, I saw the Beech-Nut cigarette advertised in the New York Evening Sun, and as it becomes necessary when you see new advertising, you immediately become busy and try to obtain the same for your publication.

Q. What was the general nature, if you remember, of this advertising of the Beech-Nut cigarette, which you saw?

Mr. Milton: Objected to.

The Court: Yes, that might be important.

Mr. Bulkley: That is simply preliminary to the question as to what the impression was which was made upon his mind with reference to the origin of the—

The Court: Well, we have got the origin in the newspaper. Now, if you are going to have him describe what was in the newspaper, you are getting on delicate ground because you might better have the copy that he saw.

Q. What was the impression in your mind from the advertising which you saw?

A. The impression made on my mind from the advertising was that the Beech-Nut Packing Company were responsible for the cigarette.

Q. I show you an advertisement. Is that the one to which you have just referred, as having been seen by you?

A. Yes, sir.

Q. What sort of an advertisement is that? A newspaper advertisement?

A. This is a newspaper advertisement.

Q. Do you remember the newspaper from which that was taken?

A. My impression now is it was the New York Evening Sun, because I know that they were carrying the advertising.

Mr. Bulkley: We offer that in evidence, your Honor.

(Received and marked Exhibit P. 36.)

Q You say that you are in a general publishing business. Do you have some particular paper that has quite a widespread distribution?

A. Yes, sir.

Q. What is that paper?

A. The Spur Magazine.

Q. At the time that you saw this advertisement and obtained the impression that the cigarette as referred to in the advertisement were made by the Beech-Nut Company—how long did that impression remain with you?

A. Why, it remained with me several weeks, because the advertising was running almost continuously in this publication even prior to the time that I attempted to secure the business.

Q. What attempt did you make to secure the business and what business was it that you sought to secure, and from whom?

A. Why, I wrote to the Beech-Nut Company and enclosed this advertisement and asked if it were possible for them to use the Spur.

Mr. Milton: Just a moment.

Mr. Bulkley: Very well.

Mr. Milton: I move to strike out beyond the statement that the witness wrote.

The Court: All right; it is consented to.

Q. Were you familiar with the general nature of the business of the Beech-Nut Packing Company at the time you saw this advertisement?

A. Yes, sir.

Q. Exhibit No. 36. And how long before that time had you been generally informed concerning the nature of the Beech-Nut Packing Company's business before you saw the advertisement?

A. I would say twenty-five years.

Q. What was the knowledge which you possessed as to the general character of that business, just tell us what that knowledge was.

A. I knew that their main establishment was at Canajoharie, New York, that they dealt in hams, and the Beech-Nut bacon and in jams, and various food products which had been liberally advertised all over the country.

Q. Did you see any gums and candies bearing the Beech-Nut label?

A. I knew they had the gum. I thought they included that in their other products.

By Mr. Bulkley: That is all, cross examine.

Cross examination by Mr. Milton.

Q. Mr. Miller, when was it that you saw the publication referred to in the Evening Sun?

A. Why, I imagine about two years ago now, to the best of my recollection.

Q. And do you recall where you were when you saw this advertisement?

A. I was in my office.

Q. Were you reading the paper, just generally, or were you—

A. No, because I buy all the New York papers, both morning and evening, and they are always on file in our office.

Q. And for what purpose were you reading this copy of the Evening Sun?

A. Looking through for new advertising.

Q. You have heard, I assume, of P. Lorillard & Company?

A. Yes, sir.

Q. What is their business?

A. Tobacco business.

Q. Do you carry any advertisements for that company?

A. Yes, sir.

Q. Did you at the time you saw this advertisement of Beech-Nut cigarettes?

A. Just ask that over again.

Q. Did you carry advertisement business for Lorillard Company at the time you saw the advertising of Beech-Nut cigarettes?

A. Yes, sir.

Q. What has been produced here and offered as Exhibit P. 36, Mr. Miller, is a piece of paper clipped from some newspaper, showing the Beech-Nut cigarette, that is right, is it (indicating)?

A. Yes, sir.

Q. And forming part of that advertisement is a representation of a package of cigarettes—correct?

A. Yes, sir.

Q. With what are two of the cigarettes projecting out of the top of the package; that is right?

A. Yes, sir.

Q. What else appears on the representation of the package of cigarettes?

A. "Beech-Nut perfect cigarettes."

Q. Is that all?

A. "P. Lorillard Company."

Q. Why the "P. Lorillard Company" come so hesitatingly?

A. Come what?

Q. Come so slowly?

A. I don't see where that—

Q. Did it or didn't it?

A. No.

Q. It didn't?

A. It is right in front of me.

Q. It is right in front of you?

A. Yes, sir.

Q. And you saw that without any difficulty?

A. Just now; yes, sir.

Q. Is that the first time you ever saw it?

A. No.

Q. You have seen "P. Lorillard & Company" printed in this advertisement before?

A. Well, I don't know; I presume I have, yes.

Q. When was the first time that you recall?

A. I couldn't give you a definite date on that, on the Beech-Nut advertising.

Q. Then I understand your testimony to be that you are unable to tell us now when you noticed for the first time either on a package of cigarettes or upon a piece of advertising showing a package of cigarettes as a part

of the advertising, you are unable to tell us when you saw for the first time or noticed for the first time the name "P. Lorillard Co."

A. Well, I presume I saw it at the same time I cut that advertisement out of the paper.

Q. Did you cut this advertisement out of the paper?

A. Yes, sir.

Q. This is the advertisement you sent to the Beech-Nut Packing Company?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. What you want us to understand now is that you noticed that at the time you cut this piece of paper out of the newspaper, is that right?

A. Yes, sir.

Q. How long had you been in the advertising business prior to the time you cut this ad. out of the newspaper?

A. Thirty years.

Q. How long have you known P. Lorillard & Company?

A. Twenty years at least.

Q. And you had seen their products advertised in various publications, I assume?

A. Yes, sir.

Q. Do you know some of the products of P. Lorillard & Company other than Beech-Nut cigarettes?

A. Why, yes, they handle, or manufacture, chewing tobacco, smoking tobacco.

Q. Do you know the names of some of the brands?

A. Cigarettes.

Q. Do you know the names of some of the brands, Mr. Miller?

A. Well, not to recall immediately.

Q. So that knowing that P. Lorillard & Company were manufacturers of tobacco, smoking and chewing, and cigarettes, which fact you had known for twenty years,

and having carried some of their business prior to the time you cut this clipping out of the paper, and seeing at the time you cut the clipping out—

A. Yes, sir.

Q. —the name "P. Lorillard & Company," you want us to understand that you, nevertheless, wrote the Beech-Nut Packing Company assuming them to be responsible for the cigarettes?

A. I wrote to the Beech-Nut Packing Company, assuming that they were responsible for the advertising, under the surmise that the P. Lorillard Company might be making the cigarette for the Beech-Nut people.

Q. I see. So that there was no confusion in your mind at the time you wrote the Beech-Nut Company as to who the manufacturer of the cigarette was?

A. No, but the confusion in my mind was the name "Beech-Nut" being applied to a cigarette when the Beech-Nut Packing Company were manufacturing so many products under their own name.

Mr. Milton: If your Honor please, I move to strike out all the answer after the word "No."

The Court: No, I will permit it to stand.

Q. At any rate, with respect to the origin, with respect to the manufacture of the cigarette itself, there was no confusion in your mind, Mr. Miller, is that right?

A. Well, that depends on what the word "manufacture" means. If you are manufacturing for another concern, putting out a product for them, I claim that my attitude was absolutely correct.

Q. I am not claiming that it was not. All I am trying to find out from you, and I don't think there is any dispute between us, all I am trying to find out from you is this, when you cut this clipping out of the newspaper, you knew that as a matter of common, ordinary every-day sense that cigarette was made, manufactured, put together, if you please, by P. Lorillard Company?

A. Yes, but that—

Q. I will go one step further—

A. The Beech-Nut Company was responsible.

Q. I will keep step with you. Let us get that fact established. Then you assumed that the Beech-Nut Packing Company was putting that cigarette out, first having it manufactured for it by Lorillard Company; that is right, isn't it?

A. That was my impression.

Q. And, accordingly, you wrote to the Beech-Nut Company?

A. Yes, sir.

Q. You had carried the business of the Beech-Nut Packing Company prior to the time you clipped Exhibit P. 36 out of the newspaper?

A. Yes.

Q. And that business was consigned to the exploitation and advertising of food products?

A. Yes, sir.

Q. Can you furnish me with an illustration of the name of any other company manufacturing and selling over its own name food products, selling a tobacco product manufactured by another concern, with the name of the manufacturer appearing on the package?

A. No.

Q. You cannot?

A. Not at the moment.

Q. Well, then, take a moment or two to think about it. (After a pause): You are not able to recall any, Mr. Miller, are you?

A. Not at the moment; no, sir.

Q. I assume, Mr. Miller, that when you wrote the Beech-Nut Packing Company in reference to getting the business of advertising the Beech-Nut cigarettes, you had not previously communicated with P. Lorillard Company to find out whether it was marketing the cigarette it manufactured?

A. No, sir.

Q. You acted immediately upon the assumption that it was a product which was being marketed by the Beech-Nut Packing Company?

A. Yes, sir, that was my impression.

Q. Now, having been so impressed by this piece of advertising, did that affect your opinion of the Beech-Nut Packing Company?

A. Why, no, I wouldn't say it did.

Q. And have you used or had you used, prior to cutting this piece of advertising out of the paper, Exhibit P. 36, any of the Beech-Nut products?

A. Had I tried them?

Q. Yes.

A. Oh, yes, many times.

Q. Bacon and ham and jams and jellies?

A. Yes, sir.

Q. And after having seen this piece of advertising, I assume that your opinion of the good quality of the products of the Beech-Nut Company was not affected thereby?

A. Not a particle.

Q. It would not make any difference to you, as a consumer of Beech-Nut Packing Company food products whether they manufactured a cigarette or sold a cigarette, would it?

A. Not in the least.

Q. You would still buy the Beech-Nut products?

A. I certainly would.

Mr. Milton: That is all.

Mr. Bulkley: If the Court will permit me, I will offer in evidence, package of cigarettes produced by Mr. Charles, the witness Charles.

(Received and marked Exhibit P. 37.)

NORMAN S. BERRY, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Berry?

A. I live in Baltimore, 3509 Cottage avenue.

Q. What is your business?

A. My business is salesman for the Beech-Nut Packing Company.

Q. And what do you sell?

A. I sell the confection line.

Q. Did you, on some occasion, ask permission to dress the window of some grocer?

A. Yes, sir, I asked permission of a grocer, 651 South Light street, Baltimore, to dress a window.

Q. Did he grant your request?

A. Yes, sir.

Q. What did you do?

A. I immediately took Beech-Nut products down and dressed the window, exclusively with Beech-Nut products.

Q. What were those products which you took down and put in the window?

A. Chewing gum, peppermint, wintergreen, lemon and orange.

Q. About when was it you dressed the window in this manner?

A. August 26, 1922.

Q. Did you have occasion to observe that window at some later date?

A. Yes, sir, in working that territory about a week later, I passed and saw a Lorillard display in with my display.

Q. What was the nature of—

Mr. Milton: Pardon me, Mr. Bulkley, this having happened after the filing of the bill, I am wondering whether or not it is competent. This bill was filed in 1921. Is that right, Mr. Cavanagh?

Mr. Cavanagh: That is right.

Mr. Milton: The incident to which this witness is testifying occurred in 1922, and I move that it be stricken out.

Mr. Bulkley: We have a right, it seems to me, to show a continuance of the state of mind of these ultimate consumers as a result of the acts of the defendant.

The Court: I will permit it.

Q. What was the nature of those products, or what was the change in the window which you observed when you saw it a second time?

A. I had a background of two large cards in the center of my window. When I passed the window about a week later, those two cards were taken out and this Lorillard background was in with my display.

Q. What did you do when you observed this change in the window?

A. I took a picture of it.

Q. Then did you develop that picture?

A. Yes, sir, I took it with my own camera.

Q. Do you recognize this photograph, which I show to you, as being the picture that you took?

A. Yes, sir, I took this picture.

Q. And do you now identify that picture as being an accurate illustration of what the change was which was made in that window?

A. That is an enlargement of this picture.

Q. Do you observe the name "Lorillard Company" anywhere in this picture?

A. Yes, sir.

Q. Where is that, at what point?

Mr. Milton: Objected to.

A. It is right on the bottom of that package.

The Court: I sustain the objection to what he observes on the photograph. The photograph speaks for itself.

Q. Independently of this photograph, did you observe the name of Lorillard & Company at any point upon the poster which you say was substituted for yours?

A. Yes, sir, on the bottom of the package.

Q. That is on the bottom of the representation or picture of the package on the poster?

A. Yes, sir.

(The witness is shown large poster with two bathing girls and man.)

Q. Is this poster which I show you, the one which you saw in the window of this grocery, on the occasion of your second observation of that window?

A. No, sir, it is a little different from that although it has the large package and the bathing girls.

Q. And had it the words, "P. Lorillard & Company"?

A. Yes, sir. It had the P. Lorillard Company.

Q. Upon the picture of the package?

A. Yes, sir.

The Court: This was in the window after you had dressed it?

The Witness: Yes, sir, after I had put my products in, and this was in with my products.

The Court: And this is what you objected to?

The Witness: Yes, sir.

Mr. Bulkley: Plaintiff offers in evidence the photograph, together with the enlargement of that photograph.

(Received and marked Exhibit P. 38.)

Mr. Bulkley: Plaintiff's counsel offers in evidence poster identified by the witness.

(Received and marked Exhibit P. 39.)

Cross examination by Mr. Milton.

Q. Mr. Berry, why didn't the words, "P. Lorillard Co." come out on the photograph which you took?

A. I took that picture with a small number of a Brownie camera, and as those colors contrast, it did not show up, as red and black will not show up on a picture. That name would not show up on a picture unless you have a special camera.

Q. The fact is, that shown on the representation of the cigarette package forming part of the poster, the words "P. Lorillard Co." appear at the base or foot of the cigarette package, that is true?

A. Yes, sir.

Q. What other articles appeared in the window than those of the Beech-Nut Packing Company and this poster?

A. Three small circular cardboards, they each had a representation of a Beech-Nut cigarette package on it.

Q. Did the window contain the advertising of any other salable article?

A. No, sir.

Q. I see a card here advertising somebody's Georgia melons, do you recall that?

A. That might be on the window. I recall a Horn's ice cream poster on the window, if I am not mistaken.

Q. How large a window was this?

A. About five feet across, and about two or three deep.

Q. What is the advertisement appearing in the upper left-hand corner of the photograph below the Georgia melon card?

A. That is Horn's ice cream.

Q. And what is the advertisement appearing in back of the bathing girl on the right of the picture?

A. I cannot really make that out.

Q. Well, it is not a Beech-Nut Packing Company product, is it?

A. What, this here?

Q. Yes.

A. No, sir.

Q. Appearing in back of the head of the bathing girl on the right-hand side of the photograph, as you look at it. The sign that appears there is not one that advertises the Beech-Nut Packing Company products?

A. No, sir.

Q. Nor is it one that advertises the Beech-Nut cigarette?

A. No, sir.

Q. What was the can that appeared on the shelf at the upper right-hand corner of the picture?

A. It looks as though it is a cigar can to me.

Q. A cigar can?

A. Yes, sir; I don't know what kind.

Q. But at any rate, it is not a Beech-Nut Packing Company product?

A. No, sir.

Q. What was the card in the lower right-hand corner of the window, in the picture?

A. I believe that was an advertisement of a trip down the Bay.

Q. So that in this window in which you put your advertisement of Beech-Nut Packing Company products, there was an advertisement of Horn's ice cream, right?

A. Yes, sir.

Q. Of Horn's Georgia melons?

A. Yes, sir.

Q. Or melon seeds?

A. Yes, sir.

Q. A can showing cigars of some other manufacturer?

A. Yes, sir.

Q. A card advertising a trip down the Bay, or some other trip?

A. Yes, sir.

Q. And a card in back of the bathing girls, one of the bathing girls, which you cannot now read, that is right?

A. Yes, sir.

Q. Advertising some product other than the Beech-Nut Company product?

A. Yes.

Q. And other than the Beech-Nut cigarettes, that is right?

A. Yes, sir.

Q. What other products or goods were advertised in that window that you recall, besides the ones I have read?

A. The Beech-Nut cigarettes.

Q. I mean other than the Beech-Nut cigarettes, other than the Beech-Nut Packing Company's goods, and the ones I called your special attention to.

A. None that I can remember.

Q. None that you can remember?

A. No, sir.

Q. Did he have more than one window in the store, or was this the only window?

A. No, sir; that was the only window.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

JAMES F. MASTERSON, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Masterson?

A. Brooklyn, New York, 362 Branford street.

Q. What is your business?

A. I am in the publishing business.

Q. What do you do in connection with the publishing business?

A. I write financial news.

Q. For what paper or papers do you write financial news?

A. One paper, the National Financial News.

Q. How long have you been writing for that company?

A. About three years for the concern, although it was under a different name prior to May 7th of this year.

Q. Did you ever write an article about the Beech-Nut Packing Company?

A. Yes, sir.

Q. Do you remember when that was?

A. I don't remember the date, no, sir.

Q. Did you ever see any packages of cigarettes with the word "Beech-Nut" on the package?

A. Yes, sir.

Q. How long ago was that?

A. I first saw them a little over two years ago, I think.

Q. Under what circumstances did you see those packages?

A. Friend of mine asked me to have a cigarette on him, and they were Beech-Nut cigarettes.

Q. Did you smoke any of them?

A. Yes, sir.

Q. Did you ever buy any of these Beech-Nut cigarettes?

A. Yes, sir.

Q. And use them?

A. Yes, sir.

Q. What was the impression created in your mind by reason of the presence of those words "Beech-Nut" on these packages of cigarettes, one of which was given to you and the others which you purchased?

A. Why, I presumed they were made by the Beech-Nut Packing Company.

Q. How long did you remain under that impression?

A. I remained under that impression until, until after I had written the story, and it was brought to my atten-

tion by a representative of the company, of the Beech-Nut Company.

Q. I hand you a copy of the National Financial News and ask you whether the article contained therein and headed "Beech-Nut Packing Company Earnings Nearly $9 a Share" was written by you, and is that the article to which you have referred (handing paper to witness)?

A. Yes, sir.

Mr. Bulkley: Would your Honor like to look at that article to see the materiality? I shall offer it in evidence.

(Paper handed to Court.)

The Court: This is May 28, 1923?

The Witness: Yes, sir.

The Court: When did the Beech-Nut Packing Company register the label for tobacco purposes?

Mr. Scott: They never did.

Mr. Milton: They attempted to.

The Court: What is the date of that?

Mr. Milton: 1919.

Mr. Scott: In 1919 the application was made and the thing went on for a few months after that.

The Court: I see your point.

Mr. Bulkley: I offer in evidence the article identified by the witness, and the paper, the National Financial News, in which the article appears, to be marked Exhibit P. 40.

Q. Did you—

Mr. Milton: Just a minute.

The Court: Simply as showing the time of this man's impression?

Mr. Milton: Yes. I suppose if it is offered for that purpose I have no objection to it.

The Court: Is there any other point?

Mr. Bulkley: Yes, we want to show the nature of the widespread publication to the world as a consequence of this article, which would have a tendency to create the same impression in the minds of a great many others.

The Court: That is a matter of argument.

Mr. Bulkley: Well, that tends to show that that argument is material, we can show it by the article itself.

The Court: There is a lot of immaterial matter in this article, a lot of things in this article that have no bearing.

Mr. Bulkley: Oh, yes, now I apprehend. It is confined only to the statement which has bearing on the confusion which might result in the mind of the reader of that article.

Mr. Milton: It is objected to, sir.

The Court: I will admit it.

(Paper received in evidence and marked Exhibit P. 40.)

Q. Was this paper, this particular issue of the paper, within your knowledge distributed in the ordinary course of business?

A. Yes, sir.

Mr. Bulkley: That is all.

Cross examination by Mr. Milton.

Q. Mr. Masterson, how long have you been connected with the "Financial News"?

A. With the magazine, the magazine has only been in existence since May 7th, but I worked for the—doing the same kind of work for the publisher of the paper for about three years.

Q. So that this paper which you now produce, Exhibit P. 40, the National Financial News, is a weekly magazine, is it?

A. Yes, sir.

Q. Published where?

A. 120 Broadway, New York City.

Q. And this particular issue of May 28th was the fourth issue of the magazine, is that right?

A. Either the third or the fourth.

Q. It says No. 4, so that I guess it is the fourth?

A. Yes, sir.

Q. How is it sold, how was it sold in May, 1923?

A. How was it sold?

Q. Yes.

A. Why, through mailing lists and representatives in Chicago and Pittsburgh and Boston, and probably one or two other cities.

Q. What was the circulation on May 28th?

A. That is something I can't say because I am not identified with that end of the publication.

Q. So far as you know it, approximately, what was the circulation?

A. I imagine—on that date there?

Q. Yes.

A. I imagine a little over a thousand.

Q. A little over a thousand?

A. Yes, sir.

Q. Is the paper still in existence?

A. Yes, sir.

Q. The occasion of your friend offering you a cigarette to smoke was the first time you had ever seen or heard of the Beech-Nut cigarettes?

A. Yes, sir.

Q. Had you heard of the Beech-Nut Packing Company prior to that?

A. Yes, sir.

Q. Are you married?

A. Yes, sir.

Q. How old are you?

A. Twenty-four.

Q. How long had you been married prior to May, 1923?

A. A little under a year.

Q. Had you used any of the products of the Beech-Nut Packing Company?

A. My wife has.

Q. I assume your wife cooked them and you ate them?

A. Yes, sir.

Q. What products?

A. Bacon and peanut butter.

Q. Now, did you know that the bacon which was laid on the breakfast table in the morning and the peanut butter which came on at luncheon or at dinner at night, were made by the Beech-Nut Packing Company at Canajoharie, New York?

A. Did I know that?

Q. Yes.

A. Yes, sir.

Q. How did you find that out?

A. I read the labels and the name on the containers.

Q. Where did you see them?

A. In my wife's kitchen.

Q. In the kitchen at home?

A. Yes, sir.

Q. You observed, on the labels that the bacon—was it in a jar or can or what?

A. Both bacon and peanut butter were in a glass jar.

Q. Where was the label?

A. On the glass.

Q. What part of it, the bottom or the top?

A. No, I think about the middle.

Q. What did it say on the label besides what I have said to you "Beech-Nut Packing Company, Canajoharie, New York"?

A. Why, I don't know that it said anything that I remember. Of course, there was a trademark. I don't remember any other printed matter on at all.

Q. Don't recall anything else but the fact that the bacon and apple butter or the peanut butter that you were looking at were made by the Beech-Nut Packing Company?

A. Yes, sir.

Q. And how did you find out that they made chewing or smoking tobacco?

A. Why, I took that for granted on the assumption that they made cigarettes. I believed that they made the cigarettes, and I therefore assumed that they made the smoking tobacco and chewing tobacco.

Q. So that your friend having offered you—by the way, when was it that your friend offered this cigarette?

A. That was a little over two years ago.

Q. Your friend having offered you casually a cigarette out of a Beech-Nut cigarette package, you assumed that the Beech-Nut Packing Company made that cigarette, and when you came to write this financial article for the Financial News you also assumed that the Beech-Nut Packing Company, being the manufacturer of a cigarette must be the manufacturer of a chewing tobacco and a smoking tobacco, that is right?

A. Yes, sir.

Q. What was on the package of cigarettes that your friend offered you a cigarette from?

A. The only thing I observed—on the package of cigarettes?

Q. Yes.

A. The only thing I observed was the name Beech-Nut.

Q. You didn't see P. Lorillard Co. on that, did you?

A. I didn't observe it, no.

Q. You weren't as keen about observing that, as you were about observing Mrs. Masterson's bacon and peanut butter in the kitchen?

A. No, I was not.

Q. Where did you get the information with reference to the allied or subsidiary companies of the Beech-Nut Packing Company, which is contained in this financial article of yours?

A. From the cards of the Standard Statistics Company.

Q. Was it before or after you had purchased or obtained from your friend the Beech-Nut cigarette that you were married—after, I think, from my calculation of time?

A. Yes, sir.

Q. So that you had learned of the fact that there was a Beech-Nut cigarette being manufactured prior to the time you were married—right?

A. Yes, sir.

Q. Well, now, prior to your being married, what familiarity did you have with where bacon came from, whether it grew on trees or whether it was manufactured or whether it came off animals and who put it up?

A. The Beech-Nut bacon?

Q. Any bacon.

A. Why, that is a matter of general knowledge, isn't it?

Q. Well, I don't know whether it is or not. You want this Court to understand that you were then about 21 or 22 years old, is that right, when your friend offered you the cigarette?

A. Yes, sir.

Q. And you were an unmarried man?

A. Yes, sir.

Q. And when your friend offered you this cigarette out of a package with the word "Beech-Nut" on it, you knew of the Beech-Nut Packing Company being the manufacturer or producer or seller of bacon and other products, and assumed that it was the manufacturer of this cigarette, is that right?

A. Yes, sir.

Q. You were then a young unmarried man of 21 or 22 years of age?

A. Yes, sir.

Q. Were you then using any of the Beech-Nut products at the time you got this cigarette?

A. Why, at home; that is, my mother was.

Q. Did you see them in your mother's kitchen, too?

A. Yes, sir.

Q. And after you were married, notwithstanding the fact that the Beech-Nut Company, as you knew it, or assumed it to be, was the manufacturer of a cigarette, you permitted your wife to buy Beech-Nut products, I assume?

A. Yes, sir.

Q. The fact that the Beech-Nut Company was making cigarettes and chewing tobacco and smoking tobacco, did not affect your judgment as to the desirability of buying its peanut butter or bacon or hams?

A. Not mine; no, sir.

Q. Peanut butter manufactured by the Beech-Nut Company was just as good whether they made or manufactured chewing tobacco or smoking tobacco or cigarettes?

A. Yes, sir.

Q. That is all.

G. FRANK DISBROW, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Disbrow?

A. South Amboy, New Jersey.

Q. And what is your business?

A. I am a laborer—a skilled laborer, for the terra cotta works.

Q. By what concern are you employed?

A. South Amboy Terra Cotta at present.

Q. Did you ever see any package of chewing tobacco or cigarettes bearing upon it the name Beech-Nut?

A. Yes, I have bought quite some of it.

Q. H'm?

A. I have bought quite a little of it.

Q. Now, having reference to the chewing tobacco, did you buy quite a little of the chewing tobacco?

A. Oh, I hung fast to it two or three months.

Q. And then did you stop using it?

A. Yes, I did not care for it, I gave it up.

Q. And during the period of time extending over three months that you chewed a tobacco contained within a package bearing those words on it, what impression did you have as to who was the one putting out that chewing tobacco?

A. I was always under the impression that the Beech-Nut Packing Company made it.

Q. Well, why did you have that impression?

A. I am a confirmed user of Beech-Nut products at home, and I thought it was another product they were putting out, I was anxious to try it, I bought it, thinking it was a Beech-Nut product and expected the usual quality.

Q. Was it or was it not, in your opinion, the same quality?

A. In my own opinion it was not.

Q. Did you ever visit the plant of the Beech-Nut Packing Company in Canajoharie, New York?

A. Yes, about seven years ago. I think it was around 1916, either '15 or '16. I think it is '16, just previous to the war.

Q. Was that before or after you commenced to chew this tobacco, Beech-Nut tobacco?

A. That was before, possibly about three years before I started using Beech-Nut tobacco.

Q. Were you taken through the factory or plant of the Beech-Nut Company at Canajoharie?

A. Yes, sir.

Q. By a guide?

A. Yes, sir.

Q. Did he explain to you the method of producing the products when he took you through?

A. We made a very thorough trip. I spent possibly a couple of hours there, the best part of two hours the day I was in, that is, we went from stem to stern of the building, through all the various departments.

Q. Now, did you purchase and smoke cigarettes on the package of which appeared the name Beech-Nut, after you had commenced to chew chewing tobacco?

A. No, I did not purchase any cigarettes until well, possibly, three or four months after I stopped using Beech-Nut tobacco.

Q. Well, with reference to those cigarettes, the package bearing upon it the name of the Beech-Nut cigarettes, what impression did you gain in the use of this package as to who made these cigarettes, or put those cigarettes out?

A. The same impression that I had formed in first buying the chewing tobacco.

Q. That is all.

Cross examination by Mr. Milton.

Q. How long have you lived in South Amboy, Mr. Disbrow?

A. About 32 years.

Q. How long have you been employed by the South Amboy Terra Cotta Company?

A. Just this year.

Q. What was your business prior to that?

A. Purchasing agent.

Q. For whom?

A. Roessler & Hasslacher, chemical companies, that includes the Perth Amboy Chemical, the Niagara General Chemical, the General Bakelite.

Q. Where are they located?

A. They have factories in St. Albans, West Virginia, Niagara Falls, Perth Amboy. Those are the principal factories.

Q. When did you first begin to use Beech-Nut chewing tobacco?

A. Well, after the war about 1920, possibly it was in 1920, I would say within that year, I could not give a definite month, whether or not it was the early part of the year or the latter. I presume about the middle of '20.

Q. How long did you continue using it?

A. The chewing tobacco?

Q. Yes, sir.

A. Oh, I guess three or four months.

Q. Three or four months?

A. Yes, something like that.

Q. How frequently would you buy it?

A. Beech-Nut? A paper every day.

Q. When you smoked cigarettes, how frequently would you buy a pack of cigarettes?

A. Twice, sometimes three times a day.

Q. You mean that you smoked between two and three packs of cigarettes a day?

A. No, I will average about two, but I give about one away a day.

Q. The vice of treating is responsible for that?

A. I don't know, it seems to be a privilege of some people to ask for a cigarette.

Q. How long did you continue smoking the Beech-Nut cigarettes?

A. Oh, not as long as the tobacco, possibly a month or two.

Q. So that in three months you bought approximately ninety packages of chewing tobacco, and assuming that

you smoked the Beech-Nut cigarettes for a month, buying two a day, you bought approximately sixty packages of cigarettes—right?

A. About that, yes.

Q. Upon any of those ninety packages of chewing tobacco did you ever observe the word "Lorillard"?

A. I can't say that I did.

Q. Can you say that you did not?

A. I can't say that I did not.

Q. What can you say about it?

A. Simply bought the tobacco and put it in my pocket and don't think of looking at it. In the average case, you don't look at the tobacco after it is in your pocket, you reach around and tear the top off and then you reach in for a chew when you care for it.

Q. How many times a day do you suppose you took a chew?

A. You add to what you have.

Q. Approximately how many times a day would you reach into the pocket to get a piece of chewing tobacco, five?

A. More than that.

Q. More than that, ten?

A. A little less than that, I would say, well, between five and ten.

Q. Between five and ten?

A. Yes, sir.

Q. So that in effect you want the Court to understand your testimony to be this, that over a period of three months you have handled packages of Beech-Nut chewing tobacco at least five times, possibly ten times a day, and you have not observed the word "Lorillard" on any of those packages at any time?

A. Not at that time, no, not at the time I was using it, I did not.

Q. Not at the time you were using it?

A. No.

Q. When did you observe the word "Lorillard" on the package of chewing tobacco?

A. After smoking the Beech-Nut cigarettes—I also always shopped around for a cigarette just a little cheaper than I have been using. I have been smoking the same grade of cigarettes for approximately twenty-two years, the Murad, looking for a change, looking for quality, I bought a package of Beech-Nut, looking for a smoke, looking for something good, a little cheaper than what I had been paying for Murads, and I noticed one day a peculiar sort of an aroma or taste of formaldehyde, a peculiar taste. I tried another one or two and didn't find it so strong, I found that in the other cigarettes; and something, I don't know, by way of chance, I guess, I was mulling over the packages, and I saw the Lorillard, and then I said, "Oh, Beech-Nut doesn't make this stuff," and that was the first indication I had of the packer.

Q. Let's see. You saw "Lorillard" on that Beech-Nut package, is that right?

A. After using it for quite some time.

Q. After using it for quite some time. How long have you been a cigarette smoker?

A. Since I was about, I don't know, around along fourteen or fifteen.

Q. So that you have been using cigarettes, I think you said, about twenty-two years?

A. About twenty-two years.

Q. What other brands of cigarettes have you smoked besides Beech-Nut?

A. Ever since I started smoking cigarettes I have stuck pretty close to Murads, occasionally Sweet Caporals, I now and then try something else to find something better.

Q. Who makes the Murad cigarettes?

A. I don't know, I would have to guess. It was either Shinasi or Anargyros.

Q. Who made the Sweet Caporal?

A. Formerly Kinney Brothers.

Q. Why do you say formerly Kinney Brothers?

A. I think it is an American product now. I was through one year the West Nineteenth street factory of Kinney Brothers, and inquired at a later time to go through again and they said it had been taken over by American Tobacco Company.

Q. Do you smoke any other cigarettes but the Murad, the Beech-Nut and the Sweet Caporal?

A. Yes, I have smoked a pack of something, trying for something else now and then.

Q. Mention them, if you can recall them.

A. You mean a package at a time?

Q. Mention what other kinds or brands of cigarettes you have smoked, if you can recollect, besides the Murad and the Sweet Caporal and the Beech-Nut.

A. Piedmonts, but very seldom—I can't recall many others. A cigarette to me is a Murad, that is all, nothing aside from that.

Q. How often, how long did you smoke the Piedmont cigarette?

A. I don't know, when I couldn't buy possibly a Murad in some small place I would buy a Piedmont to hold me over.

Q. You never noticed, of course, who made the Piedmont, did you?

A. No, sir.

Q. How long did you smoke Sweet Caporal?

A. Just fill-ins, in between.

Q. Will you explain to the Court and to me if Sweet Caporal was just a fill-in, how you know or knew that Kinney Brothers made Sweet Caporal cigarettes and you didn't know that Lorillard made Beech-Nut cigarettes until your attention was attracted by the presence of some odor, formaldehyde, I think you said?

A. When I was a kid, I can only remember one cigarette being sold for the penny, we used to get two Sweet Caps for a cent. When we reached the label, we used to mark off as kids to the label in cutting the cigarette in two. I parted the cigarette with my fingers about where Kinney Brothers, Sweep Cap, about the middle of that cigarette.

Q. Have you used Sweet Caporals recently, in recent years?

A. Yes, but I wouldn't know if there was any change in that cigarette.

Q. Where is the factory of the Beech-Nut Packing Company?

A. I only know of one, that is at Canajoharie. I was visiting there one year and I was invited to go through it.

Q. Did you ever look at the back of the package of Beech-Nut tobacco?

A. No, sir; I never observed any mark on it.

Q. You never observed that was manufactured at a factory at Ohio, did you?

A. No, sir.

Q. So that not only did you fail to observe that the word "Lorillard" was on this package of Beech-Nut chewing tobacco which you had in your hand sometimes at least five times a day, and possibly ten times a day for a period of three months, but you likewise failed to observe that on the back of the package is a statement that the tobacco is made under a special process in Middletown, Ohio?

A. I never noticed any marks on it. I have handled thousands and thousands, you might say, in 22 years, packages of Murads, and can't tell you anything about it except the Murad is made by Shinasi Brothers.

Q. Or Anargyros?

A. Or Anargyros, yes. I want the cigarette, not the package, when I buy it.

Q. So that the name of the manufacturer does not make any difference?

A. It does not appeal to me, although I like to buy a man's goods that puts quality up.

Q. Right, and when you happen to strike a tobacco of a particular blend that pleases your taste, you don't care whether it is made by Tom Jones or Richard Brown?

A. I don't care who makes it if it is good and appeals to me.

Q. That is why you smoked Murad cigarettes for twenty years?

A. Yes, sir.

Q. The same as I did. So that, after all, what you are interested in in tobacco is something that pleases your taste, isn't it?

A. That appeals to me, yes.

Mr. Milton: That is all.

FRANK ARNOLD, JR., called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Johnson.

Q. What is your age, Mr. Arnold?

A. Thirty years old.

Q. Your residence?

A. 143 St. Ann's avenue, Bronx, New York City.

Q. What is your occupation?

A. Accountant.

Q. Employed by whom?

A. H. K. McCann Company.

Q. What is their business?

A. Advertising.

Q. Located where?

A. 61 Broadway, New York City.

Q. How long have you been with them?

A. Ten years.

Q. What are your duties there?

A. Assistant head of the revenue accounting department.

Q. Revenue accounting department?

A. Revenue accounting department.

Q. Do you write advertising copy at all?

A. No, sir.

Q. I show you a package of Beech-Nut scrap tobacco, an exhibit in this case (indicating). Did you ever see a package of that before?

A. No, sir.

Q. You never saw Beech-Nut scrap?

A. No, sir.

Q. I show you a package of Beech-Nut cigarettes, which is already an exhibit in this case (indicating). Did you ever see a package of those before?

A. Yes, sir.

Q. About when?

A. About two years ago.

Q. When you first saw a package of these Beech-Nut cigarettes, whom did you think put them out?

A. I was under the impression they were made by Beech-Nut Packing Company.

Q. What made you think that?

A. In connection with the name.

Q. The name you saw on the package?

A. Yes, sir; the name of the brand.

Q. Did you buy a package of Beech-Nut cigarettes?

A. Yes, sir.

Q. And under that belief that they were made by the Beech-Nut Packing Company?

A. Yes, sir.

Q. Did you smoke the cigarettes?

A. Not all of them, I did smoke some of them.

Q. What did you do with the rest of them?

A. Gave them away to my friends.

Q. Why did you not smoke the rest of them?

Mr. Milton: No man ever smokes a full package of cigarettes, his friends usually do.

Q. Did you ever buy another package of Beech-Nut cigarettes?

A. No, sir.

Q. Why not?

A. I didn't like the taste.

Q. When did you find out that they were not made by Beech-Nut Packing Company, and how?

A. Only in conversation with other friends of mine, I learned that they were not manufactured by the Beech-Nut Packing Company.

Q. Was that some time later?

A. Yes, sir.

Cross examination by Mr. Milton.

Q. When was it you bought your first package of Beech-Nut cigarettes, Mr. Arnold?

A. About two years ago, when they were displayed on United Cigar Stores counters.

Q. You saw them displayed on the United Cigar Stores counters?

A. Yes, sir.

Q. And had you been a cigarette smoker before that time?

A. Yes, sir.

Q. What had you smoked, I mean usually?

A. Camel cigarettes.

Q. Camel. Did you know who made the Camel cigarette?

A. No, sir.

Q. As a matter, of fact, you didn't care, did you?

A. No, sir.

Q. The Camel cigarette had pleased your taste?

A. Yes, sir.

Q. Like Mr. Disbrow, the last witness, tobacco is tobacco—if it happens to hit your taste, it is what you like, is it?

A. Yes, sir.

Q. You don't care whether it is made by Beech-Nut or by Lorillard Company or by any one else, do you?

A. No, sir.

Q. If the blend suits your fancy, that is what you buy, isn't it?

A. Yes.

Mr. Milton: I think that is all.

Mr. Bulkley: Now, if your Honor please, we cannot impose upon your indulgence any further than we have already done. We do have two witnesses who have promised to be here at two o'clock or about half-past two and I would make this suggestion, if it meets with the approval of the other side, that with that exception, we will close our case, and hope to be able to put these witnesses on the stand as they relate to the same general subject.

The Court: The same sort of testimony?

Mr. Bulkley: Yes, the same character of testimony, as constitutes the testimony taken by deposition and which has been taken here.

The Court: Is the other side prepared to go on with witnesses?

Mr. Milton: No, sir, it comes somewhat as a surprise although Mr. Johnson did tell me this morning when we started to examine here, that in all probability they would finish about noon. But it comes somewhat as a surprise in view of the statement made in the opening yesterday that there were some ten witnesses to be examined. In our conferences—I have not participated with them,

but Mr. Preston and Mr. Cavanagh have with Mr. Bulkley, Mr. Scott and Mr. Johnson—they rather assumed that they would take all of today, and perhaps some time tomorrow, so we are not prepared to go on now. We will be prepared to go on, I think, perhaps at two o'clock, if we can get started.

The Court: How many witnesses have you, eight or ten?

Mr. Milton. We had planned when we made the statement yesterday that we would call some ten witnesses—we had planned to take some testimony along the lines of the testimony this morning, but we have reconsidered that and have come to the conclusion in as much as the subject matter has been so fully covered in the depositions we will rest with that, and not take any oral testimony in court—on that point, of course.

The Court: You may finish all of the testimony today?

Mr. Milton: We will hardly finish today. We will surely finish tomorrow. We might finish today, but I doubt it.

The Court: Do you think your witnesses will be here before two o'clock?

Mr. Scott: They have not come yet, your Honor, I don't believe it will be till three.

The Court: You have no right to take such liberties. Yesterday you wasted considerable time. You should have your witnesses ready to proceed. If they are not here until three, there is a waste of three hours which may interfere with the Court's plans for the week.

Mr. Bulkley: We don't want to do that, and we will rest our case.

The Court: No, I won't require that. Do you think you will have some witnesses before two?

Mr. Milton: Our witnesses are here, but I am frank to confess that I have not enjoyed the benefit of a talk with them, and I would like to discuss some few little matters with them before putting them on the stand.

The Court. Suppose we take a recess until half-past one, and will you proceed with some of your witnesses then?

Mr. Milton: I think so.

The Court: And then when your witnesses arrive we will suspend and allow you to finish your case.

RECESS.

AFTERNOON SESSION.

Mr. Cavanagh: If your Honor please, in opening defendant's proof before this Court, I think it would simplify matters if I read into the record at this time certain formal stipulations which were made, and if they are incorporated in the record, which it is intended to be printed, I think it will be greatly for the convenience of Court and counsel, and therefore, if the Court has no objection, I would like to have permission to read them. I will now read a stipulation relative to eleven exhibit books, which have been prepared by the defendant as his exhibits. These books are here. The stipulation reads as follows:

DEFENDANT'S PROOFS.

IN THE DISTRICT COURT OF THE UNITED STATES.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company *vs.* P. Lorillard Company.	Equity No. 3056.

Stipulation.

It is stipulated by and between the parties, through their respective counsel, (subject to the condition hereinbelow stated in regard to Defendant's Exhibit Book No. VII) that the labels, wrappers, posters, and other advertising matter contained in the following named books were actually used in trade in the United States, and are genuine specimens of the labels, wrappers, posters and other advertising matter so used.

Books entitled:

"Defendant's Exhibit Book No. I," containing fifty-three sheets,

"Defendant's Exhibit Book No. II," containing thirty-three sheets,

"Defendant's Exhibit Book No. III," containing twenty-four sheets,

"Defendant's Exhibit Book No. IV," containing thirty-five sheets,

"Defendant's Exhibit Book No. V," containing forty-two sheets,

"Defendant's Exhibit Book No. VI," containing twenty sheets,

"Defendant's Exhibit Book No. VII," containing thirty-one sheets,

STIPULATION.

"Defendant's Exhibit Book No. VIII," containing fifty-five sheets,

"Defendant's Exhibit Book No. IX," containing twenty-seven sheets,

"Defendant's Exhibit Book No. X," containing twenty-five sheets, and

"Defendant's Exhibit Book No. XI," containing fifty-three sheets.

It is further stipulated that all of the labels contained in Defendant's Exhibit Books Nos. I-VI, inclusive, were obtained by defendant since the institution of this suit and were, when obtained, and, so far as known, still are, in actual use upon goods bought and sold as merchandise in the open market; that the products upon which said labels are used are actually being manufactured or put out by the company whose name appears thereon as maker or producer, where such name does appear.

Provided that defendant insert in Book No. VII inscriptions showing the date of first use of each piece of advertising contained therein, the quantity and period of time during which each of said pieces of advertising contained in said book was used, it is stipulated that the advertising matter contained in said Book No. VII has been actually used by defendant in the conduct of its business.

It is further stipulated that all of the labels and wrappers in Defendant's Exhibit Nos. VIII and IX were obtained by defendant since the institution of this suit and that they were, when obtained, and, so far as known, still are, actually in use upon goods bought and sold as merchandise in the open market; with the exception that the labels of the Bollinger-Babbage Co., Inc., Louisville, Ky., for "St. Elmo Brand Peanut Butter," that appears

on pages 2, 13, 23 and 55 of Defendant's Exhibit Book No. VIII have been voluntarily discontinued by the said Bollinger-Babbage Co., Inc., upon protest of the plaintiff herein; that the cigarette, scrap chewing tobacco and chewing gum wrappers contained in Defendant's Exhibit Book No. X were obtained by defendant since the institution of this suit and were then, and, are now, actually in use upon the market, except where otherwise noted, and that where representations to the contrary appear attached to the wrapper, those representations are true, and, that the wrappers, posters and other advertising matter shown in Defendant's Exhibit Book No. XI, were all obtained by defendant since the institution of this suit, and were when obtained, and so far as known still are actually in use upon the open market.

Plaintiff reserves the right to object to all, any, or any part of any one of the foregoing Exhibit Books on the ground of incompetency, irrelevancy, and immateriality.

OFFIELD, BULKLEY, POOLE & SCOTT,
Attorneys for Plaintiff.

RICHARD B. CAVANAGH,
Counsel and Attorney for Defendant.

October 15, 1923.

Mr. Cavanagh: Now, if your Honor please, in connection with that stipulation—

Mr. Bulkley: Have you another—are you about to read another stipulation?

Mr. Cavanagh: Not at the present time.

Mr. Bulkley: I want to enter an objection under the stipulation.

Mr. Cavanagh: Yes, but I want to give the Court some idea of what is in those books. I want to say, if your Honor please, that we have five books here which contain labels showing marks which are used upon tobacco products and also the same names or marks as used upon other products. We have five of those, and for illustration you have before you here Omar cigarettes, a tobacco product, and a stock of Omar food products. You have Camel cigarettes, the famous cigarette of the Reynolds Company and Camel food products. You also have Mogul cigarettes, one of defendant's products, and you have Mogul food products. Now, these books contain a great many labels along that line; in fact, the first five books do, the tobacco books and other labels in other industries bearing the same name.

Mr. Bulkley: May I ask, as anticipatory of the objection, what you are seeking to prove by these books?

Mr. Cavanagh: I am simply trying, Mr. Bulkley, to explain to the Court so he won't be in a maze, so he can have some idea of what my books contain. You can put in any objection afterwards.

Now, Exhibit Book No. 6 contains no tobacco labels but contains labels with the same name or mark used by different companies but not inclusive of tobacco.

Exhibit Book No. 7, for the information of the Court, is a book devoted exclusively to the Lorillard advertising.

Exhibit Book No. 8 contains labels showing various kinds of ovals and bands and the like commonly used in business.

Exhibit Book No. 9 is devoted to a collection of labels showing the use of the color red as a background for these various labels. Exhibit Book No.

10 contains labels of cigarettes, scrap tobacco and chewing gum.

Exhibit Book No. 11 contains a collection of labels showing the use of the word "quality" or these labels which bear the word "quality" in some manner or form.

I state that to the Court simply to inform the Court as to what these books contain, so that the Court can put its finger on them when desired. If the Court wishes any further explanation—

The Court: No, no; that is sufficient.

Mr. Bulkley: Plaintiff objects to the admission in evidence of Books Nos. 1 to 6 on the ground of immateriality.

The Court: Well, I will overrule the objection at this time.

Mr. Bulkley: You reserve your decision on that?

The Court: I will overrule it at this time. You may renew it at such time as you may think it advisable.

Mr. Bulkley: Very well, sir.

Mr. Cavanagh: I have another stipulation here, if your Honor please, which reads as follows—which relates to the Pure Food Internal Revenue Law:

STIPULATION.

"UNITED STATES DISTRICT COURT.

"DISTRICT OF NEW JERSEY.

"Beech-Nut Packing Company, *Plaintiff*, *vs.* P. Lorillard Company, *Defendant.*	In Equity No. 3056.

Stipulation.

Re: Pure Food and Internal Revenue Law, etc.

"It is hereby stipulated by and between counsel for the above-entitled cause, as follows:

"(1) That chewing gum is subject to the provisions of the Food & Drugs Act of the United States, while tobacco used for smoking or chewing, or snuff, and not for medicinal purposes, is not subject to this Act; but that tobacco is subject to the provisions of the Internal Revenue Laws of the United States, while gum is not subject to such Internal Revenue Laws.

"(2) It is further stipulated that the printed pamphlet entitled 'Correspondence—Beech-Nut Packing Company and P. Lorillard Company—in re: "Beech-Nut trademark,"' embodies true, complete and exact copies of the original correspondence, and that the printed copy of the correspondence may be used in this cause with the same force and effect as duly proven and acknowledged originals, the execution or genuineness of the originals being admitted by both parties."

Mr. Bulkley: Have you offered that in evidence as yet, Mr. Cavanagh?

Mr. Cavanagh: No, I will in a second. (Continuing:)

"(3) It is further stipulated that regular uncertified Patent Office copies of trademark registrations, and other governmental publications may be introduced in evidence with the same force and effect as if duly certified, subject of course to correction for error.

"OFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Plaintiff.

"RICHARD B. CAVANAGH,
Counsel for Defendant.

"Dated:
New York City,
October 29th, 1923."

Mr. Cavanagh: Now, in that connection, your Honor, I would like to offer in evidence this correspondence between the parties.

(Received in evidence and marked Exhibit D. 18.)

Mr. Cavanagh: Now, I would like to explain to the Court that in connection with some of these books which bear the tobacco trademark names and the trademark names of the food product companies, plaintiff at one time was unwilling to stipulate that the food companies had no connection with the tobacco companies or vice versa, so we entered into this stipulation after affiadvits were made.

2512

STIPULATION.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff,* *vs.* P. Lorillard Company, *Defendant.*	In Equity No. 3056.

Stipulation.

It is hereby stipulated by and between the parties, through counsel, that if Richard J. Boylan, Elwin Clark Brenn and George T. Minnigerode were called as witnesses on behalf of the defendant, that they would testify as per their annexed affidavits, all executed October 29th, 1923, and that these affidavits may be incorporated in the record as the testimony of the said parties, defendant reserving all rights to object to this testimony as immaterial and irrelevant.

OFFIELD, BULKLEY, POOLE & SCOTT,
Counsel for Plaintiff,

RICHARD B. CAVANAGH,
Counsel for Defendant.

Dated:
October 29th, 1923.

Mr. Cavanagh: Now, I will first read Mr. Boylan's affidavit as testimony.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*, vs. P. Lorillard Company, *Defendant*.	In Equity No. 3056.

STATE OF NEW YORK, COUNTY OF NEW YORK. } *ss.*

RICHARD J. BOYLAN, being first duly sworn, deposes and says as follows:

My name is Richard J. Boylan; I am of lawful age; I am now, and have been for many years past Assistant Secretary of The American Tobacco Company, located at 111 Fifth Avenue, New York, and am well acquainted with the tobacco trade marks or brands of this concern; that The American Tobacco Company is the owner of the tobacco trade marks or brands Omar; Blue Ribbon; Gilt Edge; Sweet Maple; Picadilly; Excelsior; Badger; Lucky Strike; Liberty; Five Bros.; Ivanhoe and Sovereign, and that the American Tobacco Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

RICHARD J. BOYLAN.

AFFIDAVIT OF RICHARD J. BOYLAN.

Sworn to and subscribed before me, a Notary Public, this 29 day of October, 1923.

J. R. CUMMINGS,
Notary Public.

(SEAL)

New York County No. 260
New York Register No. 4056
My commission expires March 30, 1924.

Mr. Bulkley: Plaintiff objects on the ground of immateriality.

The Court: Objection overruled.

Mr. Bulkley: Subject to renewal later?

The Court: Well, I will hear you any time you want to make an objection.

Mr. Bulkley: That involves the same question that is connected with the admissibility of books 1 to 6.

The Court: At this time I will overrule your objection.

Mr. Cavanagh: I will now read the affidavit of Elwin Clark Brenn.

DEFENDANT'S PROOFS.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company,
Plaintiff,

vs.

P. Lorillard Company,
Defendant.

In Equity
No. 3056.

STATE OF NEW YORK,
COUNTY OF NEW YORK. } *ss.*

ELWIN CLARK BRENN, being first duly sworn, deposes and says as follows:

My name is Elwin Clark Brenn; I am of lawful age; I am Assistant Secretary of Liggett & Myers Tobacco Company, located at 212 Fifth Avenue, New York City, and have held such position for many years past and am well acquainted with the trade marks or brands of this company; that Liggett & Myers Tobacco Company is the owner of the tobacco brands or trade marks Star; Rex; Velvet; Sunshine; Piedmont; Polo; Chesterfield; Harmony and Perfection, and that Liggett & Myers Tobacco Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

EDWIN CLARK BRENN.

Sworn to and subscribed before me, a Notary Public, this 29th day of October, 1923.

T. C. ALLEN.
(SEAL) *Notary Public, Westchester Co.*
Certificate filed New York County No. 110.
New York Register's No. 4102.

AFFIDAVIT OF GEORGE T. MINNIGERODE.

Mr. Bulkley: Same objection.

The Court: Objection overruled.

Mr. Cavanagh: I will now read the affidavit of George T. Minnigerode.

UNITED STATES DISTRICT COURT.

DISTRICT OF NEW JERSEY.

Beech-Nut Packing Company, *Plaintiff*, *vs.* P. Lorillard Company, *Defendant.*	In Equity No. 3056.

STATE OF NEW YORK, COUNTY OF NEW YORK. } *ss.*

GEORGE T. MINNIGERODE, being first duly sworn, deposes and says as follows:

My name is George T. Minnigerode; I am of lawful age; I am Assistant Secretary of the P. Lorillard Company, the defendant herein, and have been for many years past, and am familiar with its tobacco brands or trade marks; that P. Lorillard Company is the owner of the tobacco brands or trade marks Mogul; Veribest; Climax; Red Cross; Jack Rose; Comet; Eureka; Honest; Yacht Club; Murad; Leroy; Banner; I-X-L and Peerless, and that the P. Lorillard Company has no connection with any concern making or marketing food products, confections or chewing gum under brands or trade marks of similar name or names.

GEORGE T. MINNIGERODE.

Sworn to and subscribed before me, a Notary Public, this 29th day of October, 1923.

H. S. IVIE.
(SEAL) *Notary Public.*
New York Co. No. 91.
New York Register No. 5002.

Mr. Cavanagh: Now, if your Honor please, under that stipulation and your ruling, I would like to offer in evidence these exhibit books.

The Court: I have already admitted them, haven't I?

Mr. Meyer: The stipulation has been admitted, I don't think the books have been offered.

The Court: All right, the books may be marked.

Mr. Bulkley: In order to preserve the objection on the record, I object to the admissibility on the ground of immateriality.

The Court: Objection overruled.

The Exhibit Books I to XI are received in evidence and marked as follows:

Defendant's Exhibit D. 19 (Exhibit Book No. I).

Defendant's Exhibit D. 20 (Exhibit Book No. II).

Defendant's Exhibit D. 21 (Exhibit Book No. III).

Defendant's Exhibit D. 22 (Exhibit Book No. IV).

Defendant's Exhibit D. 23 (Exhibit Book No. V).

Defendant's Exhibit D. 24 (Exhibit Book No. VI).

Defendant's Exhibit D. 25 (Exhibit Book No. VII).

Defendant's Exhibit D. 26 (Exhibit Book No. VIII).

Defendant's Exhibit D. 27 (Exhibit Book No. IX).

Defendant's Exhibit D. 28 (Exhibit Book No. X).

Defendant's Exhibit D. 29 (Exhibit Book No. XI).

JAMES T. NEWTON, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Meyer.

Q. What is your name, age, residence and occupation?

A. James T. Newton, patent and trademark attorney and solicitor of foreign patents and trademarks.

Q. With whom are you now associated in business?

A. I am now associated with the firm of Marks & Clerk, of London, Washington, New York and Chicago.

Q. What is the business of Marks & Clerk?

A. They are solicitors of patents, trademarks, foreign and domestic.

Q. Prior to your association with Marks & Clerk, what was your business?

A. For seven or eight years I was Examiner of Trademarks in the Patent Office, and I was afterwards made Assistant Commissioner and then Commissioner of Patents, and had as my duties mostly the passing on trademarks, questions that had been appealed from the Examiner of trademarks before the Commissioner, under the statute.

Q. How long were you in the Patent Office, all told?

A. Twenty-eight years, about.

Q. While in the Patent Office you became intimately associated and familiar with the trademark practice, as I understand?

A. Yes, I had charge of the trademark division, regulated it, prescribed rules and regulations, under the statute.

Q. And for what part of the time were you in charge of the trademark division of the Patent Office?

A. About seven or eight years.

Q. Has the trademark division of the Patent Office a pamphlet giving a classification of these trademarks?

A. It has.

Q. Have you such a pamphlet?

A. I have.

Q. Where in that pamphlet do you find the classification?

A. On the last page of the pamphlet, page No. 46.

Q. What is the heading?

A. "Classification of Merchandise under the Act of May 4, 1906."

Q. How many classes are there in that list?

A. Fifty classes, numbered here from 1 to 50.

Q. And those various classes pertain to various manufactured commodities, as I understand?

A. Yes.

Q. Under what class do you find food products? Has it a number?

A. The food products are numbered in this list of classes No. 46, foods and ingredients of foods. All trademarks that are registered for foods and ingredients of foods are supposed to be in that Class 46.

Q. Do you find also in that list a class for tobacco, and if so, what is the number of that class?

A. That class is numbered 17, "Tobacco products," and in that class are supposed to be all the registrations for tobacco products, such as cigars, tobacco and cigarettes.

Q. Please look at this list of commodities that the Beech-Nut Packing Company was putting out in 1915 as appearing on the list of Complainant's Exhibit 35, and state in what class the commodities are.

A. The list you handed me of the products of the Beech-Nut Company for 1915, bulk goods such as hams and bacon, sliced bacon, sliced beef, peanut butter, tomato sauce, prepared mustard, Jaffee, cider vinegar, beans, olive oil, chewing gum, mints, conserves, jams, jellies, marmalades, and fruits, and syrups, seem to me to be all classified under the Class 46, "Foods and Ingredients of Foods."

Q. Have you made an examination to ascertain instances in which the same trademark owned by different people has been registered in two registrations respectively for tobacco and food products, and if so, produce a few instances of such?

A. Yes, I have, at your suggestion, made that examination and I find there are a great many trademarks that have been registered in quite a number of classes; some trademarks seem to be more popular than others, for instance, the mark "Climax." I find that has been registered 68 times, that is, 68 different owners of the word "Climax" have registered that in the office in various classes. P. Lorillard have registered it in the class of chewing and smoking tobacco. The Climax Coffee and Baking Product Company have registered it for coffee.

Q. In what class is that?

A. That is in Class 46; that is in the foods and ingredients of foods.

Q. You find Eureka has been registered in about 60 cases?

A. In about 68 or 70 classes, different classes.

Q. And in various classes?

A. Nearly all the classes of the office, I think that word has been registered. It is quite a popular trademark and is registered for various things.

Q. Did you procure copies of those registrations, and have you them here?

A. I have. I can furnish those copies of registrations.

Q. In how many volumes are they?

A. There are three volumes.

Q. Will you tell me which of the registrations are in Volume I, just by name?

A. In Volume I are the marks "Climax," which has been registered about 68 times; the "Between the Acts" was registered several times, four or five times; "Red Cross" was registered, oh, a great many times, probably 75 or 80 times, for various kinds of goods. It has been registered in nearly every class in the Patent Office. I suppose every class in the Patent Office has some trademark, some Red Cross trademark registered in it. "Honest" has been registered several times and "Eureka" is another popular trademark that has been registered probably 75 or 80 times.

Q. What about Volume II?

A. Volume II is another list in which some of the popular trademarks and some of the trademarks that are used by the various tobacco companies show the number of registrations granted for each one of those names. For instance, "Camel" has been registered a great many times; the word "Omar" has been registered in several classes; "Omega" has been registered in many classes. The word "Rainbow" has been registered something like 75 times, I should say, for various classes of goods. These classes, of courses, are made by the Patent Office in its attempt to follow the decisions of the courts, and these classes contain what the courts would ordinarily hold to belong to the same class of goods, similar class of goods or, as they express it, goods of the same descriptive character.

Mr. Bulkley: We object, if your Honor please, to the expression of opinion on the part of this witness as to what the courts would or would not hold, as immaterial.

The Court: Well, strike out the latter part of the answer.

Q. And Volume III contains what trademark brands?

A. Volume III is another collection of registered trademarks that have been registered in various classes. The word "Navy, "Army and Navy," the word "Polo," the word "Blue Ribbon," have been registered a great number of times; so has the word "Clipper," "Horse Shoe," "King Pin," "Liberty Bond," "Liberty Bell" and the word "Liberty" itself have been registered probably 75 times in the various classes.

Q. And, as I understand you, those volumes contain trademark words which have been registered in the class of tobacco, for tobacco products, and there are also examples of instances, numerous examples of instances where the same mark has been registered for other products, like food products?

A. Yes. Most of these marks I have read have been registered in the tobacco class and in the food products class, food and ingredients of food.

Q. By different concerns?

A. By different proprietors, by different owners.

Q. So far as you know, and from your experience in the Patent Office, when an applicant, when a trademark applicant files an application, does the examiner extend his investigation outside of the class which this application belongs to, or does he confine it to that class?

A. He, I might say almost invariably, confines it to a class that the owner of a trademark says the goods belong to. For example, if an application for registration of a trademark in tobacco products were filed in the Patent Office, a search through the class of tobacco products would be made. There would be no search made outside of that class, I don't think, in any other class, except in the class of tobacco products.

Q. So far as this classification of the United States Patent Office is concerned, to which you have referred, do you know whether there is any similar classification in other countries?

A. Yes.

Mr. Bulkley: Objected to as immaterial.

Mr. Meyer: I simply want to show it is the practice of practically all of the countries to have a trademark classification of this kind.

The Court: I will permit it. The answer is yes.

The Witness: Did you—

The Court: I heard you say yes, is that right?

The Witness: Yes.

Mr. Meyer: I would like to offer in evidence the list to which the witness has referred as Exhibit D. 30—and also bound Volumes 1, 2 and 3 of the trademark registrations as Exhibits D. 31, D. 32, and D. 33, and also the Patent Office pamphlet of trademark classifications, D. 34. That is all.

Mr. Bulkley: Your Honor, we are prepared to admit all that the witness has testified to with respect to registration of different foods and different classes. We, however, do object to the admission in evidence of these large lists that have been prepared here, on the ground of immateriality.

The Court: Objection overruled. Any cross examination, Mr. Bulkley?

Mr. Bulkley: No, sir.

Mr. Cavanagh: If your Honor please, in the continuation of defendant's case at this time, there have been a great many depositions taken, and I would like to read just about three comparatively short ones to give this Court an idea of the rest of these depositions. If I have that permission I will be glad to read them.

The Court: Very well.

Mr. Cavanagh: The first deposition we will read is that of Samuel Rackmales, a witness called on behalf of the defendant, at Baltimore, Maryland. Direct examination by Mr. Cavanagh, Volume I of defendant's record, page 326.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I will now read the deposition of J. S. Weiner, taken on behalf of the defendant. It appears in Volume II of defendant's record, page 795.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I just have one more deposition, the deposition of Barnett Dickstein, presented on behalf of P. Lorillard & Company which appears in Volume II, page 1194 of defendant's record.

(Deposition read by Mr. Cavanagh.)

Mr. Cavanagh: I think that is sufficient, your Honor, to give you an illustration or an idea of the character of some of the testimony.

Mr. Bulkley: Mr. Bailey, will you take the witness stand?

HOWARD C. BAILEY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Bailey?

A. Port Washington, Long Island.

Q. What is your business?

A. Advertising manager of the International Motor Company.

Q. Did you ever see any packages of cigarettes with the word "Beech-Nut" on those cigarettes?

A. I saw these Beech-Nut cigarettes on the counter in one of the Shulte stores some months ago; I don't know

exactly, and I didn't buy any, but I simply took it for granted they were Beech-Nut products.

Mr. Milton: Just a minute, Mr. Witness, not so fast. I move to strike out all of the answer after he said he had seen them on the cigar counter.

The Court: Strike out.

Q. Were you familiar with the products made by the Beech-Nut Packing Company at the time or prior to your having seen these Beech-Nut cigarettes?

A. Yes, sir; I am familiar with the household products.

Q. To what extent are you familiar?

A. To the extent that we buy quite a few of them, my wife buys them.

Q. Sir?

A. My wife buys them frequently, serves them on the table.

Q. What was the impression made upon you by reason of having seen these Beech-Nut cigarettes, with these words, "Beech-Nut," upon the package?

A. I naturally took it for granted that they were produced by the Beech-Nut Company.

Q. How long a time did you remain under that impression?

A. Until about two days ago.

Q. How did you learn you were not correct in that impression?

A. I was talking to Mr. Anderson of the McKann Agency, and he happened to mention that there was a difference on that subject, and we talked it over.

Mr. Bulkley: That is all.

Cross examination by Mr. Milton.

Q. Mr. Bailey, when you saw these Beech-Nut cigarettes on the counter in the Shulte store, you didn't buy any, I assume?

A. No, sir.

Q. You just happened to see one or more packages on the counter?

A. On display.

Q. And that was, you think, during 1923?

A. Why; yes, yes.

Q. During this year. Are you still using in your home the food products of the Beech-Nut Packing Company?

A. Yes, sir.

Q. So that the assumption, however erroneous it might have been on your part, that the Beech-Nut Packing Company was the manufacturer of a cigarette, had no influence upon you in the purchase of these food products after that?

A. No.

Q. You were still willing to buy all of the food products which you could use of that company, notwithstanding the fact that it had gone into the tobacco business, so far as you assumed?

A. Quite right.

Q. When you saw this display, did you take any of the packages of the cigarettes into your hands, or just see them lying on the counter?

A. Saw them on the stand and took it for granted.

Q. That was while you were in buying some article of tobacco or something else?

A. Buying tobacco.

Q. Are you a cigarette smoker?

A. Yes, sir; part of the time.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

We have a witness coming at three, but rather than delay the proceedings or annoy the Court any further, we will close.

The Court: If the other side can fill in—in the meantime, it won't annoy me any.

Mr. Milton: As I said this morning to your Honor, when the counsel on both sides were in conference early this week, I think on Monday of this week, it was stated by the other side that they expected to take all of Tuesday and all of today. This sudden termination of the plaintiff's case has left us in the position where I don't think we can go on this afternoon beyond the point which we have gone. We will be prepared to start early in the morning and finish tomorrow, assuming that the cross examination is no longer than the examination in chief, and we will finish well by four o'clock, or before that.

The Court: And you will use Friday for argument of the case?

Mr. Milton: I think there was some agreement between counsel that the testimony should be written out.

The Court: First.

Mr. Milton: First, and that a sixty-day period should intervene for the preparation of briefs, if this course is satisfactory to your Honor, of course.

The Court: That would give the Court plenty of time to forget all about the case.

Mr. Scott: The understanding, your Honor, was—I think the defendant requested that the argument be put off to a later date, and we responded that we would accede to that, to the extent of asking the Court, joining them in a request, ask the Court for time to file briefs, and if the Court wanted some more argument after that we would

argue, but we put that entirely as to whether the Court wanted the argument—

The Court: You mean oral argument?

Mr. Scott: Yes.

The Court: The Court wants oral argument at some time or other.

Mr. Scott: Whether the Court wanted it later or at the close of the trial—we said if the Court wanted one later, it would be perfectly agreeable, and that is all we said. We didn't try to arrange the matter, so I think that is simply a matter for the Court to state its wishes on, whether we shall argue it now or later, or whether the Court wishes to hear some arguments now or some after the briefs. It seems to me it is simply a matter for the Court to express its wishes on.

The Court: Well, we will discuss that tomorrow. A witness will be here at three?

Mr. Bulkley: That is what we were told.

The Court: All right, I will wait until three.

Mr. Milton: We can perhaps take another witness and utilize as much of the time this afternoon as is possible.

The Court: All right.

WILLIAM R. PERKINS, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Milton.

Q. You live where, Mr. Perkins?
A. Montclair, New Jersey.
Q. What is your business or profession?
A. I am a lawyer.
Q. Associated or connected with whom?

A. I am counsel for the P. Lorillard Company.

Q. And have been counsel for the P. Lorillard Company for how long?

A. Well, off and on since December, 1911. The last time I came with them was in the spring of 1917, I think, 1918.

Q. You have been continuously with the Lorillard Company since the spring of 1917?

A. Yes.

Q. And prior to the spring of 1917 you have been counsel for the company off and on?

A. From December, 1911, until about December, 1913.

Q. Prior to December, 1911, were you associated or connected with any of the companies, the tobacco companies?

A. With the American Tobacco Company.

Q. When was the present P. Lorillard Company formed?

A. In the latter part of November, 1911.

Q. How long prior to December, 1911, had you been associated with the American Tobacco Company?

A. Since October, 1906.

Q. And in what capacity?

A. In the legal department, as one of the counsel.

Q. I show you a paper, Mr. Perkins, which is headed, "P. Lorillard Company," and under that "cigarettes," consisting of a number of sheets, 16 sheets, upon which appear the names of various cigarettes, little cigars, plug tobaccos, long cut tobaccos, plug cut tobaccos, granulated tobaccos, clippings and scrap tobaccos, and then various names under the caption of Luhrmann & Wilbern, fine cut tobaccos, packed cheroots and cigars, Federal Cigar Company brands, little cigars, another sheet headed "Federal Cigar Company, Active cigar brands, Federal Cigar Company," ditto, another sheet the same, the same on another sheet, the same on another, and the same on the last,

and ask you what you know about the preparation of that paper?

A. In or about the year 1908, the Government of the United States began a suit in equity under the Sherman Anti-Trust Law against the American Tobacco Company and its subsidiary and affiliated companies, charging that they were a combination and monopoly within the terms of that Act, and after some years in which the litigation proceeded, the Supreme Court of the United States in May, 1911, rendered an opinion holding the American Tobacco Company and these affiliated and subsidiary companies a combination and a monopoly in restraint of trade under that Act, and sent the case back to the Circuit Court of the Second District of New York to work out and enter a decree which should restore lawful conditions in the opinion of that Court. Such a decree was worked out and was entered in November, 1911, by the Federal Circuit Court of the Second District of New York, and this paper was prepared, and at the time that decree was entered, shortly after, in the carrying out of that decree, was given to the P. Lorillard Company stating the brands which under the decree it became entitled to get.

Q. Let me interrupt you right there. Have you a copy of the decree here? Is it this pamphlet (indicating)?

A. Yes. The whole proceeding is reported in 191 Federal Reporter, but there are printed pamphlets of the decree made at that time.

Q. I want you to refer us to the particular paragraphs of the decree which provide for what you have just said. Is that the decree (indicating)?

A. Yes, this is a printed copy of the decree.

Q. Oh, is it, all right.

A. That was made at that time, yes.

Mr. Bulkley: It seems to us, your Honor, that the witness should not express his opinion as to the

findings under that decree, but let the decree speak for itself.

The Court: He is going to point out a paragraph.

Mr. Milton: I am not going to ask this witness to construe the decree. I am going to ask him to point out that paragraph which he—

Mr. Bulkley: Then I move that the latter part of his answer which consists of a conclusion as to what the findings in the decree were, shall be stricken.

The Court: I forget just now what he did say.

(The last answer of the witness repeated by stenographer as follows:)

"The whole proceeding is reported in 191 Federal Reporter, but there are printed pamphlets of the decree made at that time."

Mr. Bulkley: Just preceding that.

(The answer was repeated by the stenographer as follows:)

"Such decree was worked out and was entered in November, 1911, by the Federal Circuit Court of the Second District of New York, and this paper was prepared and at the time the decree was entered, shortly after, in the carrying out of that decree, was given to the P. Lorillard Company, stating the brands which under the decree it became entitled to get."

Mr. Bulkley: That is the conclusion to which we object.

The Court: Strike out the latter part of that.

Mr. Milton: "The brands to which under the decree it became entitled."

The Court: Yes, just that part.

A. On page 17 of this pamphlet is provision F of the decree and that is the provision that provides for what we called at the time the division of the direct business of the American Tobacco Company. If I may explain that, the American Tobacco Company controlled a good many companies through stock ownership, and the decree required it to distribute the stock in various of those companies.

Mr. Bulkley: Now I move to strike that.

The Court: I will let that stand. It is a reference to facts. I will let it stand.

Mr. Bulkley: But I think not within the knowledge of the witness.

The Court: I beg your pardon?

Mr. Bulkley: Perhaps not facts within the knowledge of the witness.

The Court: You may ascertain the source of his knowledge.

A. (Continuing.) That portion of the decree is Section E of it, which says: "The American Tobacco Company will distribute among its common stockholders by way of dividends, and to be charged to its surplus, all of its securities of the following described classes, whether now owned by it or bought by it from American Cigar Company, as hereinbefore set forth, or bought by it from P. Lorillard Company, as just hereinbefore set forth, or received by it by way of dividends from any of the accessory companies defendant, as hereinbefore set forth, to wit.:

"American Snuff Company—"

And then follows a list of those companies.

Q. Do you find the Luhrmann & Wilbern Company in that list?

A. Not in that list. Then comes provision F, which provides—I will read from the decree—"There will be

organized a new corporation called Liggett & Myers Tobacco Company, and a new corporation called P. Lorillard Company, and The American Tobacco Company will sell, assign and convey to these two companies factories, plants, brands and businesses, and capital stocks of tobacco manufacturing corporations, as shown in Exhibit 'A' hereto attached."

And Exhibit A reads: "To P. Lorillard Company: All the rights of The American Tobacco Company in the present P. Lorillard Company, to wit: all the common stock and $1,596,100 at par out of a total issue of $2,000,000 of eight per cent. preferred stock; it is contemplated that as a part of these reorganizations the Lorillard Company, as at present constituted, be wound up and the new company be organized, taking over assets of the P. Lorillard Company;

S. Anargyros, a company engaged in the manufacture of cigarettes, in which The American Tobacco Company owns all the stock, and of which it has always owned all the stock;

Luhrmann & Wilbern Tobacco Company, a company engaged in the manufacture of scrap tobacco (a kind of smoking tobacco), of which The American Tobacco Company owns, and has for many years owned, all the stock;

Philadelphia Branch B at Philadelphia, Wilmington Branch B at Wilmington, Penn Street Branch at Brooklyn, Danville Branch B at Danville, and Ellis Branch B at Baltimore, branches of The American Tobacco Company manufacturing little cigars, the principal brand being 'Between the Acts';

Federal Cigar Company, a company all of whose stock is, and has always been, owned by American Cigar Company, but which, as hereinbefore provided, is to be purchased for cash by The American Tobacco Company."

Q. Now, what connection was there between those provisions of the decree and the schedule which you have

read and the paper which I have shown you consisting of a number of sheets that I specified?

A. That was the paper which was gotten up and delivered to the Lorillard Company, the new Lorillard Company, which this decree which I have read, required to be formed, as showing the brands that it got under this decree, in the division of the assets, under this decree, of the American Tobacco Company.

Q. And do you know in whose possession this paper has been ever since that time in 1911?

A. Why, it was in the possession of the officers of the Lorillard Company.

Q. I refer you to the fifth sheet, and ask you to read the names of the brands listed under the caption Luhrmann & Wilbern?

A. "Bag Pipe," "Beech-Nut," "Honest Scrap," "Natural Leaf," "Old Nut," "Polar Bear," "Scrap Iron."

Q. What had you to do with the preparation of the lists, Mr. Perkins?

A. I represented the American Tobacco Company's legal department in the preparation of them.

Q. Did you actively take part in the getting up of the lists of the brands that were divided among the different companies?

A. Oh, sure. I talked with the officers of the companies and we together prepared that list, at the same time, we prepared, of course, lists to be gotten by the American, and lists to go to Liggett & Myers.

Mr. Milton: We offer this, if the Court please.

(Received and marked Exhibit D. 35.)

Q. I now show you, Mr. Perkins, paper purporting to be assignment of business, and so forth, American Tobacco Company, to P. Lorillard Company, dated December 1, 1911, and ask you if you have ever seen that before?

A. I drew that.

Q. You drew it. And did you know the signature of Mr. Percival Hill? Is that it?

A. Yes, that is the signature of Mr. Percival Hill, also Mr. Willcox, the secretary. There is my pencil memorandum "O. K." made at the time.

Q. Made on or about the 1st day of December, 1911?

A. On or about that date.

Q. You recognize your initials?

A. Oh, yes, those are my initials.

Q. In connection with what transaction was this paper prepared?

A. The distribution of the assets of the American to the Lorillard, pursuant to the provision of the decree I have just read.

Mr. Milton: We offer that and ask that it be marked.

A. (Continuing.) You will see that that is the language of the decree.

(Received and marked Exhibit D. 36.)

Mr. Milton: I am going to call the Court's attention to it in a minute. The emphasis that we desire to lay upon this, and I will call the Court's attention to the pertinent part in the assignment, is: "All the rights of the American Tobacco Company in the old P. Lorillard Company, to wit: all the common stock and $1,596,100 at par out of a total issue of $2,000,000 of eight per cent. preferred stock." Following the language of the decree. "All the stock of S. Anargyros, a corporation existing under the laws of the State of New York, engaged in the manufacture of cigarettes;

"All the stock of Luhrmann & Wilbern Tobacco Company, a corporation of the State of New Jersey, engaged in the manufacture of scrap tobacco;

"All the stock of Federal Cigar Company, a New Jersey corporation, engaged in the manufacture of cigars;

"Philadelphia Branch B at Philadelphia; Wilmington Branch B at Wilmington; Penn Street Branch at Brooklyn; Danville Branch B at Danville, Virginia; and Ellis Branch B at Baltimore; all branches of The American Tobacco Company, engaged in the manufacture of little cigars, the principal brand being 'Between the Acts.'

"Each of the foregoing properties is conveyed as a going concern."

That language is preceded by the general assignment clause which sets over to the vendee, the Lorillard Company and its successors and assigns, the factories, plants, brands and businesses and capital stocks of tobacco manufacturing corporations as follows: which I have read, your Honor.

Cross examination by Mr. Scott.

Q. In compiling this list, Mr. Perkins, which was referred to by you containing a dozen or so sheets, do you remember where you got the information to compile the lists of different brands?

A. From the records of the American Tobacco Company.

Q. What was your procedure? Simply to go to the records of these old companies and copy out lists of brands they had used?

A. We took the brands of the various companies, just as their records showed.

Q. Simply went to the records of those companies, found out all the brand names that appeared on their books and copied them into here?

A. We took the brands they thought they had a right to convey.

Q. That they had a right to convey?

A. Yes.

Q. But you simply went to the records of these companies—I want the practical procedure—didn't you, and took off from those records the names of all the brands that appeared there?

A. I went to the officials of these companies, and in conjunction with them and their records, we made out what we regarded that these companies were entitled to of the various brands under that decree according to the best information we could get.

Q. Did you omit any that appeared on the books of those companies?

A. Not that I recollect.

Q. You made a sweeping and complete list?

A. I couldn't tell you about that, Mr. Scott. We made what we thought they ought to have under all the circumstances.

Q. So this merely represents what you individually thought they ought to have?

A. No, what the officers thought, too. It isn't my individual thought.

Q. And you say that you don't remember omitting anything, simply made a complete list of all the brands you could find on the records of these companies?

A. I cannot say that, Mr. Scott. I say that this is what we made and delivered and what the officers and myself concluded then they were entitled to. I cannot tell you whether we took all on the list or not. I cannot just remember that, I cannot remember that.

Q. You don't remember then, the origin from which you got these names?

A. I got it from the records in the office.

Q. What are those records?

A. Books and papers of those companies.

Q. What kind of books?

A. Various books they had, their conveyances, their brand books.

Q. What is a brand book?

A. Their various records that they had.

Q. Did each of those companies keep a separate book called a brand book and have a list of its brands in it?

A. I think the American had something like that, if I recall. I don't recall that the others did.

Q. What form was this record in as possessed by the other companies?

A. Why, they had their price lists and they had the conveyances to them, when they acquired them, and all those things. We went by all of them.

Q. So this list, as a practical proposition, is a summary copied off, of the names that you found on the brand books and upon the price lists and brands named in conveyances that you found in the files of these old companies?

A. Yes.

Q. That is what this is?

A. It is the brands we ascertained, and the officers said and we agreed at that time, should be included. Now, whether it was all of the brands or whether they omitted some I cannot tell you, because that is what we decided ought to be put over to these various companies.

Q. Do you remember at this date omitting any brand whose name you found on those old records?

A. No, I don't recall any.

Q. That is all.

Mr. Milton: That is as far as we can go today.

Mr. Bulkley: We have two witnesses.

HUGH PETERS, called and sworn in behalf of the plaintiff, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Peters?

A. Englewood, New Jersey.

Q. What is your business?

A. In partnership in Wall street, Mackay & Company, I am one of the partners.

Q. What is the general nature of that business?

A. Banking and investment business.

Q. And do you buy and sell listed stocks?

A. Unlisted?

Q. Listed and unlisted?

A. All classes of securities.

Q. Did you ever buy and sell any of the stock of the Beech-Nut Packing Company?

A. Yes, sir; sold some today.

Q. Did you ever see any cigarette packages bearing upon them the word "Beech-Nut?"

A. Yes, sir.

Q. And how long ago was that, about?

A. It was in the late spring or early summer of 1921.

Q. What was the impression made upon your mind by seeing such packages of cigarettes with those words upon them?

A. I was very much surprised.

Q. Why?

A. My estimate of the Beech-Nut Company was that they wouldn't undertake that type of business.

Q. Were you previously familiar with the general type of business of the Beech-Nut Packing Company?

A. Yes, sir; we had handled some of their preferred stock.

Q. Well, I mean more particularly did you know of the variety of products which they were making and selling upon the market?

A. In connection with that preferred stock issue, I myself had to write the circulars, so I had to investigate it quite thoroughly.

Q. State whether you ever heard any questions asked or any inquiries made by anyone which would lead you to believe that they thought the same concern which put out the Beech-Nut cigarette and the Beech-Nut scrap tobacco also put out the Beech-Nut chewing gum and the Beech-Nut food products?

Mr. Milton: Just a minute, Mr. Witness. Will the Court direct the witness to answer the question yes or no.

The Court: You can answer that question yes or no.

The Witness: May I have that question repeated again? It seemed to me back end foremost. I didn't quite get that clearly.

Mr. Bulkley: Well, I am reading it from the defendant's record.

(Question repeated by stenographer.)

A. Yes.

Q. How often did you hear such inquiries or comments?

Mr. Milton: Objected to on the ground it is immaterial and irrelevant.

The Court: I will permit it.

A. I should say at least 20 times.

Q. And how were they made to you?

Mr. Milton: Objected to.

The Court: I will permit it.

A. How were the questions made to me?

Q. Yes. How did you hear those questions, under what circumstances?

A. Well, I can give you one or two illustrations if I am permitted.

Mr. Milton: No, I would have to object to that.

The Court: You don't object?

Mr. Milton: I would have to object.

Q. Well, I put that in the form of a question to the witness, and ask him to state such instances or illustrations that he has in mind?

Mr. Milton: I object to that, sir.

The Court: I sustain the objection to that.

The Witness: Perhaps I can answer the other question.

(Question repeated by stenographer as follows:)

"Q. How were the questions made to you, how did you hear those questions, under what circumstances?"

A. In one instance from a person in a more or less similar line of business with myself who knew that we handled the Beech-Nut products and who spoke of it to me with some surprise.

Mr. Milton: Well, now, I move to strike that out, if the Court please.

The Court: Strike out "and who spoke of it to me with some surprise."

Q. What did he say to you?

Mr. Milton: Objected to on the ground it is incompetent.

The Court: I sustain the objection.

(Exhibits before offered in evidence received and marked as follows:

D. 30, Judge Newton's trademark list.

D. 31, D. 32 and D. 33, bound volumes of trademark registrations.

D. 34, pamphlet of trademark classifications.)

Q. Have you found in connection with the sale of the stock of the Beech-Nut Company that the impressions which were gained by you and others had any effect at all upon the sale of Beech-Nut stock?

Mr. Milton: Objected to.

The Court: I will permit that.

A. The best answer I can give to that is that the fair proportion of the cases in which this was spoken of was by stockholders who asked for information in regard to it, because they thought it affected the value of their stock adversely.

Mr. Milton: I move to strike that out, if the Court please.

The Court: Strike it out, it is not responsive.

Q. In your opinion as a broker, selling the stock of the Beech-Nut Company, has the impression that the Beech-Nut Packing Company is engaged in the sale of tobacco and cigarettes in any way affected the sale of the stock of that company?

Mr. Milton: Just answer that yes or no, if you will, please.

The Witness: I don't believe I can without creating an improper impression.

Mr. Milton: Then I object to the question, sir, on the ground it calls for a conclusion.

Mr. Bulkley: I think the witness, if the Court please, may answer the question.

The Court: Why can't it be answered yes or no?

2542

Mr. Bulkley: I think it can.

The Witness: I think it calls for a conclusion.

The Court: We don't want any conclusions.

Mr. Bulkley: May not the witness be permitted to answer it directly and then add such explanation as he may think is necessary to guard his answer as he seems to desire to so do.

Mr. Milton: That is objected to; I don't think that is a subject for opinion evidence.

The Court: I don't think it is either. I sustain the objection.

Q. When you saw this package of these cigarettes, were the packages covered with some translucent paper?

A. Yes, sir; I purchased a package in order to find out the maker.

Q. And did you perceive the name of P. Lorillard Company on the package of cigarettes that you purchased?

A. Not until after I had made the purchase and examined it carefully. I bought it under artificial light in the Shulte store; it was on exhibition in the basket there, with a label, quite a fair-sized label, about so big, "Beech-Nut cigarettes," and the price, but no name of any maker visible. I at that time didn't know who made it.

Mr. Milton: I move to strike out all the witness' answer after the words "I bought it under artificial light."

The Court: No, I will permit it to stand. He states what he did.

Mr. Milton: Will you permit the witness to state what appeared on the advertising card?

The Court: Yes, you may ask him that, if counsel does not.

Mr. Milton: Counsel did, that is my objection. The witness is now describing an advertising card which we don't see.

The Court: I will permit it to stand. It tells the condition under which he bought the package of cigarettes, what he saw there, how it was displayed.

Q. What did you do in order to ascertain who was the maker of these cigarettes, not being able to see the name under this light?

A. I happened to have this original package in my pocket. It has a glacine cover on it.

Q. What is that that you hold in your hand?

A. That is the original package I purchased at that time, which I put in the bottom drawer of my desk after sampling the cigarette. It has a glacine cover, and I pressed down on the cover and held it to the light this way (indicating), and then could read the name "Lorillard."

Q. What impression did you get, first as to who put out those cigarettes, from seeing finally the name of P. Lorillard Company on the package which you bought?

A. I then got the definite impression they were put out by P. Lorillard Company.

Cross examination by Mr. Milton.

Q. What period of time elapsed between your first impression that the cigarettes were put out by Beech-Nut Packing Company and your information acquired in the manner you have described that they were put out really by Lorillard?

A. The length of time it required to make the purchase and examine the package, part of a minute.

Q. I see. So that practically simultaneously your impression was corrected?

A. As soon as I made the examination.

Q. Yes, sir. Was this in a Shulte store that you—

A. It was in a Shulte stand, not a Shulte store.

Q Where was the stand?

A. My memory of it is it was the stand that is in the Erie subway, Erie passageway in Jersey City, but I am not certain of that exact location, that is my impression.

Q. For what purpose had you stopped at the stand?

A. I stopped because I saw the exhibition of these cigarettes right beside the Beech-Nut chewing gum and other products for sale.

Q. You stopped, saw the package—

A. I stopped because I saw it, happened to glance over there and saw it.

Q. Saw the word "Beech-Nut" on the package of cigarettes, bought it for the purpose of finding out who the maker was—

A. I bought it because I was completely thunderstruck with the idea that the Beech-Nut would manufacture those cigarettes.

Q. Let us understand that, Mr. Witness. If your impression was when you saw the package that the Beech-Nut Packing Company was the producer of this cigarette, why did you buy it, to confirm that impression?

A. Because I could hardly believe my eyes.

Q. So that you were not deceived, were you?

A. Deceived in the purchase?

Q. Yes.

A. Well, I made the purchase to prevent being deceived.

Q. Precisely. When you saw this package with the word "Beech-Nut" on it you bought it not as the casual public might buy, if I might use that impression, but for the specific purpose of ascertaining whether or not the Beech-Nut Company was the producer and manufacturer; that is right?

A. I certainly did, because I heard only the day before they were making it, and had denied it, through my knowledge of the company and belief that they wouldn't do it, but I had no official knowledge.

Q. That is the first time you mentioned you heard it the day before, isn't it?

A. Yes, sir.

Q. And you had denied it?

A. Yes, sir.

Q. So that when you saw the package of cigarettes on the counter of the Shulte stand, then you were not deceived, were you?

A. I was under the impression I may have given an incorrect statement the day before to a client of ours.

Q. And you stopped to buy the cigarettes to find out whether or not that was true?

A. Yes, sir.

Q. Are you a cigarette smoker?

A. Yes, sir.

Q. What cigarette do you smoke?

A. Lucky Strikes.

Q. Were you then selling the preferred stock of the Beech-Nut Company?

A. We had completed the issuing of it; it was only in so far as we deal in the market from time to time, as stock may be offered, that is all.

Q. Which you, of course, would do for any customer, sell any reputable stock to any man who has the money?

A. Yes. We more or less make the market for that particular stock. They come to us because we were connected with the original issue.

Q. You did market the issue of the original stock?

A. We assisted in it.

Q. When was that?

A. I don't recall the exact time, prior to this some little time.

Q. How long prior to it?

A. Couldn't tell you that without checking up.

Q. Approximately.

A. Well, at least some months, I would say at least some months.

Q. Can you fix how many months?

A. I can easily fix it by checking back, but not from memory.

Q. As a part of the campaign of marketing and selling the preferred stock of this company, were you furnished with a list of the products which it produced and manufactured and sold?

A. At that time, yes.

Q. And cigarettes were on that list?

A. They were not.

Q. Nor chewing tobacco?

A. No, sir.

Q. Nor tobaccos of any kind?

A. No, sir.

Q. So that when you approached the Shulte stand for the purpose of purchasing that pack of cigarettes, you were in the frame of mind of one who believed that the Beech-Nut Packing Company did not in fact manufacture or sell this cigarette?

A. I believed that before I saw the package even. I was somewhat shaken in the belief by the sight of the package.

Q. I say, when you approached the stand for the purpose of buying it, did you then believe—

A. I was not entirely convinced, no. I still thought it must be something wrong somewhere.

Q. This was really an investigation that you were carrying out, was it, for your own purposes? Is that right?

A. Well, yes, it was.

Q. How did the facts which you have just testified to become known to the Beech-Nut Packing Company and its lawyers?

A. Why, I was quite surprised at the fact that the Lorillard Company should use a brand so similar, and I thought that the Beech-Nut Company were probably protected in the use of that brand, and I wrote and supplied them with that information, more or less as an inquiry at that time, and heard nothing from it since.

Q. When was that?

A. That was only a comparatively short time after I had made that purchase. I knew of no case at the time.

Q. Have you fixed the time when you made the purchase?

A. In the late spring or early summer of 1921.

Q. Of 1921?

A. Yes.

Q. Mr. Peters, were you a user of Beech-Nut Packing Company products prior to the time you made this purchase of cigarettes?

A. Yes, sir.

Q. Are you still a user of the products?

A. Yes, sir.

Q. What was there about the apparent addition of cigarettes to the Beech-Nut line that surprised and thunderstruck you?

A. Why, it seemed somewhat of a departure from their policy, and from the character of their business.

Q. You mean the goods are so different?

A. I mean that.

Q. Separate and distinct classes?

A. While they have a very diverse business in the main it is food products of some sort, and this was somewhat of a departure.

Q. You regarded that as a distinct line, I suppose?

A. What do you mean?

Q. You regarded that, meaning tobacco, as a separate and distinct line?

A. I regarded it as somewhat apart from their usual line of products, yes.

Mr. Milton: I think that is all.

Mr. Bulkley: That is all.

PHILIP V. R. VAN WIRTH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Bulkley.

Q. Where do you live, Mr. Van Wirth?

A. In Summit, New Jersey.

Q. What is your business?

A. What is my business?

Q. What is your business; yes, sir.

A. I am the secretary and treasurer of the Electrical Securities Company.

Q. Did you ever see any package of cigarettes bearing the words "Beech-Nut" upon it?

A. Yes, sir.

Q. Where and under what circumstances?

A. Why, I saw them on some cigarettes packages.

Q. Where?

A. In New York.

Q. Whereabouts in New York?

A. On a stand in New York where they sold cigarettes and various other things.

Q. What was the impression that you gained from seeing those words upon that package?

A. I thought that the Beech-Nut Company had added another line to their ordinary line.

Q. Were you familiar with the Beech Nut products before you saw this package with the name of the brand on it, "Beech-Nut"?

A. Yes, sir; I was.

Q. To what extent?

A. Well, I had bought them, candies and the Beech-Nut bacon, and ginger ale, I think that was all that I—

Q. Was this a tobacco stand?

A. No, sir.

Q. What was it?

A. It was a newspaper stand and candies and newspapers and various things of that sort.

Q. How long a time did you remain under the impression that cigarettes were being sold by the Beech-Nut Packing Company under the name Beech-Nut?

A. Why, I remained under that impression until I inquired. I didn't investigate then at all. I simply saw them, noticed them and passed on, and then I was interested because I happened to be an owner of Beech-Nut stock.

Q. Of whom did you purchase that stock?

A. I don't remember now. I purchased it through the market, and I inquired, I thought the Beech-Nut Company had gone into another additional line.

Q. Of whom did you make this inquiry?

A. I made the inquiry of a friend, through whom I bought the stock, I think.

Q. Do you remember from whom you purchased this stock of the Beech-Nut Company? Who was the agent?

A. Yes, I purchased it through Mackay and Company, Mr. Murray of Mackay and Company.

Mr. Bulkley: That is all.

Cross examination by Mr. Milton.

Q. That is the house that the last witness, Mr. Peters, is connected with?

A. Yes, sir.

Q. Is Mr. Peters the friend of whom you inquired about the manufacture of Beech-Nut cigarettes?

A. I spoke to Mr. Murray; I think probably Mr. Peters, too.

Q. I see. Did Mr. Peters arrange for your coming here today to testify?

A. He did.

Q. About how long in point of time did you remain under the impression that the Beech-Nut Packing Company was a producer of these cigarettes?

A. Why, about an hour or so, until I inquired. I had that impression until I inquired about it.

Q. You didn't buy any of these cigarettes?

A. No, sir.

Q. Was this at or about the time you had acquired the stock of the Beech-Nut Company?

A. This was some time after that, I think, I acquired the stock previous, I owned the stock at that time.

Q. You had purchased the stock previously?

A. I had purchased it previously; yes, sir.

Mr. Milton: That is all, I think.

Mr. Bulkley: The plaintiff rests.

(An adjournment was thereupon taken until Thursday, November 1st, 1923, at 10:30 o'clock A. M.)

Beech-Nut Packing Co.,
vs.
P. Lorillard Company.

Thursday, November 1, 1923, 10:30 A. M.

(Case continued.)

Appearances as before.

Mr. Johnson: If the Court please, the plaintiff has several exhibits which have been stipulated into this case with the consent of defendant's counsel. Plaintiff would now like to offer those formally in evidence. They are Plaintiff's Exhibit No. 12, the scrap book of circulars and letters; Plaintiff's Exhibit No. 28, board of Beech-Nut labels displayed before the public, 1891 to 1921 —that is that big board against the wall; Plaintiff's Exhibit 32, collection of defendant's posters and signs. That is the collection against the rear wall, mounted on some boards in three panels; Plaintiff's Exhibit 33, scrap book, collection of labels used by defendant; that is this collection here. These are all labels supplied by defendant and stipulated into this case. Plaintiff's Exhibit 34, scrap book, collection of specimens of defendant's publication advertising; that is this little book. The stipulations covering these are in the printed record. I presume your Honor does not care to have them read?

The Court: Oh, no.

Mr. Johnson: In addition to that, with consent of the defendant's counsel, we would like to offer certified copies of the decisions in the Patent Office case, between these same parties, the record

of which has been stipulated into this case. That is Plaintiff's Exhibit No. 41, certified copy of the decision of the Examiner of Interferences in Patent Office Trade Mark Opposition No. 2805, and Plaintiff's Exhibit No. 42, certified copy of the decision of the Assistant Commissioner of Patents in Patent Office Trade Mark Opposition No. 2805.

Mr. Cavanagh: If your Honor please, I would just like to state with respect to the exhibit board back there of the Beech-Nut advertising of the Lorillard Company that that does not include a complete collection of everything that Lorillard has ever put out respecting the advertising of its cigarettes. Of course, we have had a great many pieces of different advertising, as your Honor will understand.

(Exhibits referred to by plaintiff's counsel, are received and given the respective marks which counsel enumerated.)

DAVID H. BALL, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Cavanagh.

Q. Your name is David H. Ball; you are of legal age; you reside in Mount Vernon, New York, and you are vice-president of P. Lorillard Company, the defendant in this case. Is that correct?

A. Correct.

Q. In what line of business is the P. Lorillard Company engaged in?

A. Tobacco business.

Q. How long have you yourself been engaged in the tobacco business?

A. In my thirty-fourth year.

Q. Would you please give us a brief history of your experience in the tobacco business, including the positions you have held, the lines of the business in which you have been engaged and the like?

A. In the spring of 1890, I secured a position with Marburg Brothers, who were then engaged in the tobacco business in Baltimore, Maryland, as a retail salesman, and what we term a missionary man, advertising and selling to the retail trade and producing business by tacking signs and sampling the consumers. I remained in that capacity with Marburg Brothers until they sold out to the American Tobacco Company, which I think was in 1891, at which time I went with the American Tobacco Company and continued in their employ in that capacity until 1892, at which time I was sent to St. Louis and put in charge of one of their departments, called the Fine Smoking Department, as head salesman in that department, and I remained in that capacity several years and from time to time, as the American Tobacco Company's business grew and my efficiency seemed to impress them, and I was given charge of their various lines from time to time until it included plug tobacco, smoking tobacco, cigarettes, little cigars, cheroots, big cigars, snuff, and, in fact, practically every commodity in the tobacco line. I remained in St. Louis in that capacity until 1904, at which time I was brought to New York City, and put in charge with another gentleman of the Bull Durham and Cut Plug Department, where I remained about six years, I think, and in January, 1910, I was made assistant to one of their vice-presidents, Mr. P. S. Hill, and remained in that position until the dissolution of the American Tobacco Company, at which time I was appointed as vice-president of the P. Lorillard Company, and have occupied that position continuously up to the present time.

Q. During these years did you sell and supervise the selling of tobacco products throughout the United States?

A. Well, not during all of those years. During the time I was located in St. Louis, of course, I only had a specific territory, Missouri and Southern Illinois. When I was a retail man, I worked Minnesota, North Dakota and part of Wisconsin. After I came to New York, then I had the supervision over the Cut Plug and the Bull Durham business together with another gentleman, for the entire United States, and since I have been with the Lorillard Company, I have had supervision over the line which I have looked after for the entire United States.

Q. Now, during these years of your experience since you have been in the tobacco business, can you mention a few of the famous brands of tobacco which have come under your charge in the selling of the same; give us the names of some of them?

A. Bull Durham, Battle Axe, Duke's Mixture, Honest Scrap, Beech-Nut and Mechanics Delight, Climax, Planet, Sensation, Union Leader, and numerous other ones.

Q. In all your experience in the tobacco business have you ever known a tobacco concern that made and put out food products such as bacon, jelly, preserves, soft drinks, chewing gum or mint candies?

A. I never have.

Q. In all your experience in the tobacco business have you ever known of any concern that put out such food products as I have enumerated making and putting out a tobacco product?

A. I never have.

Q. In your experience have you ever known of different concerns using the same trademark, one for a tobacco product and the other for a food product?

A. Quite frequently. In fact, the custom is quite general.

Q. How generally, if at all, has it been the custom for concerns not engaged in the production of tobacco products to use trademark brands which are used by manufacturers of tobacco products?

A. It has been quite general. In fact, there are quite a few of our brands alone used for various products.

Q. Can you name some of them?

A. Yes, sir. We have one exhibited there, Mogul, and there are our brands of Comet and Climax.

Mr. Scott: Before the witness continues this answer, I wish to object to this line of testimony on the ground of its immateriality. The testimony is evidently directed to showing that these labels are used upon different products, and it stops there. The parties are not parties to the case. It has no bearing upon any issue in this case. It was simply proving the existence of this mark upon different classes of goods by different makers. As far as that goes, it can in no way affect any suit here; there is no foundation for it, or even proof that the same parties do not own both lines of goods.

Mr. Cavanagh: This goes right to the very heart of this case, if the Court please. In their charge they have alleged that the goods are practically the same class and belong to the same group. Now it comes down to this question of different description of goods and different classifications. We are entitled to show that it is a general rule that the same name that is used for tobacco is used for other products, so that any member of the public would know that that is a custom or a general rule in the business. I think under every rule of evidence we are entitled to show that. This is of the essence of the charge against it.

The Court: I will not eliminate this class of evidence. I think it would be unwise to keep this class of evidence out. I will overrule your objection.

Q. To your knowledge for how long has this been the practice or the rule?

A. As long as I have been in business.

Q. Of using tobacco trademarks in other lines?

A. Yes, sir.

Q. Have you ever known any objections, to your knowledge, to be made of this practice, outside of this suit?

A. No, sir.

Q. Has any concern that you have been connected with in an official capacity, to your knowledge, ever made any objection to any other concern not in the tobacco line of business using one of your tobacco trademarks?

A. No, sir.

Q. I show you a package which is in evidence in this case as a product of the P. Lorillard Company, and which has been put upon the market since 1915. Will you kindly state what you remember about the placing of this package upon the market by your company and why this was done?

A. At the time of the dissolution of the American Tobacco Company in December, 1911, the bulk of what we term the scrap business was turned over to the Lorillard Company, and their big brand was "Honest." The year before the dissolution, or rather the year of the dissolution, which was 1911, the brand of Honest started to decline, and for three or four succeeding years, the decline was gradual all the time, and that also applied to some of our other brands, and I went out myself to make a personal investigation to ascertain the cause of this decline. And after looking the field over very carefully I decided that the taste of the consumer was changing somewhat; that brands that were somewhat sweeter than ours seemed to be growing, and our brands that were less sweet were declining, so I came back and reported it to our president and suggested that we endeavor to get up a new formula that would be better suited to the taste that seemed to be changing at the present time; and after experimenting quite a while he brought over a sample package of a piece of goods that struck me as being an

ideal product to put out. So we decided to put out another brand, and in looking around for a brand, as is our usual custom, I referred to our list of brands to see what were in a way dormant, and that had been turned over to us as our property by the American Tobacco Company, and one of the first brands I noticed was the brand of Beech-Nut, and that seemed to me to be a very appropriate name for this article, and we decided to use this brand for that purpose.

Q. And when was this, at what time?

A. This was in the fall of 1914, I think.

Q. And at that time were you in complete charge of the scrap tobacco department?

A. I was, the selling end of the business.

Q. What is included in the tobaccos that you had charge of the selling of, what was your department at that time?

A. I had charge of all the smoking tobaccos, all the plug tobaccos, all the scrap tobaccos, all the fine cut tobaccos and part of the time, little cigars.

Q. And you at that time were a vice-president of the Lorillard Company?

A. I was vice-president of the Lorillard Company.

Q. Now you have referred to a list from which you selected this Beech-Nut tobacco mark.

A. Yes.

Q. Is this Exhibit D. 35 the list (indicating)?

A. This is the list that was turned over to me at the time of the dissolution of the American Tobacco Company, some time in December, 1911, and has been continuously in my possession since that time and has been referred to by me on numerous occasions.

Q. In that list have you from time to time selected other names of brands and put them on the market?

A. We have.

Q. Can you name one or two besides Beech-Nut that you also selected?

A. Comet, Pioneer, Yacht Club, and probably there were some others in addition to Beech-Nut.

Q. Under what heading does the Beech-Nut appear on that list?

A. Under the heading of Luhrmann & Wilbern.

Q. Is there any sub-division heading there?

A. That is a sub-division heading, Luhrmann & Wilbern. Luhrmann & Wilbern made only scrap tobaccos at the time they were turned over to the P. Lorillard Company, and of course the Luhrmann & Wilbern business was turned over in a body and the brands enumerated.

Q. Now, in relating the history of this Lorillard Beech-Nut scrap tobacco which you marketed in 1915, will you please tell the Court, if you can, how you came to adopt this form of package?

A. Well, after referring to our list and ascertaining that we owned the brand, I sent for one of my assistants and asked for him to get for me a bag in which we packed Beech-Nut and he brought the old style package—this is the bag, sample of the bag that he brought at that time, and it immediately occurred to me that this package was out of date; in the first place, it had too much reading matter on it.

Mr. Milton: What exhibit number is that, please, so that we may have it in the record?

Mr. Cavanagh: It is a Patent Office exhibit.

Mr. Milton: All right.

The Court: Just refer to it for the purpose of the record.

Mr. Cavanagh: Just refer to it as the Weissinger Beechnut bag.

Mr. Milton; Patent Office Exhibit No. 17.

Mr. Cavanagh: Patent Office record "P. Lorillard Co. Exhibit No. 17."

The Witness: All right.

(Answer read.)

A. (Continuing.) It had the name of the Harry Weissinger Tobacco Company that had long since gone out of business, having sold their business to the Continental Tobacco Company, and later transferred to the American Tobacco Company, and I also noticed that it had a picture of a squirrel on the package, which immediately brought to my mind the fact that there was an active brand on the market by one of our competitors which also had the picture of a squirrel, and as is always our policy, we don't desire to, when we are putting out or revamping an old brand, to do anything that might in any way conflict with any tobacco product that is on the market and belongs to any of our competitors, and I sent for a lithographer and gave him my idea, as is usually the case, and asked him to draw a pencil layout of the brand, and while I don't recall the first pencil layout that he brought to us, but I do recall the instance of the selection of the two nuts appearing on our Beech-Nut, this Beech-Nut package, on account of—

Mr. Cavanagh: Just put in Defendant's Exhibit No. 1.

A. (Continuing.) —on account of the argument that came up on one of these sketches that was brought in as to the representation of the Beech-Nuts for our president entered into the argument and criticized the sketch that he had drawn, and the artist or lithographer seemed to be just as decided in his views that it was a good representation, and our president said, "I will bring in a couple of beechnuts to you and you can see how much different they are." And that is how I come to recall those nuts. It was rather an odd incident that came up in the line of business, it is out of the ordinary.

Q. You have spoken of another package which was on the market by one of your competitors.

A. Yes, sir.

Q. You have spoken of another package which was on the market by one of your competitors which bore the representation of a squirrel. Can you produce this package?

A. That is the package, the Hazel Nut made by John J. Bagley & Company.

Mr. Cavanagh: Package of Hazel Nut tobacco produced by the witness is now offered in evidence as Defendant's Exhibit D. 37.

(Received and marked Exhibit D. 37.)

Q. Will you please state, if you know, how you came to adopt the oval on that tobacco package of Lorillard, 1915, which is cross exhibit No. 1?

A. Well, to state positively in this particular instance would be probably somewhat difficult, but we try to make our packages as strong as we can when we put them on the market, we try to make our design as different as we can to give them an individuality and ovals have been used on many brands of tobacco in order to give more space for the name. Now, if we had used a circle on that, for example, we would have had to pinch the name of the brand down to a point where it would make it less conspicuous than it is.

Q. Can you produce any other specimen of scrap or chewing tobacco package in which the brand is owned by your company which uses an oval?

A. We have a brand of Bag Pipe.

Q. How long has that brand been on the market to the best of your knowledge?

A. That brand has been on the market—that was one of the brands that came over with Luhrmann Wilbern business, and where it originated, I don't know, but it has been a rather inconspicuous brand and we did the

same with this brand here about two years ago that we did with Beech-Nut. We owned the brand and we remodeled it, dressed it up in what we thought was a more attractive design and put it out in that form.

Q. But to the best of your knowledge that Bag Pipe brand has always used an oval?

A. Oh, yes, there was always an oval on this package, and that was the trademark, those two Scotch pipers.

Mr. Cavanagh: The Bag Pipe chewing tobacco package produced by the witness is offered in evidence, as D. 38.

(Received in evidence and marked D. 38.)

Q. Mr. Ball, from your knowledge of the tobacco business, and particularly chewing tobacco and scrap tobacco, would you say that these scrap tobacco or chewing tobacco packages have a certain standardized individuality or shape or form?

A. Yes. Scrap tobacco has been put up almost universally in that form for the last—well, as far back as scrap tobacco has been made that I can remember. That is evidenced by that line of leading brands that we have over there on the table. Now, the Hazel Nut package is not a scrap tobacco. That is a long cut, you understand.

Q. For the information of the Court, if you can from where you are at present, will you just enumerate those chewing or scrap tobacco brands and tell, if you know what concern controls or owns them. Do you know those brands?

A. Union Workman is owned by Scott & Dillon; Yankee Girl, same; Beech-Nut by ourselves; Honest by ourselves; Mail Pouch by the Bloch Brothers; Open Book by ourselves; Red Man by the Pinkerton Tobacco Company; Polar Bear by ourselves; Havanna Blossom by ourselves; Pinch Hit by the Pinkerton Tobacco Company.

The Court: You skipped Hazel Nut.

The Witness: Hazel Nut by the John J. Bagley Company. His question was scrap tobacco and Hazel Nut is a long cut, that is the reason I omitted it.

Q. But both long cut and scrap tobacco are used for chewing purposes?

A. Both are used for chewing purposes.

Q. Now, as one familiar with the Beech-Nut tobacco of the Lorillard Company, as illustrated by that package of 1915, Defendant's Cross Exhibit No. 1, can you tell us how you happened to those red radiating lines?

A. At that time the big sellers were solid colored packages, Red Man, Honest, Polar Bear, and the only exception were the two packages of Scott & Dillon, which were minor brands.

Q. What were they, just name them?

A. Union Workman and Yankee Girl. And in remodeling the Beech-Nut package we wanted to dress it up as much as possible, entirely different from anything in the tobacco line, and we did not want to use round symbols or square symbols as our competitors were using, and the question of these rays was suggested by some one—I may have suggested it myself, I don't recall—but it struck me as being a good proposition, giving this package individuality over any others that were on the market in that line at that time.

Q. To what do you attribute the success of the sale of your Beech-Nut tobacco like that 1915 package?

A. Well, there were many features that entered into the cause for the success of Beech-Nut. I think in the first place, in putting out a brand of tobacco or anything else in the tobacco business, it may not be so in other businesses, but in the tobacco business, I have observed in my experience that if you are fortunate in putting a brand on the market at the psychological moment you will go very much faster, and probably make a success

with that brand, whereas, if it had been put out three or four years earlier or three or four years later, it might have been quite a failure, and in this investigation that I made when I went out in the territory, I found a great many people, consumers I interviewed largely, because he is the man you have got to get in the tobacco business—I found a great many consumers that were very much dissatisfied with the brands that they were using. One of the most common expressions of a consumer who is dissatisfied with the brand that he has been using, "Well," he says, "it ain't as good as it used to be." Well, when a man gets that idea into his head that it isn't as good as it used to be, he is looking around for something else. That was one of the causes that made me so enthusiastic in getting our president to originate a little different formula, and the fact that this formula that he originated suited the taste, hit that change that so many people were seeking at that time, was one cause backed up by the manner in which the brand was marketed. We, I think, did a very thorough job of work when we introduced it. We worked it very hard with the dealers. We made quite an inducement to the dealer to push the brand, over and above any other brand of scrap tobacco that he was handling at that time, by giving him four packages free with a carton. We, I think, did the most effective advertising, and what we term missionary work, which is sampling, that was ever done on a brand of tobacco, and that was probably due to the enthusiasm that we created in our men and the response that we received from the consumer whom we sampled. They all liked the tobacco. Everybody had a good word for it and they had their various ways of expressing it. And if I may be allowed to give an experience that I had with one man, a switchman that I went to, and asked whether he chewed tobacco, to my astonishment, he pulled out a package of Beech-Nut, and I asked him how he liked it, "Why," he says, "that's the best piece of

chewing tobacco I ever got a hold of." I says, "What is the difference between that and what have you been using?" This particular fellow said, "I have been using Honest." I said, "What is the difference between Beech-Nut and Honest?" "Why," he says, "it is sweeter, and that is the cleanest piece of tobacco I ever got hold of." He says, "It feels clean," and he held up the package. That was his expression. Now, that man did not mean that it felt clean, he meant that it was a soft, silky pliable chewing tobacco, but that is the way he expressed it. And those things encouraged us to believe that we had hit upon a formula that would suit the people.

Q. In carrying out what you call the missionary work on this Beech-Nut tobacco during the campaign of placing it before the public or on the market, just what procedure did you follow in that missionary work? Tell the Court, so he will understand.

A. Our first method, of course, was to ship our goods to the jobbers, and after the goods reached the jobbers, then we put our men to work on the brand, and to make certain that we had as good a piece of goods as we thought we had, we at first limited it to putting it out in six towns, two towns in Pennsylvania, one in New York, and three towns in Ohio, the center of the big scrap consuming territory. And after those towns had been worked by our retail men, by soliciting orders from the retailer for the account of the jobber, the jobber had delivered it, then our men went out and visited the consumers, ascertaining first whether or not they chewed tobacco, and if they chewed tobacco then we handed them a sample, then we put our advertising matter up in the stores, using window posters and window pieces and dressing windows, using our cartons and dummy packages and things of that kind to make window displays. That was the method we used principally, but our big effort, and I think the work that got us the best results, was the sample.

Q. Is that the procedure you use in presenting any [illegible] in the matter of conducting a campaign?

A. That is the general procedure; yes, sir; although many times brands are put out broadcast, without trying them out in certain sections as we did with this one.

Q. Now, at the time you were conducting this intensive campaign on this Lorillard Beech-Nut scrap tobacco or chewing tobacco, how many men were in your sales department under your direct charge?

A. There was approximately 300.

Q. And how many employees were under your charge or in your department? I mean, what was the total of the employees in your department?

A. Well, in the selling end of it, there was something over 300, and in our auditing end of the business, there was approximately 250.

Q. And during that intensive campaign, did you put the entire strength of your department back of that Beech-Nut tobacco?

A. At that time, when we started we had our business divided into departments, and the brand of Beech-Nut was put out by the scrap department. In the scrap department, we had some 50 or 75 men, and during that time we put the entire force of the scrap department on the brand of Beech-Nut working nothing else.

Q. From your experience in the sale of chewing and smoking tobaccos, do you know of any other tobacco other than Beech-Nut considering the time of its appearance on the market that had a relative or corresponding growth in sales as compared with Beech-Nut, and if so, will you name the brand?

A. Yes, I have known several. Honest was one of them. Honest was a brand that came into the market very rapidly and then, one of the most phenominal successes ever made in the tobacco business, going back a little farther, while it wasn't a scrap brand, it was a

chewing tobacco, was Battle Axe plug. Battle Axe plug, I think obtained a bigger volume of business in two years than ever was obtained by any brand that was ever put out in the world. I think the volume of Battle Axe business ran up to 30,000,000 pounds in two years.

Q. Is this the Honest package of scrap to which you referred as having had a great growth?

A. This is the tobacco.

Q. Can you produce for the information of the Court any figures or data illustrative of the growth of the Honest scrap?

A. Yes, sir.

Mr. Cavanagh: I offer in evidence the package of Honest scrap tobacco produced by the witness.

(Received and marked Exhibit D. 39.)

A (Continued.) The first year Honest was put on the market, in 1906, it sold 1,316,242 pounds; the second year, 1907, 5,290,828 pounds; the third year, 1908, 11,538,322 pounds; 1909, 16,561,659 pounds; 1910, 18,527,034 pounds. Now, I might call your attention to this, that at the time Honest was put on the market the volume of the scrap business was very much less than it was in 1915.

Q. Why was that?

A. Well, scrap business started in the 90's in a very limited volume, and it never got any very great big volume until the brand of Honest came on the market, and it was probably due to the fact that Honest was campaigned very heavily, and it has been my experience that in campaigning any particular line of tobacco business it always produces a greater volume, on that particular line? Then, in 1908, 1909 and 1910, there were other brands campaigned and the scrap business in what we call the big scrap territory ate up the plug business, so that in later years the plug business has almost been eliminated in this big scrap territory.

These figures also show, as I related previously, 1910 was our big volume year; 1911, the last year of the American Tobacco Company, the brand dropped from 18,527,000 to 17,703,000; 1912, 16,438,000; 1913, 15,139,000; 1914, 13,512,000, when our business commenced to slip, and then we commenced to get uneasy, and I went out and made as careful an investigation as possible.

Q. Just go down the list and give the rest of the figures, so that we will have the record complete.

A. Subsequent—

Q. Yes.

A. 1915, 11,721,000; 1916, 10,474,000; 1917, 9,773,000; 1918, 6,682,000; 1919, 6,988,000; 1920, 3,699,000; 1921, 3,197,000; 1922, 2,810,000.

Q. Have you the figures there of any other—

A. I have the figures here of Polar Bear.

Q. Scrap brand which has had a large sale and decline?

A. Yes.

Q. Could you at your convenience read these figures into the record?

A. Polar Bear was one of the first brands of scrap tobacco that was put on the market in a limited way by a small concern in Cincinnati called the Luhrmann & Wilbern Company, and the first figures we have are in 1902, 4,260,000—I guess that 5,260,000 in 1902 probably represented 60 or 70 per cent. of the scrap business, it was so small at that time. Today it has run up close to 100,000,000 pounds.

In 1903, 5,491,000; 1904, 5,731,000; 1905, 6,278,000; 1906, 6,819,000; 1907, 5,405,000; 1908, 3,984,000; 1909, 3,157,000; 1910, 2,813,000; 1911, 2,743,000; 1912, 2,404,000; 1913, 2,707,000; 1914, 2,595,000; 1915, 2,297,000; 1916, 2,491,000; 1917, 2,155,000; 1918, 1,518,000; 1919, 1,485,000; 1920, 958,000; 1921, 800,000; 1922, 778,000.

Q. Does this represent a Polar Bear package of chewing tobacco that you have mentioned (indicating)? A Yes, that is our brand, Polar Bear.

Mr. Cavanagh: The Polar Bear package of chewing and smoking tobacco is offered in evidence as Defendant's Exhibit D. 40.

(Received in evidence and marked Exhibit D. 40.)

Q. Now, Mr. Ball, can you give the Court from your wide experience in the tobacco business some idea of the territory or localities in which the scrap tobaccos are sold or consumed, that is, where the consumers principally are, for scrap tobacco?

A. You mean at the present time?

Q. Yes, historically and at the present time.

A. The scrap tobacco originated practically in the State of Ohio, and it spread from Ohio in through Michigan, Indiana, Illinois, Kentucky, bordering on the Ohio River, West Virginia, Pennsylvania and New York State. That is what we term the big scrap tobacco territory; but in the last four or five years, since we have been campaigning our scrap business more intensively, it has spread to all sections of the United States. The section that we have the last business is the New England territory, they don't seem to take to that type of chewing tobacco up in that part of the country, but we are selling Beech-Nut tobacco generally throughout the United States today.

Q. Well, what class of people generally use chewing tobacco?

A. Well, as a whole I would say mechanics, manufacturing people and agricultural people are the largest consumers of chewing tobacco.

Q. How about miners?

A. Miners in some sections use quite a little scrap tobacco, but miners, particularly Pennsylvania miners have

been users of long cut tobaccos for a great many years, and they still use quantities of long cut tobaccos for chewing purposes.

Q. You don't sell much to women and children, do you?

A. I am sorry to say we don't. It is an accomplishment they have not acquired yet.

Q. Will you please outline for the benefit of the Court, so that he will understand the situation, the investment of P. Lorillard Company in the manufacture and sale of this Beech-Nut chewing tobacco from the time the present package was placed on the market in 1915, to the year of 1921, and refer to any memorandum you may have. Tell us where that memorandum was obtained (indicating).

A. I have had a memorandum made up by the auditing department, based on the value of our property that proportionately would apply to the brand of Beech-Nut where it is manufactured. If, for example, we had a factory that made 10,000,000 pounds of tobacco and 5,000,000 pounds of that was Beech-Nut, we would tabulate half of the value of that factory that would apply to the brand of Beech-Nut investment in that plant. Now, the real estate and building investment in 1915, was

	$ 83,946.90	
In 1916,	138,430.96	
In 1917,	164,724.16	at Middletown, and
	44,512.38	at Marion.
In 1918,	151,740.09	
In 1919,	148,830.85	at Marion, and
	181,029.85	at Middletown.
In 1920,	357,284.23	at Marion, and
	284,743.88	at Middletown.
In 1921,	541,781.89	at Marion, and
	241,908.51	at Middletown, and
	140,853.30	at Louisville.

Now, under machinery investment,

In 1915,	Middletown,	$ 90,140.55
In 1916,		160,174.75
In 1917,	in Marion,	13,765.65
	Middletown,	229,870.02
In 1918,		236,585.56
In 1919,	at Marion,	54,681.61
	Middletown,	289,019.31
In 1920,	at Marion,	143,913.15
	Middletown,	322,284.62
In 1921,	at Marion,	267,466.10
	Middletown,	270,285.70
	Louisville,	131,646.01

Now, our advertising and selling expense,

1915,	$239,888.39
1916,	155,097.43
1917,	109,188.91

Q. Mr. Witness, may I interrupt you just a minute. I think you have duplicate copies of that, and plaintiff's counsel would like to follow you along.

A. Yes, sir (copy handed to plaintiff's counsel).

A. (Continuing):

1918,	$134,101.68
1919,	218,347.46
1920,	455,593.41
1921,	602,882.35

Investment in raw materials, leaf and casing:

1915—I will just give the totals of this. Will that be all that is necessary?

Q. Yes, that will be sufficient.

A.

1915,	$ 912,813.12
1916,	2,070,949.83
1917,	3,645,727.04
1918,	4,567,505.18
1919,	6,573,413.19

1920,	7,591,770.00
1921,	6,273,539.28

Wrapping material:

1915,	$ 87,461.84
1916,	247,339.93
1917,	559,060.73
1918,	376,199.04
1919,	670,599.23
1920,	1,380,533.64
1921,	895,990.10

Revenue stamps:

1915,	$ 597,374.19
1916,	1,296,549.48
1917,	1,865,266.13
1918,	2,474,627.95
1919,	4,807,557.71
1920,	5,604,870.06
1921,	5,588,187.28

The grand total by years of the investment is as follows:

1915,	$2,010,524.99
1916,	4,094,066.52
1917,	6,649,255.85
1918,	7,974,678.51
1919,	12,991,824.52
1920,	16,289,273.10
1921,	15,116,610.66

Employes engaged in the manufacture of Beech-Nut chewing tobacco as follows:

1915,	172
1916,	360
1917,	554
1918,	523
1919,	713
1920,	809
1921,	900

Q. Can you produce any statement from the records of your company showing the total advertising expenses of the Lorillard Company on all these brands for the years 1911-1922, inclusive?

A. Yes, sir.

Q. Will you read that list into the record?

A. 1911, we spent:

1911,	$ 172,373.10 (one month)
1912,	5,190,436.25
1913,	6,294,942.46
1914,	6,235,563.14
1915,	4,597,163.83
1916,	4,514,785.69
1917,	3,805,501.96
1918,	4,575,280.98
1919,	4,164,221.20
1920,	2,041,325.18
1921,	3,276,274.66
1922,	4,191,068.06

Q. Why was the advertising expense so small in 1911?

A. Well, in 1911, we only had one month, the month of December. You see we did not commence to function till December 1, 1911.

Q. Now, Mr. Ball, how many ounces of tobacco are in that Beech-Nut 1915 package, your present Beech-Nut package?

A. Two ounces at the present time.

Q. And what is the retail price of that package?

A. Ten cents a package.

Q. And how many ounces are in the ordinary scrap tobacco that is on the market to your experience?

A. There is only one today that is any smaller, all the others range from 2¼ to 2½ ounces. The smaller one—the two smaller ones that I recall, one is the Mail Pouch, and the other our brand of Havana Blossom. They are 1¾ ounces.

Q. But the usual, ordinary package of scrap on the market is a larger package?

A. A larger package.

Q. But the prices are the same, ten cents?

A. Ten cents.

Q. Now, the defendant has charged in this case that your Lorillard scrap tobacco is a cheap tobacco. What have you to say to that?

A. Well, comparing it with the popular sellers today in chewing tobacco, such as Climax, Star, Horse Shoe, which are the big popular sellers for which they pay 90 cents a pound, Beech-Nut costs a consumer 80 cents a pound, and it would seem to me that that charge is without foundation.

Q. Well, now, just turn your attention to the chewing tobaccos of the type called scrap that are on the market. How does Beech-Nut compare with those in its quality and price?

A. Well, Beech-Nut chewing tobacco is the best piece of tobacco on the market in our opinion. And as I say, there are only two other smaller brands that sell for more money than Beech-Nut, and it is made from the very finest quality tobaccos of its kind that we can buy.

Q. Isn't made from sweepings or clippings or anything of that sort?

A. And— (interrupted.)

Q. Is it?

A. No, sir. There are some cigar clippings in it. There are some tobaccos in Beech-Nut tobacco that go in cigars that sell for three for fifty cents. It is not all made up of the kinds of tobacco, but there is some of that type of tobacco in it, but Beech-Nut is made from the very best types of that kind of tobacco that are produced.

Q. It is made from expensive tobacco?

A. Yes, sir.

Q. From your experience in the tobacco business and particularly with chewing tobaccos, plugs and the like, what do you—how do you account for the fact that the sales of a brand of tobacco will rise and then fall, as in the case of Honest plug?

A. Well, that can be attributed, I think, to the change in the taste of people more than anything else.

Q Now, earlier in your examination, Mr. Ball, you stated that you obtained the name "Beech-Nut" from this list, brand list, I may call it, Exhibit D. 35, at the time that you made the selection from this list, was the Bag Pipe tobacco on the market?

A. Yes, sir.

Q. That was on the market?

A. That had quite a little volume of business at that time.

Q. Was Honest scrap on the market?

A. That was a big seller.

A. Natural Leaf?

A. Yes, sir.

Q. Old Nut?

A. Yes, sir.

Q. Polar Bear?

A. Yes, sir.

Q. And Scrap Iron?

A. Yes, sir.

Q. You had all those different brands on the market?

A. Yes, sir.

Q. You have mentioned Star, Horse Shoe and Climax brands. Are those plug brands?

A. Yes, sir.

Q. They are not chewing or scrap tobacco like the Beech-Nut?

A. No, sir. They are chewing tobacco but not scrap tobacco.

Q. They are a plug tobacco?

A. Yes, sir.

Q. Now, Mr. Ball, in getting up the present Beech-Nut package, did you or your company, you speaking as an official, from your knowledge of the business and of the history of that package, have any intention or purpose of marketing it on the reputation of the Beech-Nut Food products?

A. Absolutely not. We did not consider them or think of them at the time we got out the brand of tobacco to my knowledge.

Q. What is the reason for your answer? Why didn't you consider them?

A. Because their products is so entirely different from ours. The only thing that we think of when we get out a brand of tobacco is other brands of tobacco products. We would not want to put out a brand of scrap tobacco similar to a brand of our competitors of long cut, but when it comes to considering other products, it does not enter our minds, not for a minute. There cannot be any similarity between tobacco in my opinion, and bacon or jams or jellies or chewing gums.

Q. You are speaking as a tobacco man, now?

A. That is all I know. I have never been in any other business but the tobacco business, and I am sorry I don't know more about that.

Mr. Cavanagh: That is all the direct, your Honor.

Cross examination by Mr. Scott.

Q. You have given a statement, Mr. Ball, of the advertising expenses. About how many brands does that include, all of them?

A. That includes our output.

Q. All of the Lorillard brands; about how many are there?

A. Oh, there is probably fifty brands that we advertise, probably not that many. We advertise our principal leaders, probably twenty-five of any consequence.

Q. You have referred to and read some figures, regarding the sales of Honest Sscap. This is a tobacco made by the Lorillard Company?

A. Yes, sir.

Q. And marketed by the Lorillard Company itself?

A. Yes, sir.

Q. Not supplied to some one else to market?

A. No, sir.

Q. Marketed by the Lorillard Company?

A. Yes, sir.

Q. Is the name Lorillard to be found upon that package?

A. No, sir.

Q. Does this occur in the name of any of your other brands, that the name "Lorillard" is not put on?

A. Yes, sir.

Q. What other brands?

A. I think the brand of Union Leader, if I recall correctly.

Q. Do you recall any more?

A. I don't have any at mind right now.

Q. Do you remember about Polar Bear, whether Lorillard's name is on there or not? I ask you whether you remember or not?

A. No, I don't remember.

Q. You don't remember one way or the other?

A. No, sir.

Q. This question, then, of whether the Lorillard name is on a package is a matter with which you don't think it is worth while to charge your mind, I suppose?

A. Well, if I had thought a question of that kind would have come up, I would have familiarized myself with it, but if you will allow me to explain why the Lorillard name is not on the brands, I would be glad to do so.

Q. Pleased to hear you. Go ahead.

A. In the change of anything on a live brand, you frequently take a chance of prejudicing the consumer. I recall an experience I had with the American Tobacco Company years ago, with the brand Duke's Mixture. We put a coupon in it one time in one section of the country and left it out in other sections. And there was a "G" put on the package.

Q. A "G"?

A. A "G" put on the package to indicate at the factory that the brand had coupons in it, and Georgia was one of the states in which the coupon was packed, and when the coupons were discontinued, they left off the letter "G" and that small letter, not much larger than a pea in a circle caused the loss of quantities of business, the consumer got it in his mind that when that "G" was off of there, the tobacco wasn't as good as it was with the "G" on it. The imagination is a powerful factor in the tobacco business. Now, these brands that you mentioned, Honest and Union Leader were brands that were originated by the American Tobacco Company, and the custom of the American Tobacco Company in many instances at that time, was to leave their name from the package, and they had some very good reasons for doing it, the particular reason was that the American Tobacco Company had a big volume of the business, and they were looked upon as a great big trust and they did not care about exploiting that in the minds of the consumer, so they left the name off of the package. That custom continued up until the time of the dissolution of the American Tobacco Company, and at the time of the dissolution we had all been schooled in that school, and we thought it was all right. But as time went on, some years later, we commenced to feature the value of the Lorillard name, and today every package that we put out bears the name of the Lorillard Company.

Q. This letter "G" that you refer to, that was on what product? I have forgotten it.

A. Duke's Mixture.

Q. And the package before the "G" was removed was left otherwise unchanged, was it not, when the "G" was taken off?

A. Yes, sir.

Q. So that the package was identical before and after except for this little letter "G," no larger than a pea, I think you said?

A. Yes, sir.

Q. And that proved to be a very important factor in the impression made by that package upon the consumer?

A. In that instance, in that particular state. The reason I mention that is because I came in contact with Georgia with those conditions. They were quite amazing, that such a small change would cause the effect that it did.

Q. Was that in that state only, or was it general?

A. That was where I experienced it.

Q. That was where your knowledge of it extended?

A. I mentioned that as an instance where we were always very careful not to change a package. We have some packages today that are big sellers, and as long as they sell, we jealously try to keep them identical with what they have been.

Q. I suppose there is danger of losing the benefit of the past reputation by changing this package in that way?

A. Well, it frequently affects brands.

Q. As it did there in the case of this Duke's Mixture?

A. Yes.

Q. And you guard very carefully against that?

A. Yes.

Q. This Polar Bear brand, to which you referred, is one, I believe, you purchased from the Luhrmann & Wilbern Company or came under a court decree, is that so?

A. Yes, the Luhrmann Wilbern Company was one of the companies that was turned over to the Lorillard Company as a whole by the American Tobacco Company in December, 1911.

Q. I wonder if on this table there is a Polar Bear package such as used before the conveyance to the Lorillard Company?

A. I don't know. There is a package there.

Q. That package, I think, has P. Lorillard on it, has it not?

A. Yes, sir.

Q. Do you remember how this package was gotten up when the tobacco was gotten out by Luhrmann & Wilbern?

A. Well, it must have been in the '90s.

Q. Well, I didn't ask when, but in what kind of a package, was it the same package as that?

A. I think that that is the same package other than our name has been added to it as successors.

Q. And your memory would be that that package as put out by Luhrmann & Wilbern was identical with the one you hold in your hand, except that it would not have had on it, the name P. Lorillard?

A. That would be my memory.

Q. And that is in accord, is it not, with your statement just made that it is important to preserve the identity of these various brands?

A. Yes, sir. That is one of the instances that we may take exception to where at times we put our names on brands, and that was a custom that was followed.

Q. Surely.

A. By the American Tobacco Company.

Q. But did you not disturb the identity other than by putting on P. Lorillard at the bottom?

A. No, sir.

Q. And it would have been against your policy to do so?

A. Yes, sir.

Q. Now, how about this Honest Scrap. Do you remember whether that was one of those brands that came to you by conveyance from Luhrmann & Wilbern?

A. That was one of them. There it is.

Q. We have here, Exhibit D. 39, package of Honest Scrap that you referred to before. How does the package as put out by Luhrmann & Wilbern compare with that one?

A. In what way?

Q. In design and dress and ornamentation?

A. Well, one of them is black and the other is red. One is Polar Bear, the other is Honest.

Q. You misunderstood me. With the Honest Scrap as put out by Luhrmann & Wilbern?

A. Well, the Luhrmann & Wilbern never marketed the brand of Honest Scrap.

Q. What company did you get that from?

A. The American Tobacco Company.

Q. Well, I was wrong in the ownership.

A. The Luhrmann & Wilbern Company made this tobacco for the account of the American Tobacco Company who marketed it.

Q. It was marketed then by the American Tobacco Company?

A. Yes, sir.

Q. And when they marketed it, did it have a bag with a design substantially similar to this one on Exhibit 39?

A. Yes, sir.

Q. So that when that Honest Scrap was transferred from the American Tobacco Company to the Lorillard Company the style of package was carried forward practically in its identity?

A. Yes, sir.

Q. That again was in pursuance of the policy that you outlined, I suppose, some time ago?

A. Yes, sir.

Q. You mentioned a brand called Bag Pipe. Was that a brand the Lorillard Company acquired from Luhrman & Wilbern?

A. Yes, sir.

Q. The Bag Pipe package to which you referred is designated Exhibit D. 38. Is that identical package one that was gotten out since the ownership by the Lorillard Company?

A. Yes, sir.

Q. And is it the same in the style of the package and design as it was before it was acquired by the Lorillard Company?

A. No, sir.

Q. In what way does it differ?

A. Oh, it has changed in many ways. There is less printing matter on it and it is more striking in color; it is a complete change.

Q. Have you a sample in this collection here of that?

A. I don't know that we have one. We could get you one very easily.

Q. Was this picture upon the Bag Pipe package before it was assigned?

A. Before it was what?

Q. Before the brand was assigned to the Lorillard Company?

A. I think so.

Q. The picture of the two Highlanders?

A. I think so.

Q. Practically as it is there?

A. We would probably have perfected it a little more, changed it somewhat.

Q. A little refinement of printing and drawing, but the picture substantially as it was on the package before?

A. Yes, sir.

Q. You named the Comet, Pioneer and Yacht Club brands as being brands that you took from that long list, Exhibit D. 35?

A. Yes, sir.

Q. These are brands now made by the Lorillard Company?

A. Yes, sir.

Q. Who made Comet before the Lorillard Company made it, any one?

A. That was a brand that was turned over to us by the American Tobacco Company. Just who made it and when it was made I don't recall.

Q. But they marketed it?

A. They marketed it.

Q. The American Tobacco Company?

A. Yes, sir.

Q. We didn't have a sample of that Comet here, did we?

A. No, sir; there is not a sample here that I recall. That is a cut plug today.

Q. What was scrap tobacco originally, Mr. Ball? It got the name, I suppose, originally from being made of scraps?

A. Scrap is rather a misnomer in the tobacco business. The cuttings from cigars are referred to by the cigar makers many times as cigar scraps, and the early days to find a market for that product that was too small to use to wrap up a cigar or a binder, they put it in packages, paper packages, and called it cigar clippings or cigar scraps.

Q. That was the origin?

A. I imagine it was; I haven't studied up on that particular point.

Q. I presume the sale of tobacco, called scrap now, is so great there would not be enough scrap to make it up?

A. Oh, yes, there is lots of straight tobacco bought to manufacture these big brands of chewing tobacco.

Q. Do you use any of that scraps in the Beech-Nut scrap?

A. Clippings?

Q. Clippings

A. I think we use some of it, although I am not as well posted on the contents of the packages as some of our other folks, who have charge of that end of the business.

Q. You may have some idea as to the proportion of clippings or scrap and of original new tobacco?

A. No, I have not.

Q. None at all?

A. No, sir; couldn't give you any idea.

Q. You made a statement that at the present time the name Lorillard is on all of the Lorillard brands, I think.

A. Did I say that?

Q. Well, I am asking you. I think you did.

A. If I said that I was in error, because some of these brands that were taken over by the American Tobacco Company did not bear any name, and we have not put our name on—such as in the case of Honest.

Q. That is a contemporary package right there?

A. Yes. We haven't put our name on that.

Q. That is Honest Scrap, the name Lorillard is not on it today (indicating)?

A. No, sir; they never have—there never has been, to my knowledge, a name on Honest Scrap tobacco. We haven't any hard and fast rule to go by of putting the name on the package. It has been, as I say, the custom was, up to the time of the dissolution, to leave it off, but since that time it has been put on and generally on all of our brands that we have revamped or new brands that we might put out.

Q. The name of the brand, I imagine, is the important thing about it?

A. Yes, we put a great deal of stress on the fact that the Lorillard Company has been in business since 1760,

in fact, we got out a brand called "1760" and when we sample a man we impress that upon him in most instances.

Q. Can you name any other brands than you have mentioned that the Lorillard Company is putting out today without the name Lorillard on the package?

A. I believe this brand of Comet, I am not quite sure; it looks as though we didn't put it on the brand of Bag Pipe.

Q. Can you remember any more?

A. No, I don't know that I can.

Q. But I suppose there are a great many of these brands that you would be unable to say one way or the other about, whether or not it was on, aren't there?

A. There would be quite a few.

Q. You would be unable to say?

A. Yes, that is right.

Q. Whether or not it was on in the case of a great many?

A. Yes.

Q. Mr. Ball, you stated that you, I think I have you right, that you didn't know of any food company manufacturing tobacco products, was that your statement?

A. Yes, sir.

Q. Do you know of any food company, by food company meaning dealer in food products, groceries or whatnot, who puts out tobacco under his own name, whether manufactured by himself or not?

A. What do you term a food company?

Q. Wholesale grocery.

A. Wholesale grocery?

Q. Yes.

A. Oh, yes; there are wholesale grocers that have their own brands. That was quite customary twenty-five years ago, but that custom has gone out of practice largely; there are very few today. There may be some.

Q. Do you remember any?

A. No, I don't recall any at the present time offhand.

Q. Is it usual for a tobacco manufacturing company to manufacture goods and put the brand of the purchaser on them?

A. Well, we don't do it. The large manufacturers as a class I don't think indulge in that business.

Q. You mean that the Lorillard Company does not manufacture tobacco products and put on those products the brand of a purchaser?

A. No, sir.

Q. There are tobacco companies that do that, are there not?

A. I think Scotton & Dillon make some private brands, but whether or not they put the name of the purchaser on I couldn't say; they may and they may not.

Q. Did the Lorillard Company ever make for anybody tobacco products and put on those products the brand requested by the purchaser?

A. They may have in the early days. As I say, that was quite customary twenty-five years ago, but when the American Tobacco Company came into the business they discouraged it and worked their own brands so aggressively it practically absorbed all the business of what we call private brands.

Mr. Scott: That will be all.

BENJAMIN LLOYD BELT, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination by Mr. Cavanagh.

Q. Your name is Benjamin L. Belt, you are of legal age, you reside at Lakewood, New Jersey, and you are Vice-President of P. Lorillard Company, is that correct?

A. Yes, sir.

Q. And what are your duties with the P. Lorillard Company, Mr. Belt, of what departments have you charge, or what part of the business?

A. At the present time I am co-manager in the sales department of the business, with the exception of cigars and little cigars. In 1922, the smoking and plug and scrap tobaccos and the cigarette brands of P. Lorillard Company were combined from a selling standpoint. The department of smoking, and so forth, as referred to by Mr. Ball, and my own department of cigarettes was combined on January 1, 1922, and I am jointly interested in the marketing of all the products with the exception of the big cigars and little cigars.

Q. How long have you been connected with the Lorillard Company as Vice-President?

A. Since December 1, 1911.

Q. And from December 1, 1911, until January 1, 1922, am I to understand that you had charge of the cigarette department of the Lorillard Company?

A. Absolutely.

Q. And from 1922, to the present time, you have been jointly in charge with Mr. Ball, another Vice-President, of the entire sales—

A. In directing the sales of all the brands combined, with the exception of big cigars and little cigars.

Q. Now, Mr. Belt, can you name some of the prominent cigarette brands of the P. Lorillard Company?

A. Egyptian Deities, Murads, Moguls, Turkish Trophy, London Life—you say prominent or all brands—Luxury; we have some business on that.

Q. What domestic brands?

A. Those are what we designate as all Turkish cigarettes, and in the blended cigarettes we have some business on Nebo, Zira and Cloudland, and Beech-Nut. I think those are the principal brands that we manufacture, that is about all of them.

Q. And from 1911, when you became Vice-President of the Lorillard Company, up to the present time, you personally have been in active contact and active charge

of the sales of those cigarettes, of the various cigarettes of the Lorillard Company?

A. Yes, sir; sharing that charge with Mr. Ball for the last two years.

Q. Or since 1922?

A. Since 1922, beginning of 1922.

Q. Now, Mr. Belt, will you tell us how long you have been in the tobacco business, and give us a brief history of your connection with it right from the very beginning?

A. I have been in the tobacco business practically all my life. I was born on a farm, raised tobacco, seeded it, transplanted small plants into the field and kept them cultivated and cured, and graded tobacco and carried it to market. Later I traveled through the South extensively in selling what was known at that time as the old Virginia flat plug tobacco, and subsequently I was engaged in leaf, and had some business in export, made some foreign trips in behalf of the promoting of the exportation of Virginia and North Carolina leaf tobacco, and following that, in the year 1899, I was employed by the American Tobacco Company, which connection I continued until the disintegration of that company in 1911, and my elevation to the position I now occupy of Vice-President of the P. Lorillard Company, continuously in the business and actively in the selling end for the past twenty-four years.

Q. While you were in the American Tobacco Company, which I understand was from 1899 to 1911, what were your duties and of what did you have charge and what did you do?

A. Well—

Q. What was your experience with the American Tobacco Company?

A. My first duties with the American Tobacco Company of any moment, after a few months of sort of introductory work, I was sent to Bermuda to make a sale of some cigarettes of their ownership, purchase, made

by some company they had recently acquired, the Union Tobacco Company, I think it was. I was instructed to attempt to dispose of those cigarettes in the market there, and also charged with the request to ascertain as much as I could relative to the general character of tobacco used then—from where it was obtained, from what country it was imported, the style of packing, and so forth and so on.

Upon my return—that trip lasted ninety days, probably, started out about the 1st of January, 1900, a few months after my employment, then I was put in charge of what was known as the Bright Long Cut, fine cut and German smoking tobaccos of the American Tobacco Company. That position I continued for about a year, as I recall, a little longer, and then I was put in charge of Perfection cigarettes, a brand known as Perfection cigarettes. I was given that brand exclusively, and made a little department, was told mainly for the purpose of beginning to absorb the knowledge and the experience of cigarette salesmanship, and that position I continued about another year, when the American Tobacco Company had formed the American Cigar Company, and decided to exploit extensively the cigar business, the principal brand being Cubanola, and the American Tobacco Company transferred me to the American Cigar Company and put me in charge of the marketing of the brand of Cubanola, a campaign that was conducted from the City of Philadelphia, involving that particular city and nearby sections of Pennsylvania, a very extensive and large financial campaign, employing 100 or more salesmen, and so forth. In the following spring, that was about September or October, it was decided to merge the American Cigar Company's selling end of their business into the Continental Tobacco Company, a company in which the American was interested. When this absorption was made of the American cigar business by the Continental I was put in charge, general supervisor or manager of the selling end, both from the New York office and the field of about

seventeen states, having authority to direct which brands we would work—or, as we term it, which we would call "leaders." If you were in charge of one state I might direct you to make a special effort on this, that or the other brand, which might be under the supervision of various departments, several different departments in the New York office. I had the authority to do that, to employ men, promote men, increase salaries or cause the dismissal of men, and that position I continued for about a year; and then I was made co-manager of the cigarette departments, the little one I had had previously, and the general business were combined, and I was made co-manager of that department. There were two department managers in each of the principal departments of the company.

Q. That is the American Tobacco Company?

A. The American Tobacco Company. I was made one of the managers of the cigarette business, which as I recall it was in 1903, and I continued in the cigarette department with different co-managers, several changes took place but I kept on, and it broadened out into about five or six departments, of which I became general head, of all the departments of cigarettes. That lasted up to the disintegration; I was in that position when the disintegration took place in 1911.

Q. During the time particularly that you were connected with the American Tobacco Company in charge of their cigarette department, did you supervise the get-up and bring out any famous brands of cigarettes or take part in any campaign?

A. Quite a number, several.

Q. Name some of them.

A. Both got up some and some I revamped or promoted that we purchased or acquired, acquired through the purchase of the American Tobacco Company of their business. For instance, the brand of Fatima cigarettes,

which is quite famous, was created by the Cameron & Cameron Company of Richmond, Virginia, and that company was purchased by the American Tobacco Company, and the brand of Fatimas, along with a number of other brands, was put on my desk with instructions to look them over, and so forth, and we decided to make some little effort on the brand of Fatima, being about the only one we saw much future to. In the course of a few years I had caused that brand to be built up to quite a large volume, something like a billion cigarettes a year, in 1910, 1911. A billion cigarettes at that time, particularly of that type cigarette, relatively speaking, represented a tremendous business. The whole cigarette business then was about eight billions; today it is perhaps approximately sixty billion; so a billion of Fatimas in two or three years was, we thought, a good many Fatimas; and I put out the brand of Piedmonts, that had grown from nothing in a few years up to about eleven hundred million, as I recall it. I also put out the brand of Meccas, and Hassen. They both were large brands of 1910, being somewhere around five or six years old. It all took place between 1903, or really, I didn't become active until 1904, because I was away from the fall of 1903, until July of 1904, on leave of absence, on account of ill health, so between 1904 and 1911, these brands had been conceived or revamped and built up into considerable volume.

Q. These specimen packages represent the Fatima and the Piedmont (indicating)?

A. And the Piedmont.

Q. Those are today well known tobacco brands of Liggett & Meyers?

A. They are large and prominent brands.

Q. Since you have been with the Lorillard Company as Vice-President, beginning in 1911, December, have you had charge of the bringing out, or have you been instrumental in bringing out any cigarette brands, and if so, will you name them?

A. Several. Immediately, early in 1912, we brought out a brand called Zira, I think that was the first one, and Nebo. They were right within a very short period, I am under the impression, without having made reference to it, the first to be brought on the market was the Zira—both perhaps before the middle of 1912, were on the market, and since that time other brands were brought out, both in what we call the blended cigarette, and in the all-Turkish cigarette, London Life in all-Turkish, Coat of Arms, Zubelda in the blended cigarette, I recall are other brands having brought out.

Q. Did you have anything to do with the bringing out of the Beech-Nut cigarette?

A. I did.

Q. Will you please first relate briefly how you came to bring out this Beech-Nut cigarette, like the package I show you, and which has been frequently referred to in this case as the Lorillard Beech-Nut cigarette? Just give us the history first briefly of how you happened to bring that out.

A. We had not been very successful in holding the volume on Nebo or Zira cigarettes. We had, however, in a very short time relatively been successful in getting them up to quite a conspicuous volume, but for some reason they did not stick, didn't last, and we found ourselves about in a position of no blended cigarette business of any consequence, our entire cigarette business being on the higher priced all-Turkish brands.

Q. Right there. The Lorillard Company practically controls the Turkish cigarette business, the great volume of it, doesn't it?

A. Our brands represent a majority volume, major portion of the Turkish cigarettes that are in existence.

Q. Now continue your answer.

A. But we were not satisfied to confine ourselves to all-Turkish, as we estimated a larger and more growing business on the other type of cigarette. So we were con-

sidering for a long time putting on the market another brand of cigarettes of a blended type and were about ready to do it a year or two sooner than we did, it being deferred on account of the war, and the great inability to get tinfoil and wrapping material and so forth. Well, we dragged it along, so to speak, and did not actually get the cigarette in question, Beech-Nut, on the market until in the spring of 1921. As I recall the opening campaign was started in the City of Boston just the day following Washington's Birthday, in the year 1921. Prior to that time, of course, we had created the brand of Beech-Nut in its present state.

Q. What did you have to do with the getting up of this package, that is, the design and the ornamentation? Did that come under your supervision?

A. I directed it.

Q. How did you happen to take the name Beech-Nut for the cigarette?

A. Because we owned the brand of Beech-Nut tobacco which was a very large seller, having at that time, as I recall, reached something like 30,000,000 of pounds—25 or 30,000,000 of pounds. It seemed very popular. The compliments that were bestowed upon it, its quality, merit and so forth, it had made many friends with the consumer, and I felt inclined to adopt it as the cigarette name, feeling security in the title which we had—we often had gotten brands and had some trouble much later, causing loss and so forth. But I felt that we were absolutely secure in that as we had been marketing it for five years or six years, and another factor that quite influenced me was the fact that one of our competitors, the American Tobacco Company had in the interim during this period of considering gotten out a blended cigarette, offered on the market a brand of cigarettes called Lucky Strike, and Lucky Strike cigarettes were derived in name from Lucky Strike tobacco that had been on the market

for a very long time, perhaps twenty-five years, and had likewise built up a good reputation, had a good following. And that had a good deal to do with convincing me of the propriety, not of the legality, of our taking Beech-Nut, but of the propriety of taking it. That brand had gone out from a smoking brand as a base, to use as a cigarette with marked success. Then after conferring with our President, Mr. Ball, and perhaps others in the company of sufficient capacity, we determined then that we would make our fight, or we would select the brand Beech-Nut, and get up the package and undertake to secure our share, or as large a share as we could possibly obtain of that brand as a blended cigarette. And then I started the machinery to create a package.

Q. How did you happen to select a red color for this package?

A. Well, it has always been my idea and policy to obtain as great an amount of individuality as possible in our cigarette merchandise, and being quite familiar with the cigarette field, the principal brands in existence, that we would become competitors of, that were established and all of pronounced colors—Fatima—

Q. Will you produce some of the brands to which you refer and just briefly mention them in your answer?

A. Fatima being buff or yellow package like this, and Camels, which was then on the market and a very big seller, being a more or less similar package in color, buff with brown trimmings, Omars being a delicate baby blue and Piedmonts being white and Chesterfields being likewise white, Lucky Strikes being dark green and Salisburys brown or green, or very similar color. It really left me, by preference, however, I would say, about the only color of what we call the representative colors, of red; and the brand of Pall Mall cigarettes, a high priced Turkish cigarette, in a box, so entirely distinct, but of a red color had been very popular and I had heard many

compliments of the color scheme of the Pall Malls being appreciated; so then I decided that to keep away from these brands in appearances, and to get something that was entirely distinct, that I would take a red color and promote that scheme, and in getting out a package we kind of adhered to the same general type of red that was already more or less in evidence in the Beech-Nut radiating red shoots or lightning scrolls. So we have about the same red in the Beech-Nut cigarette package as we have in the Beech-Nut chewing package, and in my anxiety to excell, if possible, in the appearance of my package to create the approval of the consumer, I went a little farther than any of these packages had gone, some of which I had created and some not, in taking what I call the border off of my Murad package, on this package, it being a very high class Turkish cigarette of large volume—there is a kind of Mosaic tile effect border, and I felt that I could take that, part of that, and use that with that color scheme in bordering the Beech-Nut which would give it more tone and class and appearance than I felt that these other brands, in a sense had, and that it would lend itself more to the eye of the consumer by having that character of border. So that is where we got the border. We took it from our own brand, and we did not think that it being so different, one a box selling at 15 cents for ten and the other a package to sell at 15 cents for 20, that there would be any question of mixing up or reflecting in any way on Murads by doing that. So that is about in the rough the way we come to get the red package.

Q. Now, as to the shape or form of this package, it is quite common in the trade and is known as a cup package, is it not, the general package?

A. Cup package.

Q. As distinguished from the box package?

A. That used to be open at the bottom, and the old-fashioned cigarette was put up with the foil around, and

sort of half stuck here, either end would open, and they would fall out. So way back in the American days, I put the bottom on the Fatima package to change it from its open end package making it cup because it had a bottom that would hold, and it has since then been known pretty generally as the cup package. That is the way that originated.

Q. Now, as to the transparent or glazine wrapper, about the Beech-Nut package, will you tell us how you happened to put that on?

A. As a protection of the brand, as an impressive medium to the consumer of care and guarding the contents from exposure from which all tobacco suffers from too much moisture or too much dryness—suffers, perishes, loses its flavor and charm and so forth. So some years prior to this I had originated an idea to take our Egyptian Deities and wrap it in this paraffin paper, which presumably excludes the air and the contents would retain their natural moisture, just like it came from the machine.

Q. Were you the man in the tobacco business who got up the idea of wrapping packages?

A. I put that around Egyptian Deities and it was immediately seized upon by our competitors and we were unable to stop them because we had no patent on that way of doing it. Then we put it around this package on the same principle, to give it tone and class and appearances and protect the contents from too much moisture or too much dryness, and the belief in my mind was that it made you feel that it was particularly good and classy. I did not originate the thought, I applied it. I was lunching one day in a prominent New York restaurant, and I found a roll served to me in a little paraffin sack, and it impressed me as being very acceptable because the waiter did not have to handle the bread. I immediately went to work, put that sack in my pocket, and went to work applying it to cigarettes. It is an applied idea, not an originated one.

Q. Now, you spoke of this glazine scheme being adopted by your competitors. Do you know of any brands of cigarettes on the market today, other than the Beech-Nut which have the glazine put around them?

A. Yes, I think the Melachrino cigarettes use that wrapper.

Q. Have you any there which show the use of the wrapper?

A. I have not looked at these. The Salisbury has it. That is the American Tobacco Company's manufacture. Displayed again by Chesterfield, Liggett & Myers manufacture; Omar, American Tobacco Company, and Lucky Strikes, and two, four, five packages in my hand, and Sweet Caporals making six, all coming from that same channel and generally used.

Q. Now, turning to this Beech-Nut package how did you come to adopt the oval and the picture of the twin beechnuts on it?

A. I took it from the Beech-Nut package that we owned in principle, leaving off the 1760 established, which appears on this package, and applied it to the cigarette package as coming from that package. But I have, in my experience in getting out other brands used the oval, many years ago, before the present Lorillard Company was in existence, I put out packages with the oval on.

Q. What was the name of that package?

A. Twelfth Night was one, I recall.

Q. Now, in connection with this Beech-Nut package something has been said in here about the use of the word "quality" on the package. How did you come to put the expression, "perfect quality" on the Beech-Nut package that you did?

A. Well, we believed that the contents of the package warranted the use of the phraseology, and it wasn't new to us, the word "quality" on cigarettes. I was looking at the package recently of Piedmonts, and I found there,

"Cigarettes of quality." Pardon the reference, but I wrote that in there years ago when I was with the American Tobacco Company, on a piece of advertising matter and my superior officer was so impressed with it that he had it transferred to the package.

Q. To the Piedmont package?

A. To the Piedmont package. It was on a piece originally of window display, and I put on there "Cigarettes of Quality," because they were particularly good then, and our executive officer had it transferred and ordered the use of it on the package, on the theory, he said, that the phrase was right before the consumer all the time he held the package.

Q. So it is a common thing to use the word "Quality"?

A. Very frequently used and misused.

Q. Now, Mr. Belt, when you started your campaign with this cigarette in 1921—as I understand—what procedure did you use—what method did you use in introducing it to the trade?

A. We had shipped the goods to the jobber at Boston.

Q. That is where you started the campaign?

A. Practically confined the campaign to the immediate future, or for the time, to the City of Boston, and the very nearby towns like Lynn and Lowell, if you are familiar with the locality, they are so near that they interchange trade, and you have to incorporate those so that the jobbers may take care of the trade. We canvassed the retail trade and offered the jobbers' salesmen with the consent of the jobber, 25 cents a thousand for a period of 60 days or 90 days—60, I think, perhaps, that for every thousand Beech-Nut cigarettes that they would sell and cause to be delivered to the retail trade, to enable us to get a quick and interested distribution of the brand, and then I put in that section about 40 retail salesmen or missionary men whose duty it was to canvass these stores, street for street and block for block and obtain a sale, if possible, of one or more cartons, or one or more

thousand of Beech-Nut cigarettes with every retailer, and in a very short time the cigarette was well distributed. They had advertising matter, as I recall, the poster on the far side to the right was the one that we used in posting on the windows of the stores, the top cream colored poster, practically the center, advertising these cigarettes, and then we sampled and we a little later reproduced something similar to that poster on what is known as bill boards, this large 24 sheets, and then a little bit later, I got the first cigarette ad I have ever seen on the front pages of the Boston papers, not a very large ad but on the front page. Generally, they always had to go back inside, but I was able to get the papers to accept a Beech-Nut ad presented on the front page, and that, of course, gave it very quick and prominent publicity.

Q. Just read this. Does this Defendant's Cross Exhibit No. 5 illustrate the ad that you had put on the front pages of the papers?

A. Yes, that is the thing.

Q. And that ad has the word "Lorillard" on it?

A. Yes, Beech-Nut, made by P. Lorillard Company, and we pursued those methods. I only roughly state them, with much energy and effort, and distribution was quickly obtained and the brand began to sell right away.

Q. In addition to your missionary crew of 40 men, did you use your regular salesmen in pushing the brand?

A. Well, those were our salesmen assigned to this brand. We had, as I recall, about forty men in the City of Boston. That was, we felt a sufficient number for Boston and the nearby towns. Our other employes of the Lorillard Company continued to feature their regular business, like Planet tobacco, or various other merchandise.

Q. But you made up a special crew to take the Beech-Nut territory?

A. We sent salesmen with a head man assigned to Beech-Nut and nothing else. Then an assistant and corps of salesmen and advertisers who devoted their exclusive time to the Beech-Nut cigarette.

Q. Did you have any intention or purpose of trying to sell this Beech-Nut cigarette or market it on the reputation of the Beech-Nut Packing Company?

A. Not the slightest in the world. As foreign to my mind, as it would be to commit a crime right here or murder somebody.

Q. When you were getting up the package, did you have such an idea?

A. Not the slightest on earth. We took what we thought belonged to us, and adapted it to suit our package as we have done on many occasions.

Q. Now, how did the Beech-Nut cigarette sell when you first put it on the market?

A. Very well, indeed. As well, perhaps, as any cigarette I have ever been associated with in marketing, maybe a little quicker at the beginning.

Q. Were you ever associated with the introduction of a cigarette which had a large sale at the beginning as the Beech-Nut along the same line?

A. Yes, several brands I had put out previously had a rapid sale, but maybe not the first week or ten days did they start going as quickly. But in a period of 30 days or 60 days, they had run the same momentum.

Q. Can you name some of them?

A. Yes, I put the brand of Meccas and Hassans on the market. They both got into a considerable volume in a reasonable time. We got such a sale on Hassans to such an extent that we had to cancel the orders. That was a cork tip and we could not get the machines to put on the cork, and we could not get the cork to put in the machine. We imported it from Spain. That was really what caused us to put out Mecca, which was on the same principle with the exception it was not a cork tip. That

went right along. That is how it came upon the market. That was in the old days, prior to the present Lorillard Company's existence. When we put out Zira and Nebo cigarettes, to which I referred, in 1912, they both ran into tremendous volume in a very short period of time, and as I recall those cigarettes before the end of 1912, had reached approximately seventy-five to one hundred millions a month, which back in 1912, was a lot of cigarettes.

Q. Proportionately it was larger than Beech-Nut or as large?

A. Well, I haven't referred to those figures. I intended to do it, but overlooked it. I am under the impression that we sold as many of Zira or Nebo separately within the same fiscal period as we did of Beech-Nut approximately. I am not absolutely certain of the details, but in substance, as I recall, we put out about nine hundred and some odd millions of Beech-Nut in the year 1921, and I think that we sold something like that many of the other brands. I think so. Those figures, I must say, I am not positively accurate about.

Q. How are Beech-Nut cigarettes selling today?

A. Very poorly indeed.

Q. To what do you attribute the decline?

A. Well, primarily to the fact that our competitors, who have enormous volume of brands were selling to the consumer at the time we put Beech-Nut on the market at 20 cents a package.

Q. What cigarettes, for example?

A. Camels, Chesterfields, Lucky Strikes, Piedmonts, and there was quite a business on Sweet Caporals in some sections, and we came on the market in what has previously been referred to as what we thought was the psychological time to offer the public what we regarded as an equal cigarette in quality, and certainly in physical appearance to any cigarette on the market at 15 cents for the package. And it seemed to me to be a very happy response; in 1921, the whole country was recovering from

the deflation and so-called panic and in tobacco merchandise, at least, everybody seemed to be looking for a little better bargain, and that was what we thought would be the psychological time to offer 20 cigarettes for 15 cents that we believed to be for smoking purposes, as acceptable and as good as 20 cigarettes of our competitors as represented by these several brands, Camels, Chesterfields, Piedmonts, and Lucky Strikes, which were being sold for 20 cents for 20, and we sailed along splendidly with the merit and quality of the Beech-Nut cigarette until in the late fall of 1921 when they tilted the prices a little bit, and by and by those big brands that were so powerful that they could command the situation got down not only to the price that we had expected to sell Beech-Nuts to the consumer, but got cheaper, and it was not an infrequent thing to find Camel cigarettes offered at two for a quarter, and Beech-Nut being unable to force its position by lack of its volume, 15 cents, and the big brands were really cheaper and it just took the living life out of Beech-Nut and cut them down from nine hundred million—on that basis a billion a year, and not the whole country covered at once, mind you—we begun in New England and worked across the country, and had about covered the United States at the time these other brands became cheaper.

Q. You had a cut price war, did you not?

A. We begun and went into the most pronounced cut price war that I have ever observed in my entire tobacco experience, and the more they cut, and the more general that cut got to be—until every little hamlet and country store and everything was selling these goods at 15 cents and two for a quarter, and some exceptions, it may have been 16 or 17 cents, but the great volume of the business was down to the same or lesser price than our brand had been, and we suffered tremendously and quickly and our volume today on this brand is represented by approximately five or six millions a month—six or seven—be-

Mr. Cavanagh: Turkish Trophy package is offered in evidence and marked D. 42.

(Package marked D. 42.)

Mr. Cavanagh: The London Life package is offered in evidence and marked D. 43.

(Package marked D. 43 in evidence.)

Mr. Cavanagh: And the Windsor Castle Fag package is offered in evidence and marked D. 44.

(Package marked D. 44 in evidence.)

Q All those four packages last referred to as exhibits were on the market prior to your adopting the red background for the Beech-Nut?

A. Yes, sir.

Q. This morning in your testimony you also spoke of the rapid growth of Nebo cigarettes and Zira cigarettes, which I understand were put out under your supervision.

A. Yes, sir.

Q. If necessary can you produce the yearly figures from 1912, say, showing the growth of these cigarettes?

A. I think so; I think I have it; I have prepared it, I I didn't this morning, it has been prepared.

Q. Now, Mr. Belt, in connection with your designing of the Beech-Nut pouch or cup for the Beech-Nut cigarettes and its connection or outgrowth, as you have testified, from the Beech-Nut Scrap Tobacco package, which I will call it, I would like to read you from a letter, which is part of Defendant's Exhibit D. 18 in this case, which is correspondence between the Beech-Nut Packing Company and P. Lorillard Company. This letter says:

Mr. Gifford: Give the date.

Mr. Cavanagh: It is page 25 of that correspondence.

Mr. Gifford: Give the date.

Mr. Cavanagh: Dated August 7, 1919. "In discussing the situation"—this is to P. Lorillard Company from the Beech-Nut Packing Company, and it reads as follows:

"P. Lorillard Company,
119 West 40th Street, New York City.

Dear Sirs:— Mr. Thomas J. Maloney.

"Our president, Mr. Arkell, was here yesterday and your letter of July 28th was presented at a meeting of our Executive Committee.

"In discussing the situation, a suggestion was made which possibly has not occurred to you, and therefore we are submitting it to you for your consideration. In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your cigarettes; in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product. Our thought in regard to the above is prompted by the procedure of the Patterson Co. in connection with their Lucky Strike Smoking Tobacco and Lucky Strike Cigarettes.

"Should you not care to follow the suggestion offered above, we hope you will abandon the red background and change the same to blue or some other color, and we would like to see the words 'Beech-Nut Brand' a straight line instead of a curve, provided you could work out this idea to your satisfaction.

"Mr. Arkell has no recollection of hearing mentioned the advertising matter or wrappings you

have provided for your Beech-Nut cigarettes, and while Mr. Lipe recollects some mention of it, no reference, as far as he can recall, was made in regard to quantity and neither of these gentlemen gained the inference that you would expect the Beech-Nut Packing Co. to absorb the cost of these supplies."

Now, I call your attention in particular to that portion of the letter referring to the adoption or to the suggested adoption for your cigarettes of the design or the substantial design of the Beech-Nut package. Did you, as a matter of fact, prior to the receipt of that letter, ever attempt or design a wrapper or package for your cigarette along the lines of the Beech-Nut scrap tobacco design on the package, and if so, can you produce the same?

A. We did.

Q. Just tell us what happened.

A. We, I felt very much inclined to the same belief as expressed in that letter prior to its receipt, and I had ordered an experiment made in the reproduction of the Beech-Nut chewing tobacco package for a cigarette package, and this, as far as I can tell, is what was produced, but as soon as I got it down to this proportion, being so much smaller in area than a package of cigarettes, and being intended to reach an entirely different type of consumer, I immediately reached the conclusion that the amount of proper class, as I will term it, and appeal, did not exist in this package, and I felt the necessity of looking further for an idea and explore that. Besides, in the consideration of the fact as related, I recalled the so-called sunburst effect, I believe it was popularly called around our place, the sunburst package—those words have been applied to it at least, I recall the sunburst effect to some degree at least and similarity of the old Sweet Caporal package, and in the desire to steer as far as possible from any form of infringement or copy that

we might even get by with legally, but be criticized in policy of having adopted it, it assisted me in forming the still further conclusion of an unfitness, and to that I will add another objection. Previous to that I had put on the market a brand of cigarettes called Zubelda, a brand of cigarettes intended to be considered as a more direct competitor to the Fatima cigarette than anything that was then in the market, and that package—I happen not to have one, it may be in the exhibit—I don't know—was distinctly of stripes, as I recall it, it was a bluish green stripe and another color, I forget what the other was, on a yellow background or a yellow strip, but I have had visions and nightmares, I might almost say, of the Zubelda striping, radiating yellow and green, and I did not want any more striped packages with the memory of the failure of Zubelda in my mind, and the fear of a criticism by my competitors, the American Tobacco Company, in the radiating lines that existed on the package of Sweet Caporal cigarettes, and therefore we didn't proceed farther in attempting to apply an exact reproduction of the tobacco package as a model and fashion of the style label for the cigarette package.

Q. And you had, as I understand your testimony, made this specimen design that you have produced along the lines of the Beech-Nut Scrap Tobacco prior to the receipt of that?

A. Oh, long, that was the first thing we had tried out.

Q. Did the Sunshine package of Liggett & Myers, do you know, have any rays on?

A. Yes, but at the time that we were considering this the Sunshine package, I don't think was in existence. I think it has rays, but it was put out prior to the—subsequent to this period, after this period. I think that came along probably a year, the previous year. I think it was put out in 1920, and this was considerably before that time.

Mr. Cavanagh: If your Honor please, we offer in evidence this specimen wrapper of the Beech-Nut cigarettes.

The Court: Admitted.

(Wrapper marked D. 45.)

Mr. Cavanagh: And also the package of Zubelda cigarettes to which the witness has referred.

(Package marked Exhibit D. 46.)

Mr. Cavanagh: And I also offer in evidence the package of Sweet Caporal cigarettes.

(Package marked Exhibit D. 47.)

Q. Now, Mr. Belt, in your long experience in the tobacco business, have you ever heard of a tobacco company which manufactured any food products, confections?

A. I never have.

Q. Do you regard food products, from your experience in the tobacco business, do you regard food products and confections as being in the same class of goods?

A. By no means, entirely distinct.

Mr. Cavanagh: The direct examination is closed. The witness is yours.

Cross examination by Mr. Scott.

Q. I think you said, Mr. Belt, that your principal Turkish brands are Helmar, Deities, Murad, Mogul, Trophies, and London Life; is that correct?

A. Yes, that is.

Q. Do they form a material part of the business of the Lorillard Company, an important part?

A. You mean of the cigarette business or the total business?

Q. Do the cigarettes I have named in the aggregate form an important part of the Lorillard business?

A. Yes, they represent a considerable volume of that business.

Q. One of the most important parts of the business?

A. Perhaps classified as a unit, as against any other one proposition, that is, I mean as against any one brand other than Beech-Nut tobacco, they may be better than any other one brand taken as a whole, collectively.

Q. How about Helmar cigarettes, is that a big seller?

A. Very good seller.

Q. How does that compare in importance with the others of the list I named?

A. Well, the Helmar is about the same volume as Murad, but not as profitable a brand. We haven't been able to make as much money on Helmars, because the selling price is hammered down to such a point which has left but a small margin of profit with highly increasing cost of the imported Turkish leaf. We sell about equal in volume, about equal, but Murad pays a better profit to the company.

Q. Are there any of the all-Turkish that sell in larger numbers than the Helmar and Murad?

A. No, those are among the largest brands.

Q. Did you have a box of the Helmars in your hand?

A. I haven't had the Helmar.

Q. I think I have one with me. This is a box of the Helmar cigarettes that you have referred to, is it not (indicating)?

A. Yes, that is a package of tens. There are packages of twenties, fifties and one hundreds.

Q. Does the name Lorillard appear on that package in any place?

A. Yes, "Capital stock owned by P. Lorillard Company," I think, if it is a modern package. "Capital stock," I am sorry to plead my poor eyes, "owned by P. Lorillard Company" under the name S. Anargyros.

Q. Where did you read that?

A. Underneath the signature "S. Anargyros."

Q. On the inside of the cover?

A. Of the package, yes.

Q. You read it, did you not, with some difficulty?

A. Poor eyes.

Q. The name that you read appears in white letters upon the black scroll or flourish appearing under the name Anargyros?

A. No, that is a straight line, the—under Anargyros there is the corporation inscribed in the scroll, but the capital stock owned by P. Lorillard Company is in a separate and distinct line under the scroll, and very legible in most. That is a bad print. Most of them are very clear.

Q. The place where you have read the words "Capital stock owned by P. Lorillard Company," being on the inside of the package of the Helmar box, inside of the cover?

A. Yes.

Q. That is the only place, is it not, where the name Lorillard appears upon this Helmar box, that is right?

A. I think so.

Q. So that from the exterior of the box when sealed according to the Government regulation with a Revenue stamp, there is no place where the name Lorillard would be visible?

A. It is not visible as applied to the package on its exterior.

Q. Not in any place?

A. Not in any place.

Mr. Scott: I would like this marked for identification, to be offered later as plaintiff's exhibit.

Mr. Milton: Mark it in evidence, if you like.

Mr. Scott: All right, I offer that as Plaintiff's Exhibit P. 43.

(Package marked Exhibit P. 43.)

The Witness: I would like—am I permitted to make a statement?

Mr. Scott: You may.

The Witness: I don't know what the law is but the reason, Mr. Scott, that the "Capital stock owned by P. Lorillard Company," appears as it does, is due to the fact that those brands were gotten out under the name of S. Anargyros when S. Anargyros was a corporation owned by the American Tobacco Company before its disintegration, and it was transferred or made a part of the assets of the new Lorillard Company *in toto*, all the stock, physical assets, and so forth, came over, and the American Tobacco Company had been marketing the brand as S. Anargyros, but reasons developed that made it necessary to S. Anargyros, who was then operating as a corporation, but who was not known as a corporation and we applied the corporation and the capital stock owned by P. Lorillard to prevent the public from believing or possibly getting the impression that S. Anargyros was an individual and was offering cigarettes on his individual merit, and we put corporation on there to apprise the public of the fact S. Anargyros was a corporation, and as an individual might be dead or might be alive, might be in this country or might be in Greece, and we put the capital stock owned by P. Lorillard Company so as to show that all of that corporation was the property of the P. Lorillard Company and was not run as an independent separate corporation but to apprise the public of the fact that the capital stock belongs to the P. Lorillard Company, that S. Anargyros is a corporation and not an individual, and we did not think it would be judicious to affix P. Lorillard on the outside of those packages, because they were transferred without it, or to change the appearance of them, and we did not make an original place for

it as we did not feel the necessity for doing so. It wasn't done and I think you will find that same thing applies to all the Anargyros brands owned by the Lorillard Company.

Q. The idea, as I understand you in short, was to have this information regarding the stock ownership conveyed?

A. As a legal proposition.

Q. In some part of the package but without at all interfering with the appearance of the exterior of the package? Is that right?

A. It was. The brand was in existence when that was decided to be applied. It had been on the market for some years.

Q. And I am right in my question?

A. Yes.

Q. You said that you thought that also applied, Mr. Belt, to the other brands?

A. I think it applies to all the Anargyros brands, Murad, Helmar, Deities, Moguls, Trophies—I think it is applicable to all of them.

Q. Your recollection, without verifying it—you may do that if you wish later—would be that the name Lorillard in this same way appears on all these brands you mention?

A. That is my recollection.

Q. You don't know whether it does or not.

A. I think so. I really think you will find that to be correct, although I am not absolutely certain.

Q. Have we a package of Deities in evidence? I will show you, Mr. Belt, a box of Deities, and you may examine it just to see whether your recollection was right.

A. It is on the front of this package, on the other it was on the inside, "Capital stock owned by P. Lorillard Company." I think it is on all the packages just under the name of S. Anargyros in every instance. On that package it appears on the outside.

Q. Very small type as compared with the Anargyros?

A. Yes. Put in after they had been running for years and could not be very well made larger.

Mr. Scott: If I may, I will also offer this as Plaintiff's Exhibit P. 44.

(Received and marked Exhibit P. 44.)

Q. Now, we will just run through some more of these. London Life was another one of these Turkish brands?

A. I believe I called that; I am not sure whether we transferred London Life to Lorillard. It has been a very inactive brand; I am not sure whether we retained it or not. I don't think it is on this one—yes, it is on the inside.

Q. It is on the inside of the London Life box in the same way as with the Helmar—I am correct?

A. Yes. Whether the S. Anargyros appears on the package, that is, when it appears solely on the inside it appears in that way; where it appears on the outside as in Deities it appears on that "S. Anargyros Corporation, capital stock of S. Anargyros owned by P. Lorrilard Company."

Q. I think you stated toward the close of your examination that you did not know of any tobacco company making food products. How about the converse of that proposition; any food company marketing tobacco products under the food company's own brand?

A. As a manufacturer, I believe the question was raised of what we call a wholesale grocer; that exists sometimes, a wholesale grocer has his private brands of food products and his private brands of tobacco products and may be using the same name, but I don't know of any so-called tobacco manufacturer who manufactures any food products under any name, and consequently, I don't know of any prominent food products manufacturer

like the Beech-Nut Company being the manufacturer or who have intended to manufacture tobacco products.

Q. But you do know of wholesale grocers who put out cigars and cigarettes? A I think it was more or less in the old days, the custom of wholesale grocers to have the name that might apply to various merchandise, food stuffs, maybe some private brand. I am under the impression that Sprague, Warner & Company of Chicago had a brand made for them, Richelieu, I think is the name that is used on some food products, and also on some tobacco products. But this is a private controlled brand, not an open market brand.

Q. Private controlled brands of that kind are not unusual?

A. It is the property of Sprague Warner. I don't think the manufacturer, whoever it may be, makes it for anyone except Sprague Warner.

Q. That is not an unusual circumstance?

A. Not restricted to individual distributors, but as an open trademark, I don't know of it to my knowledge.

Q. Do you happen to know whether the firm of Park & Tilford in New York put out any cigars or cigarettes under their own private brand or under their own name?

A. Why, I think they are putting out a brand of cigars called Tilford. That is a controlled brand. Park & Tilford put out a cigar called Tilford.

Q. You don't understand that they manufacture it themselves?

A. Yes, I think they do. I think Park & Tilford manufactures Tilford cigars, a cigar that is called "Tilford."

Q. You think they have a cigar factory?

A. I think so. They did have, I am sure.

Q. Do they put out cigarettes, do you know under their own name?

A. I don't think so. I don't know of their putting out a cigarette.

Q. Do you know of any wholesale grocer who puts out cigarettes under his own name or his own brand?

A. I don't believe that I recall it, it has been once or twice my experience that we have given in the old days a controlled brand to a jobber, that is, he controlled it like Sprague and Warner did the Richelieu. I think I recall giving a firm of Stickney & Company, St. Louis, some years ago, a brand of cigarettes for which they had no competition, but I don't think we ever got a duplicate order. It has often resulted in similar efforts receiving no justification.

Q. You mean the Lorillard Company—

A. That was in the old days, in the days of the American Tobacco Company. We haven't done it, I don't think we have a so-called controlled brand—we manufactured a brand for Liggett Company—their property; we did the work for them, they sold it.

Q. Well, this instance you referred to in St. Louis. The American Tobacco Company made the cigarette and put the St. Louis Company's brand on, and the St. Louis Company took them and sold them.

A. Whether we put Stickney & Company's name on, I am not clear. It has been 15 years ago, but it is a clearly established fact that brands like that have never existed to any extent.

Q. The tobacco company manufacturers or many of them do manufacture when requested to do so, brands for customers, do they not?

A. Well, it may be possible that some do, we don't. I don't recall that we are making anything except this brand for the Liggett Company. We have made a brand or two but it is so infinitesimal.

Q. Of cigarettes or cigars?

A. No, cigarettes. I am not posted about the cigar end of our business much, but I think there are very few brands of cigarettes in existence other than the open

trademark brands of the principal manufacturers, perhaps the percentage would represent less than nothing.

Q. Does the Liggett chain of drug stores have a brand of cigarettes?

A. Yes, I spoke of them. Black and White.

Q. You make them?

A. They have a brand that we manufacture for them. They own the brand.

Q. The Lorillard Company makes them?

A. We simply make it. They guarantee the wrapping material in case it is discontinued to reimburse us. We manufacture the brand, a certain grade, and deliver them to them at a price. That is all our connection with them. It is their property, the trademark rights of the Black and White lies with them. I spoke of that just before.

Q. In your direct testimony you spoke of offering special inducements to the salesmen who introduced the Beech-Nut cigarettes?

A. Salesmen of jobbers, or to the jobber, I believe, we made it; it, in the main, I think, reached the salesmen of jobbers.

Q. Salesmen who come in direct contact with the retailer?

A. Yes, sir.

Q. Were they any special instructions issued by the Lorillard Company that were directed to or intended to reach the salesman who came in contact with the retailers?

A. Well, only through the house we sent a circular, matter of record, we sent a circular to all of our customers in that section saying that we would pay an extra compensation of 25 cents per thousand on the sales of Beech-Nut in a fixed time, say two months, and the jobbers, most generally, almost without exception, unless it be some little fellow who did his own selling, they, as I understood it, extended that offer to their selling organization and the point was, it was maiden territory, you understand, and the goods were at that time sold at the price the manu-

facturer had hoped would prevail which gave the jobber a very radical profit and the 25 cents additional went to the salesmen, and a good big effort was made to get in quick and get the distribution. That is why I made the offer. We were able to accomplish more distribution and enthusiasm and co-operation with that 25 cents than we could buy without jobber salesmen with a dozen quarters to the thousand. It would probably cost us three or four dollars a thousand to do it straight from the shoulder with our forty men, as against the combined selling power of all the jobbers.

Q. During this publicity campaign for the introduction of the Beech-Nut cigarettes, did it come to your knowledge at any time that the Beech-Nut cigarettes were being mistaken for a product of the Beech-Nut Packing Company?

A. Do you mean thought to be a package of gum or a package of something else?

Q. No, thought to be a product of the Beech-Nut Packing Company?

A. I cannot say that I recall directly. There was some discussion of it at different times. I think I met with some instances myself where something relative to that or in reference to that was mentioned. There seemed to be curiosity expressed by some dealers that I might visit or retailers who were familiar with the name Beech-Nut in gum, perhaps and were not at that time, much familiar with it in tobacco products because the brand of Beech-Nut tobacco had practically never reached at that time beyond a very extremely limited way in a distribution in New England and particularly in Boston, and I felt constrained to believe that, because, as we came further west, with the Beech-Nut cigarette there was practically no discussion of it as compared with at first, when we covered the area that had been covered by Beech-Nut. But these remarks that may have been made of whatever nature they were were at the immediate moment, so to speak, when the brand was put out, but it passed almost like vapor.

It did not linger. They quickly appreciated the fact that Lorillard was the manufacturer of Beech-Nut cigarettes. It was stamped on the package and pretty clearly admitted on the face of the package. I do recall that salesmen at different times might make some reference to the usual chat between retailers and themselves. There might have been some reference in some way, what I would call sort of careless conversation.

Q. Did you ever issue any instructions to or designed to reach the salesmen who came in contact with the retailer?

A. When that information came—

Q. Instructing such salesman to take precautions against the Lorillard Beech-Nut cigarette being mistaken for a product of the Beech-Nut Packing Company?

A. Any time there was any discussion by the salesmen, I gave the men in charge of crews and channels down orders to make it very clear that we had intended to do that, and pointed out that we put the name "P. Lorillard" on the package to identify it very clearly as a Lorillard product, and that we did not wish anyone to be under the wrong impression regarding it, and therefore to please make it very clear that Beech-Nut cigarettes and Beech-Nut tobacco were manufactured by the P. Lorillard Company.

Q. The substance then of this communication, however conveyed, was that the salesmen were to take special precautions to make it clear that they were not made by the Beech-Nut Packing Company?

A. Well, they were to meet any careless remark with the proper information on the subject. As far as making any special precaution we did not take any, except that when a man said, "Is that made by the Beech-Nut Packing Company," we said, "No, it is made by P. Lorillard." We did not wish him to deceive himself. It was our intention to do just the opposite with all things.

Q. Then it did come to your knowledge that certain merchants were making that mistake?

A. There had been some remarks on the subject of the name.

Q. Mr. Belt, when the Beech-Nut cigarette was first put upon the market, did the package bear the expression "Cigarettes of Beech-Nut Quality"?

A. No. I think we had a phraseology to my recollection like that, that we changed slightly. Changed the wording, resulting from, I think, some kind of a protest or objection on the part of your clients. And not desiring to offend we acceded, I think, we making that change in the wording. I am not familiar with the exact words.

Q. My question, Mr. Belt, was more directed to know whether that change was made before or after—

A. I say, I think the label was in existence, but had not been shipped. That was my expression, that it was changed.

Q. You cannot be sure about it yourself?

A. I cannot at the moment. I am positive, though, almost positive, that the package as we have it, is the way we shipped it. That is my recollection.

Q. That is one of the new packages you have?

A. I imagine so. The only one I know of that was shipped, we were discussing several other things.

Q. Mr. Belt, about how many brands of all kinds of tobacco products, including chewing tobacco and smoking tobacco, cigars and cigarettes are now put out by the Lorillard Company?

A. There must be—

Q Approximately?

A. 50-75-80, extreme aggregate, taking everything that exists.

Q. Can you state how many of these brands are put upon the market without the name "Lorillard" on them?

A. No, I cannot, Mr. Scott.

Q. You know that some are, though?

A. Some are without the name?

Q. Yes?

A. Yes.

Q. And if I were to name any particular one of the brands barring a few that you definitely remember, you could not tell me whether or not the name "Lorillard" appears on it, could you?

A. The detail of them from memory isn't in my mind. My association has been with cigarettes.

Q. Well, limit the question to cigarettes?

A. How?

Q. We will limit the question to cigarettes.

A. Why, yes, I think the name "Lorillard," I believe appears on most of the brands that we have put out since the disintegration. I think it is on Zira and Nebo.

Q. On the outside or inside of the box?

A. That I would have to challenge my memory for. The brands have been very slow sellers for several years. And I haven't kept up with them, but I think they are on. I know from several years ago, now, a year or two ago, at least, Mr. Maloney thought that we were making a mistake in not making "Lorillard" more prominent, more closely identifying it with new packages. And I think we put it on our Muriel cigar, the front of the box, Lorillard Murial Cigar, or on the inside somewhere, I know that brand ran without it, and that has been more or less the case with a number. I know it is on our Lorillard cigars and our old Virginia cheroots, too, I imagine.

Q. Can you tell me definitely whether the Lorillard Company ever did issue any circular designed and worded to cause the salesmen to guard against any impression that the public or the retailer should think the Beech-Nut cigarettes were produced, or put out by the Beech-Nut Packing Company?

A. I don't recall any such publicity, Mr. Scott. I remember having spoken to the men, some small reference to it, but I don't recall. You see it has been several years ago, much has happened in my mind in that time. I don't recall such a circular. I don't recall any such—it might have been some direct letter to someone that may have written for information, I don't know.

Q. If there was any general custom on the part of district salesmen in this regard, it would not have originated with you then?

A. Well, no—yes, in so far as, for instance, if I was in Boston, and the district manager said, "Mr. Belt, somebody got into an argument, and asked me today about Beech-Nut and spoke about another Beech-Nut on the market." I may have said to him, "Well, I hope you made it very clear to him the fact in the case. I will be glad if you will do that whenever an occasion presents itself." But so far as in advance speaking to other men, and anticipating that, I cannot say that I ever did. I don't recall ever having done so. There was a very little of it and for a very short time.

Q. It would be your best opinion then that the only warnings of that kind would be merely casual and occasional?

A. They were, Mr. Scott.

Q. That is right?

A. Yes, sir. I don't recall such a letter, it may have been by the Legal Department or somebody else—it may be in existence, but I don't recall it at the moment.

THOMAS J. MALONEY, called and sworn in behalf of the defendant, testified as follows:

Direct examination by Mr. Cavanagh.

Q. Your name is Thomas J. Maloney; you are of legal age; you reside at 197 Belmont avenue, Jersey City, N. J.,

and you are president of P. Lorillard Company, the defendant in this case, is that correct?

A. That is right.

Q. Mr. Maloney, how long have you been president of the P. Lorillard Company?

A. Since 1900, going on 24 years.

Q. You were president of the P. Lorillard Company while it was a part of the old tobacco combine?

A. The American Tobacco Company never controlled the old—it controlled it but it did not own the stock. It had never been dissolved and stayed intact, and I succeeded P. Lorillard as the president in 1900.

Q. So you have been the president of P. Lorillard Company for—

A. Going on 24 years.

Q. And the P. Lorillard Company is engaged in the manufacture of all kinds of tobacco products except snuff?

A. All kinds except snuff.

Q. Mr. Maloney, how long have you been in the tobacco business yourself?

A. About 50 years.

Q. Will you briefly, and in order, if you can, as you go along, describe your connection and experience in the tobacco business from the time you started out up to the present, to give the Court an idea of your experience in this line?

A. I started as a boy in the tobacco business in Covington, Kentucky. I went to strip tobacco for a cousin of mine who was in the tobacco business. From that I went with a firm by the name of Lovell & Buffington, who were manufacturers of fine cuts and smoking tobaccos, and afterwards went in the plug business. I left Lovell & Buffington concern and went with the R. Hamilton concern, better known as the Bull Dog Tobacco Works. I was with him then as the superintendent of his factory, and had been promoted to a buyer. From the fall of 1880,

until the time I made a connection with the Lorillard Company of Jersey City, and during that period I was four years buyer for the company of the raw materials. In 1885, July 1st, I made my connection with the Lorillard Company as the superintendent of their fine cuts and smoking. After a period of three years, I became general superintendent of the Lorillard Tobacco Company interests, who manufactured all kinds of chewing and smoking tobaccos and snuff. In, I think it was the spring of 1900—no, the Continental Tobacco Company was formed in the fall of 1899, the Lorillard Company was taken over by the Continental Tobacco Company and in the following spring I was made president, through the control of the common stock of the Lorillard Company, and I have maintained and held that position since. During that time I had been made a director of the American Tobacco Company that same year, and also occupied the position of vice-president of the American Tobacco Company up until the dissolution of the American Tobacco Company. So that brings you right up to the moment.

Q And from the time of the American Tobacco Company in 1911—

A. Yes.

Q. —up to the present day, you are and have been president of the P. Lorillard Company?

A. I am and have been president of the Lorillard Company.

Q. Mr. Maloney, it has been testified in this case that Luhrmann & Wilbern Company was a part of or controlled by the American Tobacco Company.

A. Yes.

Q. Did you ever have any official connection with the Luhrmann & Wilbern Company?

A. Why, I have no recollection other than the supervision and production of their manufactured goods.

Q. Through your connection with the—

A. With the American Tobacco Company.

Q. As I understand you, Mr. Maloney, you have had a great deal of experience, years of experience, in the manufacture of tobacco and in the buying of tobacco?

A. Yes.

Q. And in the selection of tobacco.

A. During my vice-presidency of the American Tobacco Company my chief position was that of charge of the manufacture, purchase and construction.

Q. And, as I understand it, you have gone from the leaf end of the tobacco business, with which you are familiar, to the manufacturing end?

A. Yes.

Q. Did you ever yourself devise any blends or formulas for tobaccos?

A. Many.

Q. In order that the Court may gather something of your experience, will you please name some of the better known or famous tobaccos of which you have made the blends?

A. I made the blend of Honest, I made the blend for the Pickerton Tobacco Company of Red Man, I made the blend of Beech-Nut, I made the blend of Havana Blossom, and many other blends during my time with the American Tobacco Company and the Lorillard Company.

Q. The blend or formula of tobacco is a very important factor in its success, from your experience, is it?

A. I would say yes.

Q. Mr. Maloney, did you ever yourself invent or devise any machinery in connection with the manufacture of tobaccos?

A. I have invented quite a few machines.

Q. Will you name one or two types or kinds?

A. I own the invention of the first man in America to put foil and paper together, that is one; I have invented labelling and stamping machines, and also driers. I was the first man to introduce into the tobacco busi-

ness what was the textile system of drying, which was used by yarns, which made an enormous saving in labor, and the breaking up of tobacco, as it was a continuous process, instead of like in the old days they put it on racks, carried it from room to room, and the tobacco stuck on those racks, they used to have to knock it off with pieces of belting on account of the sweetening material adhering to these racks, and there was great destruction and breakage of tobacco by this system. This was after I became associated with the American Tobacco Company. Some claimed it might destroy the texture, but through hard efforts I won out and had every plant connected with the American Tobacco Company throughout the United States equipped with that process of drying.

Q. How about stemming machines?

A. Stemming machines? I have had a great deal to do with it, but I have not been the inventor of stemming machines. I never invented a stemming machine.

Q. Mr. Maloney, in order that the Court may understand what we refer to as leaf tobacco and follow the case with more clearness, perhaps, will you produce some leaf tobacco?

A. I have some samples of leaf tobacco there which I would be pleased to explain to the Court. Like Mr. Bolt, my eyes are getting poor, and I have got to use glasses.

Q. You may then explain to the Court what the various kinds of tobacco are in the leaf.

A. This is what we call our grade M tobacco, Burley tobacco, which is used in the Navy plug chewing.

Q. What is a Burley tobacco?

A. It is a particular kind of tobacco grown in the State of Kentucky, in the eastern and western part of Kentucky.

There is a grade of leaf tobacco we call our P. grade (indicating), which we used in our second grade of plug chewing.

Q. Is that a Burley?

A. That is a Burley tobacco; that is the wrapper that goes to cover the plug (indicating). That is what we call bright Virginia or North Carolina tobacco.

Q. That is due to its color?

A. Due to its color and its process of raising.

This is what we call a Green River tobacco, it is raised in the southern section of Kentucky, used principally for long cuts and pipe smoking, and chewing tobacco, such as Five Brothers, Honest Long Cut, Liberty Long Cut, Mechanic's Delight Long Cut, and Green Turtle.

Here is what we call, Judge, Grade K (indicating). It is considered the highest grade of Burley tobacco that grows, used in Planet Plug Tobacco, which is sold in the New England States, the biggest seller that is in the New England country.

That is the wrapper, that is the dark Virginia, showing you how different the color may be between the two tobaccos grown in the same state, cured under different processes by heat (indicating).

The plug will show there. Have you the plug there, young man? (Package handed to witness.) There it is, right there. There is the Climax which shows the bright (indicating). That is the Planet plug, that is the wrapper that is used on the Planet Plug (indicating).

Now, we get down to the Burley type, what we call our G2X, which is made into the blend of the cigarettes of the Beech-Nut and the Camels, and of the Lucky Strikes and Chesterfield. That class of tobacco that goes into that blend to make that class of cigarettes is the Turkish tobacco and the Virginia tobacco, which I will show you later.

This is a class of Burley which we rate as our CL, which is made usually in the case of fine cut chewing to-

bacco, such as Pioneer Fine Cut, our Sweet Burley Fine Cut, made by Liggett & Myers, or Spalding & Merrick, of Chicago.

There are types of Havana tobacco, which is used in connection with Between the Acts, Little Cigars, and our Muriel cigar, in the blend.

This is what we call the Connecticut, C2 (indicating). That grows in any size up into the wrapper, the binder, that is what we call a C2, used as a filler, and also used in connection with making Beech-Nut chewing tobacco.

Q. Beech-Nut chewing?

A. Yes, that is part of the blend. Here is Porto Rico filler. I have none of the Porto Rico leaf here, because of its duty being on the leaf, it is usually stripped in Porto Rico and they usually send it stripped because labor is cheap in that country. This is what they call the Havana filler (indicating). That is the term, I can't just think of the term they call it there in Cuba. There is a bunch of it, the Havana, showing you how close they work on the scrap there—they gather the small leaves and tie them in that condition (indicating). Here is WF, No. 1, that is Wisconsin tobacco. That is used in Beech-Nut chewing and the blend.

You see by these various tobaccos, (these are binders), that is where they get the scrap—those are the most perfect leaves that come out of the crop, and when the cigarmaker takes that, you will notice that the operator will take the face of the leaf and will stretch it. He takes his knife and strips it so as to get it the shape of the cigar when they roll the cigar, so that you will get a smooth surface, and these cuttings and trimmings the cigarmaker sells for scrap, and that is why you get the very best tobacco that grows into this blend.

Q. Beech-Nut blend, you mean?

A. Yes.

Q. Of the Lorillard tobacco?

Q. Yes, we have competitors, outside manufacturers. That is from Porto Rico, some Porto Rico tobacco (indicating).

Q. What is that, Mr. Maloney?

A. This (indicating) is the bright Carolina, this (indicating) is what we call the old Belt of Virginia tobaccos; this is the foundation of the blend of these blended cigarettes. The proportion is greater in most blended cigarettes of this class of tobacco than either the Turkish or Burley which go to make the blend of cigarettes.

I bring these specimens to the Court to show that it requires skill and time, a long time, to gather this information to enable a man to supervise and clearly operate a tobacco plant. As I say, I have been fifty years in the business, I have made a success of the business, I made millions for the people who employed me as a young man, and it was my knowledge of this tobacco and the various types that raised me to the position which I have occupied for the last 25 years.

I was told at the time that the American Tobacco Company was formed—I was then the general superintendent of the Lorillard Company—some of my colleagues of the Lorillard concern said "we had better form a combination, any man who is not from North Carolina cannot live in that company,"—I said, "I never formed a combination, a group of any kind in my life, and I will take my chance."

Q. What is that tobacco, Mr. Maloney?

A. This tobacco here is broad leaf tobacco.

Q. What is that used for?

A. Used principally for binder and wrapper.

Q. And this (indicating)?

A. That is the same, only strip.

Q. Now, Mr. Maloney, outside of those tobaccos is also what is known as the Turkish leaf, isn't there?

A. Yes.

Q. Where is that tobacco grown?

A. It is produced in Greece and Turkey, and we buy most of ours from Sassoon, and we have had headquarters at Constantinople, Athens and Sassoon.

Q. And that Turkish tobacco is used in the Turkish cigarettes?

A. For straight Turkish cigarettes, yes, 100 per cent. pure.

Q. When you make blended cigarettes, what do you use?

A. Usually with Burley tobacco and Virginia and Carolina tobacco.

Q. That is a domestic tobacco and the Turkish in the blend?

A. Yes. If it were not, which has been proven time and again, the tobacco interests of this country would have been hurt tremendously—if it hadn't been for the percentage of Turkish tobacco that holds fire well to consume and burn with the domestic tobaccos.

Q. As I understand your testimony up to this point, tobacco is a highly specialized industry, is it not?

A. I would consider it so.

Q. And the men who make a success in it are the men who have been brought up, born and brought up in it from the start?

A. I have been acquainted with most every man for the past 25 years that has been in the tobacco business who has made a success at all, and every one of them has come up from the ground. The men who are operating our plants today, some came in there as boys from Jersey City to me, from Louisville to me, from Middletown, and they have grown up into foremanships, assistant superintendentships, and superintendents, and to buyers. It takes years to bring them up. They must acquire the knowledge of these various grades. If they don't, how can they produce?

Q. Then you would consider, from your long and wide experience in the tobacco industry, that any experience gained in the manufacture of food products, chewing gum, jellies, hams or candies and things of that sort in the food line would not be of any particular or practical benefit in your business?

A. I don't think so.

Q. In other words, speaking from your experience, you would not put the superintendent of a food plant in charge of your tobacco, to make your Murads or your Planet, would you?

A. No, indeed. Even with our board of ten directors, with five officials and the other five directors of the board are all practical men in their departments, we haven't got what they call a dead man in our organization, either by pull or any other way. He is there on his merits.

Q. How about the other tobacco companies with which you are acquainted?

A. So far as I know they are on the same basis. There may be some that aren't, but not the heads.

Q. They are all practical men that are heads of the companies that you are connected with?

A. Mr. Duler, president of Liggett & Myers, is a practical man, and Will Reynolds is one of the most practical.

Q. Of R. J. Reynolds Company?

A. Will Reynolds of the R. J. Reynolds Company.

Q. The Camel cigarette people?

A. Mr. Reynolds has risen in his position in the tobacco business in the sales end of it. I don't think there was a man more familiar with the raw material or the manufactured process of the tobacco.

Q. Now, Mr. Maloney, can you produce for us from your knowledge and connection as president of the Lorillard Company, some figures showing the extent of the tobacco business or industry, so that the Court will have some idea of what this tobacco business is, that is, general statistics?

A. Yes. The number of acres used in growing tobacco in the calendar year 1922 was 1,725,000 acres.

The number of pounds in the crop for that year was 1,324,840,000. The value of the crop was $306,179,000.

The figures for the above three questions represent the aggregate of leaf grown in the United States in the year 1922, according to the official publication of the Department of Agriculture.

How many concerns engaged in the tobacco business—10,291. That counts men who get their license from the Government to enter the business.

Investment represented in these concerns $604,839,000.

How many cigarettes manufactured, in the year 1922, there were 53,582,028,983; cigars, large, 6,892,608,654; cigars, small, 634,671,847; smoking and chewing tobacco, 382,070,511 pounds. The snuff was 38,162,198 pounds. The figures showing the actual manufacture have not yet been published but will be practically the same as above.

The number of people employed from these figures here shows 157,097. The value of the products, $1,012,932,000. This is the last book issued by the Census Department of the Government.

Q. Mr. Maloney, can you give us some idea, and have you before the Court, simply for exhibition purposes, the principal brands that are put out by your concern, the Lorillard Company?

A. Yes.

Q. Will you name them, for instance the smoking and chewing tobaccos?

A. Yes. We have Climax as our leading plug brand. Planet comes next, in scrap tobacco, that is in the classification of scrap tobacco comes the Beech-Nut chewing and Honest is the second brand, with the brand of Bagpipe following close, if not probably leading Honest today at the rate it is going. In smoking tobaccos, our leading brand of smoking tobacco is Union Leader, and then comes

Sensation, Omega, Mechanics' Delight and Long Cut, and Buzz and Red Cross.

Q. Just to be brief, this display which is before the Court here, running from this end of the railing—

A. Yes.

Q. —over to there (indicating), that is practically a good showing of the various tobacco products that the Lorillard Company puts out, is it not?

A. I would say yes.

Q. About what is the total approximate business of the Lorillard Company a year?

A. Between seventy and eighty million dollars.

Q. And how many people do you employ, all told, about?

A. I think at the present time about eight to nine thousand people. The introduction of machinery in the tobacco business since before the war has been tremendous. It has enabled the manufacturers of tobacco to almost cut their total labor in two. I will cite, for example—I will take that Polar Bear pack; I go back to before the machinery was introduced, a task, what was considered at that time before machinery came, a girl would pack 800 of those packs a day, that would be say, 100 pounds. She got probably a dollar and a quarter for doing that. We now put two girls on a machine and we get 100 gross from that machine, and there is 144 papers to the gross, so you can see what machinery has done, and with it all we have never had labor enough yet to go around, no matter how much machinery seems to be introduced into the business, we never cease, I mean we keep running constantly.

Q. How many factories have we, Mr. Maloney, about?

A. About twenty.

Q. They are located in various parts of the country?

A. In various parts, starting with New York City, Jersey City, Newark—

Q. What Newark and Jersey City factories have you?

A. A cigar factory which we own right here in Newark.

Q. What in Jersey City?

A. Two plants, a cigar factory on First street, and what we call the Marion branch on the west side of the hill.

Q. Can you make this Beech-Nut tobacco at the Marion branch?

A. Yes, making the Beech-Nut tobacco in three factories.

Q. Where?

A. Jersey City, Middletown and Louisville.

Q. Middletown, Ohio?

A. Middletown, Ohio.

Q. Mr. Maloney, has the Lorillard Company, to your knowledge, in the twenty odd years you have been president of it, ever manufactured or sold or had any connection with any concern manufacturing food products?

A. None.

Q. And in your wide experience in the tobacco industry did you ever know of any tobacco manufacturing concern which has also engaged in the food business?

A. No.

Q What is the retail price of this chewing tobacco, Lorillard scrap chewing tobacco?

A. You mean the Beech-Nut tobacco?

Q. Yes, that package there (indicating).

A. Ten cents.

Q. How many ounces are in there?

A. Two ounces.

Q. How many ounces in the usual scrap tobacco package?

A. From two and one-quarter to two and one-half ounces. Two and one-half is the maximum weight that I know of today in that class of tobacco.

Q. I understood your testimony to be that nothing but the highest grade tobacco is put into that cigarette, that

you explained to the Court, and in the chewing tobacco, as you explained to the Court?

A. Tobaccos are classified, you see, in the cigar, as in the bright Virginia Belt and the dark Virginia as to wrappers, binders, fillers and what they call trashes.

Q. There is nothing but high class tobacco in them?

A Nothing but high class. We standardize as the best class of that tobacco in this country.

Q. What have you to say as to the plaintiff's charge that that Beech-Nut chewing tobacco of yours is a cheap tobacco?

A. I just think he doesn't know what he is talking about, he doesn't know tobacco, that is all.

Q. That tobacco has a good rating in the tobacco world?

A. I would like to ask the plaintiff a question, if they ever chewed Beech-Nut tobacco.

Q. That tobacco has a good rating in the tobacco world?

A. It is recognized in the trade as the standard.

Q. To your knowledge how does the volume of sale of this Beech-Nut tobacco compare with other chewing or smoking tobaccos on the market, the volume of sales or amounts sold a year?

A. I would say that the brand of Beech-Nut, according to the figures of 1922, was as large as nearly all other brands of this class sold. I think there was something about over sixty million pounds of scrap tobacco used, and I think there was over thirty millions of Beech-Nut.

Q. Mr. Maloney, speaking about this tobacco again and it being called scrap, I notice you have the word "chewing" on there. That is not a true scrap tobacco, is it?

A. No, that is made from long leaf. I say we do use some cuttings.

Q You showed the Court the cigar cuttings?

A. Yes.

Q. It is not sweepings that you take out of the factory or anything of that sort?

A. No. We own today probably the largest stock of raw material ever owned in the world by one company. We own today over one hundred million pounds of seed leaf tobacco today.

Q. Did you or your company ever have any of the intention or desire or idea this tobacco should sell upon the reputation of the Beech-Nut food products?

A. No, never.

Q. What, if any, instructions have you as president of your company given as to the preservation of formulas of tobacco wrappings and the like?

A. What is that?

Q. Have you ever given any instructions, or is your practice to preserve tobacco formulas, wrappings, wrapping materials?

A. Absolutely, yes.

Q. You always keep them?

A. Absolutely, there can be no destruction without the approval of the president of the company.

Q. You are willing to fill an order any time you receive an order for tobacco—

A. Any time.

Q. —from a reputable person.

A. Yes.

Q. Can you state, as president of your company and connected with the Luhrmann & Wilbern Company, whether you ever had any intention of abandoning that brand of Beech-Nut Scrap Tobacco?

A. Never. Brands are too scarce articles associated with the tobacco business to cast aside as of no value. That trademark today stands as worth millions.

Q. Mr. Maloney, there is one other thing I should like you to tell the Court, and then I will be through. In connection with the representation of the Twin Beech-Nuts which appear upon your chewing package, and also upon the cigarette package, can you tell the Court just exactly how that design of that Beech-Nut, the picture of the

Beech-Nut came to be adopted, so far as your own knowledge goes?

A. Yes, I think I can shed some light upon that.

Q. I wish you would tell the Court.

A. It was either Mr. Ball or some of his associates in the sales department came in with a sketch. I said, "Who in the name of heavens ever brought that thing in as a beech nut," and whoever it was said, well, they stood by it, that that was the exact—I said, "I know better because I have a beech nut tree on my place."

Q. Where is your place?

A. Saddle River, New Jersey, here, and I said, "I will bring down some beech nuts, and I happened to have my secretary call because I had a number of foreign language newspaper men, who came to see me, and it happened to be on Sunday, call up on the telephone, wanted to see me, and I had my secretary at my home, and after I got rid of those men I said, "Come, Leo, go with me and we will get those beech nuts," and I wanted to run up to the farm a minute anyway, so we got in the car and brought down those beech nuts with us, and that is what the thing was about.

Q. You took down those two beech nuts?

A. I must have had a dozen of them. I brought some in an envelope.

Q. Will you show the Court some beech nuts from your farm of the kind you gathered?

A. (Witness hands beech nut to the Court.)

Q. Yes, they look just exactly like the picture that is on that.

Mr. Cavanagh: Those are all the questions I will ask you, Mr. Maloney.

Mr. Scott: There will be no cross examination, your Honor.

WILLIAM R. PERKINS, recalled:

Direct examinaton by Mr. Gifford.

Q. You have already testified in this case?

A. Yes.

Q. In Exhibit D. 18, there is a correspondence commencing on June 28th, 1918, and extending down to October 15, 1919; were you familiar with the circumstances surrounding that correspondence?

A. Yes, sir.

Q. In what way did you become familiar with those circumstances?

A. As counsel for the Lorillard Company.

Q. Did you participate in any way to the matters related in that correspondence?

A. I participated in the conferences concerning them, and I drafted most of the letters, that is, so far as written by the Lorillard Company.

Q. Will you please state the circumstances surrounding that correspondence, taking up the letters in their order?

Mr. Scott: I object to that question, if the witness is to be asked he ought to let us know what circumstances these are.

(Question repeated.)

The Court: I don't think that is admissible.

Q. Will you please make any explanation that is within your knowledge and which you think important to the Court of the statements in this correspondence?

Mr. Scott: I object to that, your Honor.

The Court: Objection sustained.

Q. In the letter of June 28th, 1918, is the following paragraph, "On your part, there the matter was dropped, you having made no further reply or objection. On our part, we have continued to manufacture and sell tobacco

products under the trademark 'Beech-Nut' until today it is one of the leading tobacco trademarks in this country."

Q. Can you point out here a specimen of the package which was there referred to?

A. It is the Beech-Nut package with the red radiating lines which was put up by the Lorillard Company in 1915, Defendant's Cross Exhibit 1.

Mr. Scott: The question is asked the witness to say what package this letter referred to?

Mr. Gifford: Yes.

Mr. Scott: And he points to this package?

Mr. Gifford: Yes.

Mr. Scott: I object to the answer and move it be stricken out.

The Court: I will permit that, he was referring to the chewing tobacco that is in issue in this suit. I understand. I should think you would admit that.

Q. In the course of this correspondence, the Beech-Nut Stogie Company is referred to, and the plaintiff called the attention of the defendant to the use by that company of the name "Beech-Nut," and in the letter of July 22, 1919, reference was made to calling the attention of the Lorillard Company to the matter and "let them take steps against the Beech-Nut Stogie Company." Were any such steps taken?

A. Why, there was, at that time, the information to the effect that the Stogie Company was applying for registration in Washington, of the brand Beech-Nut for cigars. They had been under stogie, but that is a form for cigars. And we investigated that and found out that was untrue. This Stogie Company had been doing business for some years over here in Pennsylvania, dating back to a time when there is a question whether the manufacturer of a chewing tobacco could stop another person from using the trademark for cigars. The Patent Office had not at

that time held that the two were so near together that one embraced the other, and afterwards they embraced that decision and held otherwise and that is probably that situation.

Mr. Scott: I move to strike all this out after the answer to the question. The question was were any steps taken? There was a motion or so that answered it, and I move that the rest be stricken out.

The Court: Yes, I don't think this long explanation is necessary.

Q. In the letter of the Lorillard Company to the plaintiff, *July* 28, 1913, there is this paragraph: "We are now opposing in Washington an attempted registration by this concern of the name 'Brush-Nut' for some tobacco products. This is the beginning of measures which we hope will result in stopping the use of the name by this concern for tobacco products." What was done in that connection?

A. That is what I say was the information we had. And we took it up and found that that information was erroneous. We were informed they were going to do that, and took it up with our lawyers, but found out that they were not going to do it.

Q. In the letter of August 7, 1913, from the plaintiff to the defendant is this statement: "Our president, Mr. Askell, was here yesterday, and your letter of *July* 28th, was presented after the meeting of our Executive Committee. In discussing the situation a suggestion was made which probably has not occurred to you and therefore we submit it to you for your consideration; in view of the splendid success of your Brush-Nut scrap tobacco, would it not be worth while to stimulate your Brush-Nut scrap to have package in a wrapper for your cigarettes, etc." What do you understand to have been the Brush-Nut scrap tobacco package they referred to?

2640

A. The same package I referred to before.

Q. That is, Defendant's Cross Exhibit No. 1. In the letter of August 27, 1919, to the plaintiff from the defendant is this statement: "Your letter of the 7th has been received and its contents noted, and we appreciate very much your suggestion of our use for the cigarette tobacco of the design now upon our scrap package. This thought occurred to us when we were originating a package of the cigarette and was tried out with the result that in our opinion the design was not adaptable to a package of the size of a cigarette package." What did that refer to?

A. The scrap package referred to the same scrap package I just referred to.

Q. And what was the package for cigarettes which is referred to there?

A. Well, the cigarettes had not at that time been put out. The package, the design was afterwards put out, but hadn't been put out at that time.

Q. This letter speaks of a design which was not adaptable to a package the size of a cigarette package. Is there any exhibit here of that design for a cigarette package?

A. Mr. Belt introduced that with his testimony. I have forgotten the exhibit number. It is marked D. 45.

Q. That is all.

No cross examination.

Mr. Cavanagh: Mr. Scott, we have a great number of exhibits or specimens, and you also have a set over here of your goods. It would be too much of a burden, I think, to try to put these in as exhibits. Would you be willing to stipulate that any time hereafter that we want to use them each party, upon an appeal, could use the same?

Mr. Scott: I don't know that it can be part of the record, because we are not going to put them in court.

The Court: You are not going to put them where?

Mr. Scott: If he is not going to put them in as exhibits, I don't see what effect the stipulation is going to have on them, but I can assure Mr. Cavanagh, if he simply wants to list these things, we will list ours and we will take them into the Court of Appeals informally, but I don't see how there can be anything binding about it, if they are not put in in the form of exhibits.

The Court: What are they here for now?

Mr. Scott: For the Court to look at; the exhibits that we introduced were simply to show the place where those labels were used, and the variety of products; I will have to leave it to Mr. Cavanagh for an explanation of his selection.

Mr. Milton: Can't we offer these exhibits as one, and furnish a list to the stenographer, what they consist of?

The Court: I should think so. Maybe the Court of Appeals would like to look at those things.

Mr. Cavanagh: Then, if your Honor please, defendant now offers in evidence, as one exhibit, the Lorillard collection of products which is here before the Court, and we will prepare a list of these various products and furnish a copy for the Court and for the plaintiff, if that is permitted by the Court.

(Received and marked Exhibit D. 48.)

The Court: Perhaps the other side will want a number for their products?

DISCUSSION RE EXHIBITS.

Mr. Scott: Plaintiff offers the collection of plaintiff's products present in the court room, and will furnish the reporter with a list thereof, it being understood that each party may withdraw these from the Court's custody—was that the understanding, or do you want to leave them here?

Mr. Milton: Well, I think we should leave them here.

Mr. Scott. All right. Just leave the offer unqualified.

Mr. Cavanagh: I think we might leave them here, and I would also suggest this, Mr. Scott, with the permission of the Court, that in case of the wear or tear of any of the packages we have on the list or in case any become lost or soiled, that we can replace them with duplicate packages, the same as we did with the stipulation throughout this long case. Packages rapidly become lost or soiled and we would like to substitute any in case one was not according to the list.

(Plaintiff's collection is marked P. 45.)

Mr. Cavanagh: If your Honor please, I would also like to offer as one exhibit, the collection of Mogul, Omar and Camel products as one exhibit.

(Received and marked Exhibit D. 49.)

Mr. Cavanagh: Now, your Honor, there is only one more point that I would like to ask Mr. Scott and counsel for the plaintiff about and that is this, that we have here the original Patent Office exhibits. Now, the stipulation in the Patent Office case in connection with this record is to the effect, and I think counsel will agree with me, and correct me if I am wrong, that all the testimony in the Patent Office case, plus the exhibits and the stipulations, are incorporated in this case, the same as if taken herein. Is that correct, Mr. Johnson?

Mr. Johnson: That is right.

Mr. Cavanagh: And as far as Patent Office exhibits go, I see no necessity, in view of that stipulation of reintroducing them as separate exhibits here. Is that correct?

Mr. Johnson: That is right.

The Court: If they are identified, there is no need of doing it the second time.

Mr. Cavanagh: They are identified. We have a list of them in the Patent Office case.

Mr. Scott: It must be understood that the Patent Office testimony is not reprinted in our large volumes, but there is a separate volume, two volumes, one of the Lorillard Company and one of the Beech-Nut.

Mr. Cavanagh: Defendant would also offer in evidence as Exhibit D. 50, a number of pieces of window display advertising, putting them in as one group exhibit, there being three pieces all told.

(Received and marked Exhibit D. 50.)

DEFENDANT RESTS.

Mr. Scott: We have no rebuttal.

(At this point an adjournment was taken to a date to be fixed by the Court for oral argument. In the meantime briefs are to be exchanged on or about December 1st, and if answering briefs are to be filed, they are to be filed by the respective parties upon the date of the oral argument.)

IN THE UNITED STATES DISTRICT COURT, FOR THE DISTRICT OF NEW JERSEY.

IN EQUITY. No. 3056.

Beech-Nut Packing Company,
Plaintiff,

v.

P. Lorillard Company,
Defendant.

OPINION.
(Filed May 7, 1924.)

MESSRS. OFFIELD, BULKLEY, POOLE & SCOTT, solicitors for plaintiff, (WALTER A. SCOTT, ESQ., of counsel). CHARLES C. BULKLEY, ESQ., and JAMES R. OFFIELD, ESQ., and H. MCCLURE JOHNSON, ESQ., on briefs.

MESSRS. TREACY & MILTON, solicitors for defendant, (LIVINGSTON GIFFORD, ESQ., JOHN MILTON, ESQ., RICHARD B. CAVANAGH, ESQ., of counsel). J. GRANVILLE MEYERS, ESQ., and THOMAS L. PRESTON, ESQ., on briefs.

LYNCH, *District Judge.*

The plaintiff, a New York corporation engaged in the manufacturing and selling of food products, complains that the defendant, a New Jersey corporation engaged in the manufacturing and selling of tobacco, has damaged the plaintiff's reputation and good will by wilfully and fraudulently adopting the plaintiff's trade-mark "BEECH-NUT" as a label for tobacco products, for and on account of which the plaintiff prays an accounting for past damages and an injunction enjoining the defendant from further use thereof. The defendant, admitting the use complained of on certain brands of chewing tobacco and cigarettes, asserts a legal right thereto and prays a dismissal of plaintiff's bill. The word "BEECHNUT or "BEECH-NUT" was years ago adopted as a label by the predecessors in business of both parties to this action. A brief history thereof is advisable.

About 1897 the Harry Weissinger Tobacco Company, a Kentucky concern, adopted it for a combination smoking and chewing tobacco which was put up and sold in small packages. The tobacco was described as being of "superior quality Havana cuttings" and was what was and is known as a scrap tobacco. Following is a copy of the label adopted and used by Weissinger (Exhibit No. 17):

It will be noted that the word "BEECHNUT" is spelled without a hyphen; that the form of the label, in which not only the word "BEECHNUT" appears but a description of the contents and the name of the manufacturer as well, is square and that immediately underneath the word "BEECHNUT" is the print of a squirrel. The tobacco so labeled was sold on the market in Kentucky and adjoining states for a number of years subsequent to 1897. The right to make and sell it passed by assignments, stock transfers and otherwise from the Weissinger Tobacco Company first to the Continental Tobacco Company, next to the Luhrmann & Wilbern Tobacco Company, of Middletown, Ohio, and finally to the American Tobacco Company, where it resided when the latter company was dissolved by the United States Supreme Court during the year 1911. From 1897 to 1911 the tobacco continued to be manufactured, sold and dealt in by these various companies. For some years prior to 1911, however, the demand for it was gradually lessening, the output reaching a very low ebb in 1911. The decree dissolving the American Tobacco Company apportioned to the P. Lorillard Company, the defendant, a large number of tobacco trade-marks and brands, including *the word* "BEECHNUT." At that time the sale of "BEECHNUT" tobacco was practically *nil.* Up to that time, however, at least, the word had been continuously used as a trade-mark for smoking and chewing tobacco in substantially, if not precisely, the original form adopted by the Weissinger Company back in 1897, although, as we have indicated, the sales had almost completely fallen off. And up to this time (1911) the right to use the word "BEECHNUT" as a trade-mark in connection with smoking and chewing tobacco does not seem to have been assailed, certainly not by the plaintiff in this suit or by its predecessor in business.

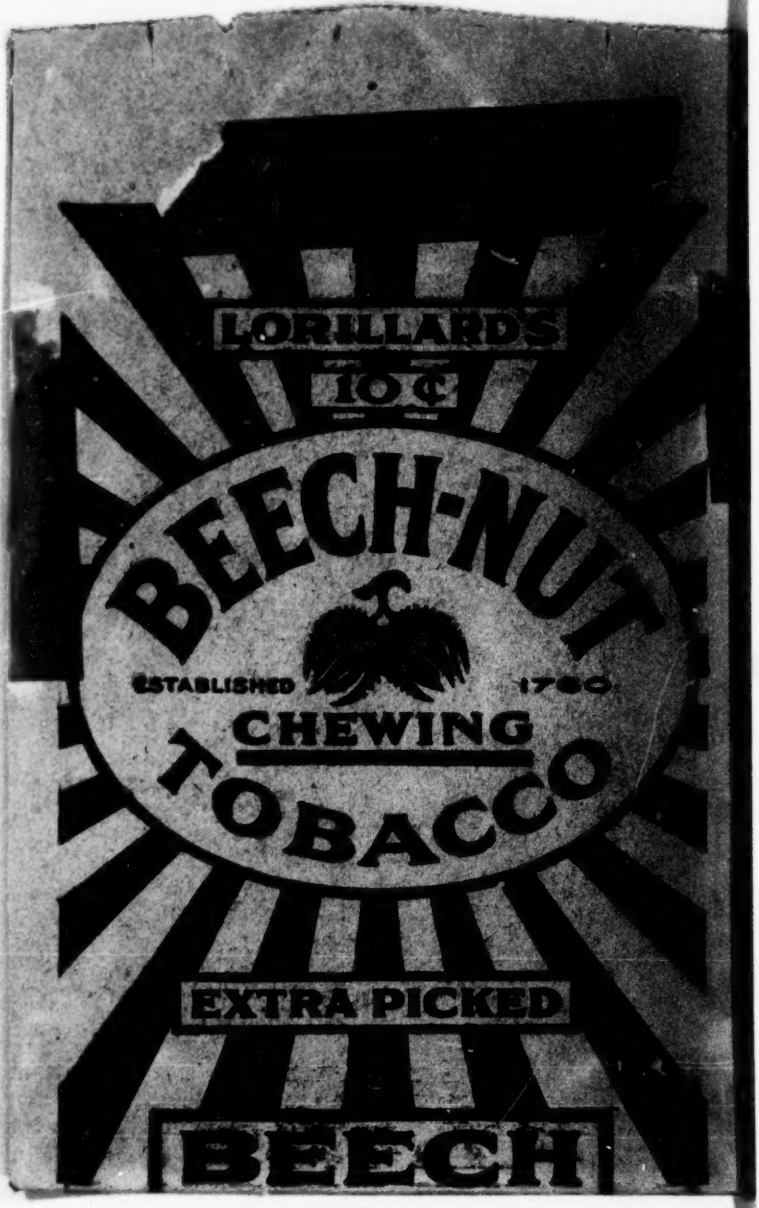
That predecessor was the Imperial Packing Company, which, in 1892, adopted the word "BEECH-NUT" (spelled with a hyphen) as its label for a few food products, such as bacon and ham, which it then manufactured and sold. In about 1899 the Beech-Nut Packing Company was formed, succeeding the Imperial Packing Company. Thereafter the food product business of the plaintiff, growing rapidly, was extended to a variety of products, all relating to food, such as peanut butter, baked beans, chili sauce, tomato catsup, jams, jellies, vinegar, olive oil, ginger ale, mints, chewing gum, etc., in addition to ham and bacon, all of which were labeled "BEECH-NUT" and sold as the product of the Beech-Nut Packing Company. An illustration of the plaintiff's label follows:

It will be observed that this label is oval shaped; that within the oval are three pictures of beechnuts—one in the center and one on each side of the oval. Printed across the top will be found the words "BEECH-NUT BRAND" and across the bottom the name of the particular article which is contained in the package. From the smallest kind of a beginning in 1891 or 1892 the Imperial Packing Company and its successor, the plaintiff, built up a business which in the year 1919 approximated receipts of $12,000,000.

The Lorillard Company had been in the tobacco business for many, many years prior to 1892, utilizing a great variety of trade-marks and labels in the huge tobacco trade which it had succeeded in establishing. The name of brand or trade-mark "BEECHNUT" coming to it in 1911 was not at once utilized in the original Weissinger form or otherwise. Nor were any of the 1000 or more other trade-marks listed on typewritten sheets which the defendant company acquired at the apportionment which we have already referred to. The lists containing all of these names or brands were put aside for future reference.

In 1911 the defendant was manufacturing and distributing such well-known cigarettes as "MURAD," "MOGUL," "EGYPTIAN DEITIES," "HELMAR," "EGYPTIAN TROPHIES" and the well-known tobaccos "CLIMAX" and "SENSATION," besides a large number of other well-known brands. One of these other brands was known as "HONEST." There is testimony on behalf of the defendant company that the sales of this "HONEST" tobacco had, for a long time, been falling off. We think it is common knowledge that tobacco brands come and go. But, be that as it may, the defendant in or about the fall of 1914 conceived the idea of putting upon the market a new scrap chewing tobacco—a new brand. The formula therefor was worked out, the

blend was perfected and a name was considered. The defendant quite naturally consulted its lists of names or trade-marks which a few years prior thereto had come to it from the dissolved American Tobacco Company. Names on that list which had theretofore been identified with scrap tobacco were of course first considered. There were but eight or nine of such names, among which were "BAG PIPE," "PANHANDLE," "METAL LEAF" and "SCRAP IRON." It was discovered that most of these "scrap" names were at the time being used as names for tobaccos then on the market, which fact limited the selection to two or three names. Among the two or three available was "BEECHNUT." So "BEECH-NUT" was selected and adopted. This new scrap tobacco, which was designed for chewing only, was not, however, put out in the old Weissinger "BEECHNUT" wrapper. That old wrapper described "BEECHNUT" as a chewing and smoking tobacco. It had not been manufactured for two or three years and there does not seem to be anything in the case to justify the conclusion that it had been sold during that period of time. It had just about died out, as tobacco brands often do. And as the new "BEECH-NUT" tobacco was of a different character, it was decided by the defendant company to change that old wrapper to one more in accord with the facts and the times. The wrapper decided upon follows:


LORILLARD'S
10¢
BEECH-NUT
ESTABLISHED 1760
CHEWING
TOBACCO
EXTRA PICKED
BEECH

It will be observed that instead of a square label covering almost the entire package the changed wrapper has what has been termed a sunburst or radiating effect, in the center of which is an oval in shape somewhat similar to the oval of the plaintiff. Across the top of the oval inside the word "BEECH-NUT" with a hyphen was placed. Underneath the word "BEECH-NUT" the defendant placed the outline of a beechnut *upside down*. Other words placed by the defendant on its label were "CHEWING," "TOBACCO," "BEECH-NUT LEAF," "FULL WEIGHT," "EXTRA PICK" and across the top was printed "LORILLARD'S." The red band oval of the plaintiff was not adopted. Instead the defendant adopted an oval which was quite similar to ovals which were common at the time. (See the exhibits.)

This new "BEECH-NUT" scrap tobacco, introduced in 1915, within a few years was developed into a business of unbelievable proportions. Selling to the trade at less than the retail price of ten cents per package, its sales in 1919 amounted to $14,000,000 per year to the manufacturer—approximately $2,000,000 over and above the receipts of the plaintiff for its entire output. Many persons inquired concerning it. Some of them wrote to the plaintiff, the Beech-Nut Packing Company, regarding it and the plaintiff for a time turned these letters over to the defendant for attention. Then there developed some correspondence between the parties regarding the use by the defendant of this revised or revamped "BEECH-NUT" label. This correspondence, which contains a history of the case and the attitude of the parties, is important enough to be set out herein. It follows:

"BEECH-NUT PACKING COMPANY
"Canajoharie, N. Y.
"6/11/15

"Lorillard Co.,
"Middletown, O.

"Dear Sirs:

"We adopted many years ago as our trade name the word 'Beech-Nut' arbitrarily selected by us as the mark or name for our manufacturing output of food material. We also associated with such trade name 'BEECH-NUT' and as a part of the trade mark, an oblong or oval frame or border of a red color surrounding and enclosing a white oblong space with a picture or representation of a Beech-Nut centered therein.

"We have built up during the last quarter of a century a vast trade in our products and always with our trade name or trade mark associated therewith. We have expended a very large sum of money in so doing and the word or name 'BEECH-NUT' and our trade mark has become of vast value to us not only for these reasons but for the reason of a high quality and perfection of the various products manufactured by us to which this name and mark has been applied.

"So completely has this name and mark been attached to and associated with our goods during all of these years that the purchasing public has come to recognize this name and mark as our property as to origin and to purchase the manufacture and output to which this name and mark is applied without any further identification as to the origin of the word or name itself, believing that wherever they see our name and mark applied that we are the manufacturers of the product and purchase accordingly.

"We have from time to time added to the variety of our manufacturing commodities to which this name or mark has always been applied, as for example, a chewing gum product of somewhat recent production upon our part. While we have

never as yet manufactured tobacco, the taking on of such manufacture in the future is by no means impossible or improbable. You will also see that the name or word 'BEECH-NUT' is a part of our corporate name. We have been thus particular to state this matter to you by reason of the acts upon your part which now follow.

"We have been shown a lined bag evidently employed for packing 'BEECH-NUT Scrap Tobacco,' apparently manufactured by one of your factories at Middletown, O. A prominent feature upon the bag is our trade name 'BEECH-NUT,' including the oval band and our characteristics burrs and nuts. It is difficult to believe that the presence of our trade name 'Beech-Nut' and mark upon the bag will not deceive the purchasing public in the belief that the contents of the bag are of our manufacture, and to us there is no other explanation to be given to the presence of our trade name 'Beech-Nut' and mark upon this bag except the intention on your part that the public shall be so deceived: and you will sell your tobacco by reason of the presence thereon of our name and mark. In other words, these acts strongly indicate to us intentional unfair trading.

"We have decided in the first instance to write you fully as to this matter and present to you our view of your acts and to request to you immediately to cease this use of our name and mark and give us written assurance of the same.

"We have confidence that now your attention is called to it you will recognize the justice of our position and that there will hereafter be no necessity of using any harsher course to enforce recognition of the same. We have been thus particular also for the reason that there can be no contention hereafter that we have not fully stated your position and ours in this matter. An early reply upon your part is requested and expected.

"Yours very truly,

"BEECH-NUT PACKING CO.,
"F. E. Barbour."

"BEECH-NUT PACKING COMPANY
"Canajoharie, N. Y.
"6/18/15

"P. Lorillard Co.,
"Middletown, O.

"Dear Sirs:

"Will you kindly advise if we may expect an early reply to our recent communication with reference to the use of the word 'Beech-Nut' in connection with your new brand of chewing tobacco?

"Yours very truly,
"BEECH-NUT PACKING CO.,
"F. E. Barbour."

"June 23, 1915.

"Beech-Nut Packing Company,
"Canajoharie, N. Y.

"Dear Sir:

"Your letters of June 11th and June 18th addressed to this company at Middletown, Ohio, relative to the use by us of the name 'Beech-Nut' for Scrap Tobacco, have been referred to me.

"Preliminary to any discussion of the matter, will you be good enough to let me know when you first began to use the name 'Beech-Nut'? I notice on your letterhead, 'Incorporated 1899,' but this of course does not necessarily mean that you began to put products on the market under the name 'Beech-Nut' at that time.

"The statement in your letter of June 11th, that you believe we are using the name 'Beech-Nut' with the intention that the public shall be deceived into thinking that our product is of your manufacture, is not only without the slightest warrant, but is little short of ridiculous. As a matter of fact, if such an impression should be formed, it would be to our detriment.

"Yours very truly,

"TSF/L"

"BEECH-NUT PACKING COMPANY
"Canajoharie, N. Y.
"7/2/15

"P. Lorillard Co.,
"119 West 40th St.,
"New York.
"Mr. Thomas S. Fuller.

"Dear Sirs:

"Your favor of the 23rd ult. duly received.

"Our 'BEECH-NUT' trade mark and trade name has been used by ourselves and our predecessors since and prior to the year 1891. Both our trade mark and our trade name 'BEECH-NUT' has been used continuously since that date in our business and to such an extent and in such manner that both the name and the mark long since came to have a 'secondary significance and meaning'; that is, wherever the mark and name 'BEECH-NUT' is seen and no matter with what product it is associated with, it has a 'secondary significance' and means only the product and products of the Beech-Nut Packing Company.

"You are woefuly mistaken and entirely misinformed in your assumption and, indeed, your statement that the public is not deceived by your clients use of our trade mark and name 'BEECH-NUT.' We know as an absolute truth what is apparent on the face of the facts that the general purchasing public is deceived by your use of our 'Beech-Nut' trade mark and trade name and, indeed, this could not well be otherwise, but we know further that your salesmen and agents deliberately push your goods and trade under this identity of use of their mark and name.

"We beg to call your attention in this connection to our former communication to you in this matter and to again urgently request that you immediately stop the use in every way and manner of our trade name and mark 'BEECH-NUT,' in your business without further action upon our part.

"Yours very truly,
"BEECH-NUT PACKING CO.,
"F. E. Barbour."

"Beech-Nut Packing Company,
"Canajoharie, New York.
"(Attention F. E. Barbour, Esq.)

"Gentlemen:

"We have your letter of July 2d, further with reference to our use of the name 'Beech-Nut' on scrap tobacco, and informing us that you and your predecessors have used the name since and prior to the year 1891.

"That the name 'Beech-Nut' has acquired a secondary significance and meaning in the packing industry and is associated in the public mind with goods of your manufacture may be perfectly true, but this would not give you the right to the name for all purposes. The authorities are overwhelming on the subject. You seem to proceed upon the assumption that we have recently begun to use the name on the tobacco. This is not the case. This Company and its predecessors in ownership of this brand have used it continuously since prior to the year 1898, as shown by records in my office. I have not made a search beyond that time, but I have no doubt that I can find that the brand is very much older.

"We would not desire to have it thought that our 'Beech-Nut' tobacco is made by your Company, and if you can give us the name of any salesman of ours who has made such a representation, we would be very glad to have it, and we can assure you that if he did make such a representation, his discharge will immediately follow. It could be of no conceivable advantage to us to have the public think that our tobacco product was manufactured by a packing establishment. Our concern has been in business for more than one hundred and fifty years, and in that length of time has built an enviable reputation for the excellence of its tobacco products.

"Though you may turn out an excellent quality of bacon, it does not follow that you could turn out an excellent quality of tobacco, or steel rails, or pianos or aeroplanes. If your conten-

tion were true, we, who have a brand of tobacco called 'Climax,' could enjoin the use of the name on a well-known threshing machine which is sold in the Western States, or we could enjoin the use of our name on the Lorillard Refrigerators. It has never occurred to us to attempt either.

"If you will look at our package of Beech-Nut Tobacco, you will see that the name 'Lorillard' is prominently displayed thereon. This was done with the desire that people should know the tobacco is coming from the Lorillard Company. It has been our belief that the fact that Lorillard made it would of itself be of value to the brand.

"It is difficult to see how you can seriously claim that there is the slightest similarity in the marking of the package and the fac-simile of your mark as displayed on your letterhead.

"If you desire me to point out to you authorities which I consider completely sustain my view as expressed herein, I will take pleasure in doing so.

"**Yours very truly**

"TSF/L"

"BEECH-NUT PACKING COMPANY

"Canajoharie, N. Y.

"7/26/15.

"P. Lorillard Co.,
"119 West 40th St.,
"New York.
"Thomas S. Fuller.

"Dear Sirs:

"Please pardon the delay in acknowledging receipt of your favor of July 8th.

"We will greatly appreciate it if you will send us samples of your product showing the manner of use of the word 'BEECH-NUT' since the year 1898, copies of advertisements or of letter-heads showing your use of this name. We trust you will consider this a fair request as we would like

to reach a prompt and friendly termination of the correspondence on this subject.

"We also desire to take advantage of the offer contained in the last paragraph of your letter to point out to us the authorities which sustain your views.

"Thanking you in advance for the information requested herein, we remain,

"Yours very truly,

"BEECH-NUT PACKING CO.,

"F. E. Barbour."

"BEECH-NUT PACKING COMPANY

"Canajohorie, N. Y.

"9/2/15.

"Mr. Thos. S. Fuller,
"119 W. 40th St.,
"New York.

"Dear Sir:

"Kindly refer to your favor of July 29th in which you advised that you would collect the information requested in our letter of July 26th after your return from a week's absence. Up to the present we do not seem to have heard from you and will greatly appreciate the information requested.

"In this connection, we received today an inquiry from New River Gro. Co., Hinton, W. Va., asking the best jobbing price on Beech-Nut scrap tobacco, from which you will note that in the minds of some, at least Beech-Nut scrap tobacco is credited to the Beech-Nut Packing Co.

"Thanking you to favor us at your early convenience, we remain,

"Yours very truly,

"BEECH-NUT PACKING CO.,

"F. E. Barbour."

"September 15, 1915.

"F. E. BARBOUR, ESQ.,
"BEECH-NUT PACKING COMPANY,
"Canajoharie, N. Y.

"Dear Sir:

"I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco and enclose them herein. I am also sending you an old package showing the use of the name 'Beech-Nut' and our present package.

"Beech-Nut chewing and smoking tobacco (scrap) was made by Harry Weissinger Tobacco Company, of Louisville, Kentucky. This Company was bought out by The American Tobacco Company some time in 1903. Prior to the acquisition of the Weissinger Tobacco Company by the American Tobacco Company the Luhrman & Wilbern Tobacco Company of Middletown, Ohio, was acquired by the Continental Tobacco Company. In 1904 the American Tobacco Company and the Continental Tobacco Company were merged into a new company formed for that purpose and known as The American Tobacco Company.

"Under a decree of the Circuit Court of the United States for the Southern District of New York, the so-called Tobacco Combination, which included The American Tobacco Company, was split up. In this disintegration proceeding the Luhrman & Wilbern Tobacco Company, which had always been maintained as a separate entity, was acquired by P. Lorillard Company. In the meantime some of the brands formerly manufactured by the Weissinger Tobacco Company had been taken over and manufactured in the Luhrman & Wilbern factory in Middletown, and after the acquisition by our Company of the Luhrman & Wilbern business, including these brands, we continued to operate it as a separate Company until about two years ago, when we dissolved it, taking over all of the business and brands directly in our own name.

"I give you this history so that you may understand the various price lists in the name of Luhrman & Wilbern Tobacco Company and the package in the name of Harry Weissinger Tobacco Company. I do not know the exact date of the old package, as the stamp is not legible, but it was prior to 1903.

"The price lists that I send you are dated January 2, 1904; May 6, 1907; July 1, 1910, and November 3, 1910.

"It is difficult for me to see how anyone can claim that there is any similarity in our products and yours, or in your label and ours, other than the name 'Beech-Nut.' Your claim that we would not have the right to use the name 'Beech-Nut' on tobacco products must find its basis in the idea that you can appropriate the name 'Beech-Nut' for all products of whatever character.

"That the law does not permit of such a claim is elementary. If your claim were maintainable, then the Lion Brewery in New York could enjoin the manufacture of Lion brand collars, or vice versa. Suppose that the J. B. Williams Company should tomorrow put out a new brand of shaving soap called 'Beech-Nut.' Do you argue that you could stop it because you have first used the name on ham and bacon? It seems to me that your argument must lead to this conclusion. The law of unfair competition, so far as it assumes to protect the public, assumes to protect the purchaser of average intelligence. It is difficult to believe that a person of average intelligence who enters a store for the purpose of buying 'Beech-Nut' hams or bacon could be deceived into thinking he was getting either if he were handed a package of 'Beech-Nut' chewing tobacco, or that the 'Beech-Nut' chewing tobacco was manufactured by the manufacturer of the hams and bacon. It is no more the custom in this country for a packer to manufacture chewing tobacco than it is for a manufacturer of beer to manufacture collars, and the purchaser of average intelligence perfectly well knows this.

"We have tried to make it evident on our package that our 'Beech-Nut' chewing tobacco is of our manufacture, by stamping across the top of the package, before the name, 'Beech-Nut' 'Lorillard's'. We have also on the other side of the package, plainly printed that it is manufactured at Middletown, Ohio. There is nothing in the get-up of the label, whether in design, color or wording, which could suggest to a person of average intelligence that it was of your manufacture, or in fact the manufacture of anyone except the Lorillard Company.

"As I have written you before, we consider it of immense value to the brand itself that it is manufactured by the Lorillard Company, and we desire the consumers of tobacco to know this, because we believe that the Lorillard name carries with it a vast amount of good-will and a guarantee of excellence. We are justified in this belief by reason of the immense increase in the sales of 'Beech-Nut' Scrap since we took the former manufacturer's name off and put 'Lorillard's' thereon.

"I think this covers the situation except with respect to any representations which you claim that some of our salesmen made, to the effect that our 'Beech-Nut' Scrap was a product of your Company. I have written you before that if you will give me the name of any salesman who has made such representation, and that fact can be determined, his discharge will be immediately forthcoming, as he can be of no service to us. If you will point out to me anything in the conduct of our business which tends to create a belief in the trade that our 'Beech-Nut' Scrap is made by you, we will thank you, so that we may rectify it. I assure you that we are just as anxious as you are, if not more so, to prevent any impression that our tobacco is made by you. Will you

let me have a copy of the letter you received from the merchant in West Virginia making inquiry of you for 'Beech-Nut' tobacco?

"On this general subject, if you have not already done so, you might consult Nims on Unfair Business Competition, pages 200 to 300; therein I think you will find a very complete and satisfactory discussion of the law governing this subject. I will quote you paragraph 117 on page 236:

> " 'Property in a place name for all purposes cannot exist in one person, under ordinary circumstances. The defendant must be using it in the same or a similar business as the plaintiff. Large amounts of rubber as well as licorice might be found in Anatolia. If there were, the rights which the complainant has acquired in the use of the name in the licorice business, would not prevent another under certain conditions from acquiring a sole right to use the name in the rubber trade.'

"There is no distinction so far as the principle here laid down is concerned between a place name, a generic name, or a fanciful name. You might also consult the cases of Bordens Ice Cream Company against Bordens Condensed Milk Company, 201 Fed. 510, and Wells v. Ceylon Perfume Company, 105 Fed. 621.

"I apologize for the length of this letter. I desire to give you the facts fully, together with our views, and I sincerely hope that this will satisfy you as to the law and our entire good faith. We are as proud of our good-will and the excellence of our products in the tobacco business as you are of yours in the packing industry, and we believe with good reason.

"Yours very truly,

"(Sgd.) THOS. S. FULLER."

"BEECH-NUT PACKING COMPANY
"*Canajoharie, N. Y.*

"9/20/15.

"Mr. Thos. S. Fuller,
"119 West 40th St.,
"New York.

"Dear Sir:

"We have your very interesting letter of Sept. 15th together with the price lists referred to and the package of tobacco.

"Your letter is a very interesting one and before giving a definite reply to same, desire to review the matter as presented by you so that we can give you an intelligent reply.

"At this time, however, we may express our agreement with you that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence. So does the name 'Beech-Nut Packing Co.' and we take the view that the increase in sales of Beech-Nut Scrap Tobacco is due to the exploitation of the name 'Beech-Nut' with the oval label, and we cannot help but assume that the general impression is that these goods are manufactured by this Company rather than by Lorillard, at least to a considerable degree, for since writing you last we have another inquiry, and this time from Wm. Edwards Co., of Cleveland, O., asking us to ship them five cases of Beech-Nut scrap tobacco. The previous inquiry came from New River Gro. Co., Hinton, W. Va.

"Yours very truly,

"BEECH-NUT PACKING CO.
"F. E. Barbour."

After this correspondence terminated in 1915 no action of any character was taken by the plaintiff as against the defendant. For four years thereafter there was inactivity on the part of the plaintiff during all of which time the defendant continued to deal in this

"BEECH-NUT" scrap chewing tobacco on a very large scale.

In 1919 the Lorillard Company planned to put on the market a "BEECH-NUT" cigarette and again there ensued some correspondence between the parties relative to this. (See correspondence, Record, p. 15, etc.) Negotiations between the parties relative to the right of the defendant to use "BEECH-NUT" as a label for cigarettes terminated without result. Thereafter the Beech-Nut Packing Company decided to apply for registration of "BEECH-NUT" for cigarettes, which application was published in the Patent Office Gazette and the Lorillard Company, upon learning of it, filed a notice of opposition in the Patent Office, where a hearing was had. The proceedings, a copy of which is by stipulation a part of this case, resulted in the denial of the plaintiff's application from which the plaintiff did not appeal.

In May, 1921, the plaintiff instituted its present cause of action, alleging that the defendant has injured its business good will—has appropriated the good will of the plaintiff to its own uses.

One of the defenses interposed is that of estoppel, the following extract from the opinion of Judge Mayer in the case of Valvoline Oil Co. v. Havoline Oil Co., 211 Fed. 189, being called to our attention:

> "It cannot be equitable for a well-informed merchant with a knowledge of a claimed invasion of right to wait to see how successful his competitor will be and then destroy, with the aid of a court decree, much that the competitor has striven for and accomplished, especially in a case where the most that can be said is that the trade-mark infringement is a genuinely debatable question."

To the point of estoppel the plaintiff replies that the testimony taken in the Patent Office proceedings

first revealed to it that the defendant had abandoned the "BEECHNUT" label or trade-mark which was acquired in 1911; that it, from 1915 on, relied on the representation of the defendant as to facts which were peculiarly within the knowledge of the defendant and inaccessible to it, which upon their face (as furnished by the defendant) gave the defendant the indefeasible right to go on with the "BEECH-NUT" scrap tobacco; that the Patent Office proceedings disclosed that there was no continuous use of "BEECH-NUT" as a label for tobacco as the defendant had stated to it in 1915 but that the label "BEECHNUT" so allotted in 1911 had been abandoned and that some years thereafter a new trade-mark containing the word "BEECH-NUT" was adopted —the facts showing that there was a clear intention on the part of the defendant to abandon the old "BEECHNUT" label and to substitute for it one similar to that used by the plaintiff.

Did the defendant abandon "BEECHNUT" as a label for tobacco by permitting the word to lie dormant for three or four years and then reviving it in the manner which has already been described?

In considering this question it should be constantly kept in mind that the right to use a word for trade-mark purposes is usually, if not always, confined to "merchandise of the same descriptive properties." The limitation of the scope of trade-marks "to merchandise of the same descriptive properties" (Sec. 5 [b] Trade Mark Act, February 20, 1905) was adopted in the statute as an expression of the scope designated in the decisions of the Court under the common law (Hanover Star Milling Co. v. Metcalf, 240 U. S. 403, 412-14), and the classification of the Patent Office by which "tobacco products" were placed in Class 17 by themselves, is an expression of legal scope by an authority which raises a presumption. Likewise, the placing of "foods and in-

gredients of foods" in a class by themselves, No. 46, raises a presumption that the scope of trade-marks adopted for foods and ingredients of foods is not to extend over other classes. If any cases are to be found which seem to depart from this rule, examination will show either that they involved facts showing actual fraud or bad faith or the equivalent thereof (Peninsular Chem. Co. v. Levinson, 247 Fed. 658), or that the two articles of merchandise are habitually used in conjunction, as was the case of the flour and syrup in Aunt Jemima Co. v. Rigney Co., 247 Fed. 407, C. C. A. 2, of steam apparatus and steam traps to be used therewith in Simplex v. Gold, 43 App. D. C. 281, of electric lamps and incandescent mantles in Anglo Co. v. General Co., 43 App. D. C. 385, and of automobile tires and automobiles in Akron-Overland Tire Co. v. Willys-Overland Co., 273 Fed. 674.

In Peninsular Chemical Co. v. Levinson (C. C. A., 6th Cir.), 247 Fed. 658, the Court held as stated in the first point of the syllabus:

> "Where the certificate of registration of a trade-mark recited that it was used for chemicals, medicines and pharmaceutical preparations, the trade-mark did not include cigars, for they cannot be said to be of the same descriptive properties as the specified articles, even though they are usually sold at drug stores."

As we shall see, the fundamental doctrine in this country, as declared by the Supreme Court of the United States in the Hanover Star Milling Company cases (240 U. S. 403, 412-414) and reiterated by that court in the Rectanus case (248 U. S. 90, 97), is that there is no such thing as property in a trade-mark except as a right appurtenant to the established business or trade in connection with which the mark has been applied so that a trader has no property in the

mark *per se* but only in reference to his trade, and cannot prevent another trade from applying this mark to goods which are not of the same description.

Indeed the books are full of cases illustrating and applying the well-settled doctrine that in this country the same mark may be used by different concerns for different articles, notwithstanding these articles are packaged and sold in the same stores.

Examples are:

Candy and breakfast foods (Paul F. Baich Co. v. Kellogg Co., 49 App. D. C. 186, 262 Fed. 640).

Milk and ice cream (Borden Ice Cream Co. v. Borden's Condensed Milk Co., C. C. A. 7th, 201 Fed. 510; Borden's Condensed Milk Co. v. Eagle Mfg. Co., 47 App. D. C. 191).

Cereals and macaroni (Quaker Oats Co. v. Mothers Macaroni Co., 41 App. D. C. 254).

Cheese and butter (Lawrence v. Sharpless, 203 Fed. 762, affirmed C. C. A., 3d, 208 Fed. 886).

Fountain pens and hair brushes (National Picture Theatres v. Foundation Film Corporation, C. C. A., 2d, 266 Fed. at p. 211, note).

Soap and hair tonic, hair dye, perfumery and dentrifice (Barclay v. Casell Barrie, 5 T. M. Rep. 86).

These cases are but an application of the broader doctrine that in this country there is no such thing as a universal trade-mark which would be the practical result of adopting the position taken by plaintiff's counsel. For under modern conditions for purposes of sanitation, convenience and attractiveness to the consumer, all sorts of commodities are packaged and sold in the same stores, even over the same counters, regardless of their inherent qualities or conjoint use, as for instance, handkerchiefs and hairpins, pens and playing cards, razors and rubber goods, candy and candles, soap and soup, tomatoes and tobacco.

Many instances of the use by one concern of a word as a trade-mark for tobacco and the use by a different concern of the same word as a trade-mark for products of a different character have been called to our attention.

There are "MOGUL" cigarettes and there are "MOGUL" food products, such as evaporated milk, tapioca, sugar, red pepper, almond flavor and peppermint.

There are "CAMEL" cigarettes and there are "CAMEL" food products, such as canned corn, tomato catsup, rolled oats, oysters, ginger and sweet pickles.

There are "OMAR" cigarettes and there are "OMAR" food products, such as vanilla, plums, waxed beans, sauer kraut and coffee.

There is "STAR" tobacco and there are "STAR" soap and washing fluid.

There are "SUNSHINE" cigarettes and there are "SUNSHINE" biscuits.

There are "POLO" cigarettes and there are "POLO" canned goods.

There is "CLIMAX" tobacco and there are "CLIMAX" chocolate dates.

There is "APPLE" tobacco and there is "APPLE" chewing gum.

It will thus be observed that the distinction between tobacco and food products has for a long time been quite generally recognized.

Next we shall refer to the law of "abandonment."

In Baglin v. Cusenier Co., 221 U. S., at pages 597-8, the Court said:

> "But the loss of the right of property in trade-marks upon the ground of abandonment is not to be viewed as a penalty either for non-user or for the creation and use of new devices. There must be found an *intent* to abandon, or the property is not lost;"

In Saxlehner v. Eisner, 179 U. S. 31, the Court says:

> "To establish the defence of abandonment it is necessary to show not only acts indicating a practical abandonment, but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed."

In Brown on Trade Marks, Sec. 681, it is said:

> "A person may temporarily lay aside his mark and resume it without having in the meantime lost his property in the right of user. Abandonment, being in the nature of a forfeiture, must be strictly proved. . . . A defence of abandonment is abhorrent even in an action at law and the assertion of title on the ground of abandonment by the prior owner must be established by the strongest proof. Mere lapse of time does not *per se* warrant the conclusion of abandonment. The circumstances of the case, other than mere lapse of time, almost always give complexion to the delay and either excuse or give it a conclusive effect."

And in Hopkins on Trade Marks, (3rd) p. 213, appears the following:

> "The length of time during which a trade mark is not used is, as we have seen, merely a circumstance to be considered with all the other facts in the case in determining whether there was an intention to abandon its use. Thus, defendants have been restrained from using a mark that has lain in disuse for periods of one year, three years, four years, nine years, ten years, and even twenty years. The vital question is the intention of the owner of the mark and the burden of establishing abandonment lies upon the party who affirms it."

In a comparatively recent case of Wallace & Co., v. Repetti, 266 Fed. 307, the Circuit Court of Appeals

for the Second Circuit, speaking through Judge Manton, said:

> "In order that an abandonment may be established as a defense, it is essential to show, not only acts indicating practical abandonment, but an intent to abandon. Thus, where the appearances may be sufficient to indicate an abandonment, this may be satisfactorily explained by showing a want of intention to relinquish the right claimed. Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60. There is no penalty which inflicts the loss of right of property in trade-marks by non-usage, unless there also be found an intent to abandon" (p. 308).

In Monson & Co. v. Boehm, L. R. 26 ch. D. 398, a leading case here (See Saxlehner v. Eisner, 279 U. S. at 31) as well as in England, the court held as stated in the syllabus:

> "In order to deprive a manufacturer of his right to a trade-mark, the use of which has been practically given up for a period of five years, mere discontinuance of user for lack of demand, though coupled with non-registration and non-assertion of any right, is not enough; there must be evidence of distinct intention to abandon."

In Baglin v. Cusenier Co., *supra,* the Supreme Court said, as we have seen, that abandonment was not to be viewed as a penalty for the "creation and use of new devices."

When the defendant received the list containing these trade-marks including "BEECHNUT" in December, 1911, it filed that list with its records. There is undisputed testimony in the case that trade-mark names are valuable, have unlimited values, and so far as appears, the only tangible thing received by the defendant at the time was the list of words, including

"BEECHNUT." That list was not destroyed but was put away where it was consulted from time to time.

On three different occasions at least the defendant took from this list names for use as labels for tobacco products, to wit: "COMET," "PIONEER" and "YACHT CLUB." Reviewing the conduct of the defendant, one must conclude, it seems, that it intended to retain all of these listed names and avail itself of them from time to time as the situation of its business suggested. For three years there was no act on the part of the defendant which would tend to indicate in the slightest degree that the word "BEECHNUT" had been or was to be abandoned. When it is remembered that there were a thousand or more names on the list, the mere non-usage of one word for that period would not in itself amount to abandonment. So we find that in the fall of 1914 there had been no abandonment of "BEECHNUT" on the part of the defendant.

The other aspect of the question is whether in reviving the use of "BEECHNUT" as a label for its tobacco products, there was effected an abandonment because the defendant in 1914 changed both the old Weissinger formula and the old label in favor of a new kind of tobacco and a different label.

Change of formula has never indicated abandonment. The contrary is the ruling of the courts.

In Royal Milling Co. v. J. F. Imbs Milling Co., 44 App. D. C. 207, the Court of Appeals for the District of Columbia, says:

> "The trade-mark is not to be vitiated by change in the species of wheat used any more than it would be vitiated by an important change in the process of making flour."

In Ball and Gunning Milling Co. v. Mammoth Spring Milling Co., 48 App. D. C. 243 (1918), the Court

of Appeals for the District of Columbia, following its earlier ruling in Royal v. Imbs, *supra,* said:

> "Appellant first contends that Appellee has abandoned or forfeited its mark, because prior to 1907 it used the mark on its highest grade flour, but about that time produced and sold under another name a better grade of flour. There was no contention in the Patent Office, nor is there here, that the standard of quality of the 'Golden Gate' brand was lowered; in other words, there is no evidence that the Golden Gate brand is not as good today as it was when the mark was adopted. These facts bring the case within the ruling in Royal Milling Co. v. J. F. Imbs Milling Co. (44 App. D. C.) where a mark that had been used on flour made from soft wheat was used on flour made from hard wheat of the same grade and it was held there had been no misrepresentation."

The defendant acquiring the right to use the word "BEECHNUT" for tobacco purposes found that the particular formula of tobacco which had been sold for both smoking and chewing purposes by the predecessors who controlled the trade-mark was practically dead. The defendant, under the circumstances, certainly had the right to endeavor to revive this old tobacco, if it could, and it seems to the court that it also had the right to improve it, if it could, improve the tobacco in any way which would make it marketable. Tobacco is tobacco, but there are many, many blends, mixtures, etc. Adopting a new formula, therefore, did not, in the opinion of the court, work an abandonment. Next, as to the right of the defendant to change the label:

In the case of United Barber's Service Co. v. Canalaito, 12 T. M. Rep. 265, a case before the Commissioner of Patents for cancellation of a registered trade-

mark, "X-Ray," it appeared that the owner and registrant had proven use of the mark since 1914, while the plaintiff or petitioner proved use since 1915. The commissioner dismissed the petition, holding

> "The fact that the first labels were in manuscript and printed labels were used only from 1918, does not matter, as the use was continuous.
>
> "Nor does the fact that the printed labels used in 1918 first showed the picture of a woman, though use was claimed since 1913, . . . , as the word 'X-Ray' is the essential feature of the mark."

This decision was affirmed by the District of Columbia Court of Appeals, January, 1923. Vol. 13 T. M. Reporter, p. 137.

In Hier v. Abrahams, 82 N. Y., 519-525, the Court held:

> "But where the trade mark consists of a word it may be used by the manufacturer who has appropriated it in any style or print or form of label and its use by another in any form is unlawful. . . . The trade mark consisted in the word simply and the plaintiff might have printed it on any form of label they might fancy without losing the protection of the law."

Hopkins on Trade-Marks (3rd), p. 214, says:

> "the adoption of a new label or brand is, of course, an abandonment of all the distinctive features of the old label or brand not preserved in the new one."

In the instant case the defendant did not actually copy the plaintiff's trade-mark. We do not think it is contended that the defendant used an exact reproduction of the plaintiff's oval or colors. If it did, the question involved might be quite different. An examination of them will demonstrate that they do not resemble each other closely.

There is nothing in the record to indicate that the old Weissinger squirrel label was attractive to any purchaser either because of its color or design. Whatever sales were effected do not appear to have been effected because of the label. Although it carried the picture of a squirrel, the tobacco was always referred to, so far as we are aware, as "BEECHNUT" and not otherwise. There does not appear to be any particular reason why a squirrel should appear under the word "BEECHNUT" rather than the picture of a beechnut. The old formula was not to be dealt in any longer and it seems to us that the change in the formula justified a change in the decorative feature of the package which was to contain this new blend or mixture. So the label was modernized, made attractive. Is it not common knowledge that many old standard tobaccos are now ornamented considerably differently than they were years ago? Boxes, containers and packages for tobacco have undergone many improvements during the past twenty years. To hold that the rightful owner of an established trade name may not redecorate or reornament or, to use a somewhat inelegant phrase, polish it up, would be, in our opinion, unreasonable. So the defendant, availing itself of the right to redecorate and reornament its label, adopted as the main change, as a comparison will promptly disclose, what has been called a sunburst or radiating effect. Nothing like this sunburst or radiating effect appears on the labels of the plaintiff and the fact that the defendant adopted it demonstrates conclusively, it seems, that there was no attempt on the part of the defendant to copy or imitate the standard mark of the plaintiff. Not only was there a sunburst or radiating effect placed upon this new label, which, by the way, overshadows most of the other features of it, but instead of there being three colored photographs of a

beechnut, the defendant placed the red outline of one in an inverted position. The plaintiff argues that the two trade-marks are so similar that the public thinks that they are the same. If one should eliminate the word "BEECH-NUT" from both labels, it would be extremely difficult to locate any similarity at all between them. And each party has the right to the word "BEECH-NUT" for its distinct product. It may be that what the defendant did in changing the old Weissinger label has amounted to an abandonment of the squirrel and other decorative features of that old label which have been omitted from the revised label, but the court is unable to agree that the word "BEECH-NUT" was abandoned simply because a hyphen was utilized in addition to the adoption of different decorative features, the main feature of which is a sunburst or radiating effect unknown to any label of the plaintiff which has been called to our attention.

What we have said relative to the defendant's right to use the word "BEECH-NUT" in connection with tobacco applies also to the cigarette feature of this cause. Cigarettes contain tobacco and are smoked. The trade-mark acquired by the defendant was for smoking and chewing tobacco and, as we have already pointed out, it is our opinion that the blend or formulas could be changed and the labels could be redecorated without effecting an abandonment of the word.

There being no abandonment on the part of the defendant, the bill should be dismissed.

DECREE.

(Filed June 17, 1924.)

This cause having come on to be heard, and having been argued by counsel, and the Court being fully advised in the premises; thereupon, upon full consideration thereof,

IT IS ORDERED, adjudged and decreed, that plaintiff's bill of complaint herein be and the same is hereby dismissed without costs to either party.

CHARLES F. LYNCH,
United States District Judge.

Dated June 17, 1924.

Approved as to form.

.....
Counsel for Plaintiff.

.....
Counsel for Defendant.

UNITED STATES OF AMERICA,
DISTRICT OF NEW JERSEY, } *ss.:*

I, GEORGE T. CRANMER, Clerk of the District Court of the United States of America, for the District of New Jersey, in the Third Circuit, do hereby certify the foregoing to be a true copy of the original decree on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District, this 17th day of December, nineteen hundred and twenty-four.

(Seal)

GEORGE T. CRANMER,
Clerk, District Court, United States.
By R. S. CHEVRIER,
Deputy.

ASSIGNMENT OF ERRORS.

And now comes the plaintiff, Beech-Nut Packing Company, by its solicitors, having prayed to appeal to the United States Circuit Court of Appeals, for the Third Circuit, from the decree of the District Court of the United States for the District of New Jersey, made and entered the seventeenth (17th) day of June, 1924, and respectfully makes and files this its assignment of errors; that the said District Court of the United States for the District of New Jersey erred in the following particulars:

1. The Court erred in making and entering its decree dismissing the bill of complaint.

2. The Court erred in not finding that plainaiff's common law rights and statutory rights in its "Beech-Nut" trade-mark include the exclusive right to use said trade-mark upon and in connection with tobacco and tobacco products.

3. The Court erred in not finding that the use of the "Beech-Nut" trade-mark by defendant upon tobacco and tobacco products in and since the year 1915 infringed plaintiff's common law and statutory rights in its "Beech-Nut" trade-mark.

4. The Court erred in not finding that the use of the "Beech-Nut" trade-mark by defendant upon tobacco and tobacco products in and since the year 1915 constituted unfair competition with plaintiff's business.

5. The Court erred in not finding that defendant before using the "Beech-Nut" trade-mark upon to-

bacco or tobacco products had abandoned any rights which it might ever have possessed in the "Beechnut" trade-mark previously used by the Luhrman & Wilbern Company and its predecessor, Harry Weissinger Tobacco Company.

6. The Court erred in not finding the discontinuance of use by the Luhrman & Wilbern Company of its "Beechnut" trade-mark in the year 1910 and the nonuse at any time thereafter of said trade-mark by either said Luhrman & Wilbern Company or defendant to have constituted abandonment thereof.

7. The Court erred in not finding that the unanimous and uncontroverted testimony of the many ultimate purchasers who were examined as witnesses that they believed defendant's product bearing the "Beech-Nut" trade-mark to be plaintiff's product establishes the fact that plaintiff's right to the exclusive use of said trade-mark extends to and includes its use upon tobacco and tobacco products.

8. The Court erred in not finding the intention by defendant to abandon the Luhrman & Wilbern Company "Beechnut" trade-mark in defendant's adoption in the year 1915 of a trade-mark containing the word "Beech-Nut" with an accompanying design substantially identical with plaintiff's trade-mark and unlike the Luhrman & Wilbern Company "Beechnut" trade-mark in every particular.

9. The Court erred in not finding the intention by defendant to abandon the Luhrman & Wilbern Company "Beechnut" trade-mark in defendant's admitted knowledge that its use of the "Beech-Nut" trade-mark adopted by it in the year 1915 caused confusion in

trade and induced the purchasing public to believe that defendant's goods bearing said trade-mark were the product of plaintiff.

10. The Court erred in not finding that defendant did not acquire from the Luhrman & Wilbern Company any title or rights of any kind in the "Beechnut" trade-mark which is alleged to have been used by said Luhrman & Wilbern Company in and prior to the year 1910.

11. The Court erred in not finding that the owner of a trade-mark is without right in law to separate out a single element of his trade-mark and combine the separated element with an imitation of the trade-mark of another and thereby cause confusion in trade and induce the purchasing public to believe that his goods are the goods of such other party.

12. The Court erred in not finding that, regardless of abandonment or non-abandonment of the Luhrman & Wilbern "Beechnut" trade-mark by defendant, defendant had no right in law to so use a single element of said Luhrman & Wilbern trade-mark as to cause confusion in trade and induce the ultimate purchasers to believe that defendant's goods were the product of plaintiff.

13. The Court erred in not finding, regardless of the abandonment or non-abandonment of the Luhrman & Wilbern "Beechnut" trade-mark, that defendant had no right in law to use the single word "Beechnut," however spelled, with such accompanying decorations and accessories as to cause the ultimate purchasers to believe that the goods upon which said word was so used was the product of plaintiff.

14. The Court erred in dismissing the bill of complaint, and finding that defendant has the right to use

plaintiff's "Beech-Nut" trade-mark by reason of defendant's alleged acquisition of the Luhrman & Wilbern Company's "Beechnut" trade-mark, in the absence of any evidence whatsoever that a single purchaser of tobacco thought or believed that said trademark as used by defendant indicated that the goods so marked were the product of the successor of Luhrman & Wilbern Company, or of Luhrman & Wilbern Company, and in the absence of the evidence of any ultimate purchaser that he even remembered that any scrap tobacco or other tobacco or tobacco product had ever been made or sold by anyone under the trademark "Beechnut," spelled or printed in any manner whatsoever, prior to the adoption by defendant in the year 1915 of the "Beech-Nut" trade-mark for tobacco, and notwithstanding and in disregard of the evidence of the large number of ultimate purchasers of tobacco who testified unanimously and without exception that they believed that defendant's tobacco bearing the "Beech-Nut" trade-mark was the product of plaintiff.

15. The Court erred in not finding as a matter of law that ownership of and right to use a trade-mark can exist only in the party who is believed by purchasers to be the producer or vendor of goods bearing such trade-mark, and in not finding that such ownership cannot exist in a party whose use of such trademark causes purchasers to believe that goods so marked are the product of another.

16. The Court erred in not finding that the common law right of the owner of a trade-mark to the exclusive use thereof, and the statutory right of the owner of a registered trade-mark to the rights and privileges granted by the statutes of the United States

extend to and include the right to the exclusive use of such trade-mark upon all goods of such descriptive properties that the use of such trade-mark upon or in connection therewith will cause the purchasing public to believe that all such goods bearing such trade-mark are of the same origin, or made or sold by the same party.

17. The Court erred in not finding that defendant deliberately and fraudulently misled plaintiff to plaintiff's detriment and damage in the statement made by defendant to plaintiff in the year 1915 that defendant had used the name "Beechnut" as a brand on tobacco "continuously since prior to the year 1898," and in not finding that defendant by the employment of said fraudulent misrepresentation caused plaintiff to defer assertion of its rights to its great damage.

18. The Court erred in not finding that defendant had the right under the law to rely upon the representation made to it by defendant in the year 1915 that defendant had used the brand "Beechnut" on tobacco continuously since the year 1898; in not finding that defendant intentionally made such misrepresentation for the purpose of preventing plaintiff from asserting its legal rights; in not finding that defendant utilized plaintiff's inaction induced by said fraudulent misrepresentation for the purpose of establishing and conducting a large and profitable business in the manufacture and sale of tobacco and tobacco products which were sold with defendant's knowledge that such tobacco and tobacco products were believed by the purchasing public to be the product of plaintiff.

19. The Court erred in not granting to plaintiff the relief prayed for in the bill of complaint.

Wherefore the plaintiff prays that the said decree be reversed and that such other and further relief to the plaintiff be granted as may be just and proper

OFFIELD, MEHLHOPE, SCOTT & POOLE,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. McCLURE JOHNSON,
Solicitors for Plaintiff.

Dated, December 12, 1924.

PETITION FOR APPEAL.

The above-named plaintiff, Beech-Nut Packing Company, feeling itself aggrieved by the decree of this Court made and entered on the seventeenth day of June, 1924, in the above-entitled cause, does hereby appeal from the said decree to the United States Circuit Court of Appeals for the Third Circuit, for the reasons set forth in the assignment of errors herewith filed, and the said plaintiff prays that this, its appeal, may be allowed; and that a transcript of the record, proceedings and papers upon which the said decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Third Circuit.

OFFIELD, MEHLHOPE, SCOTT & POOLE,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. McCLURE JOHNSON,
Solicitors for Plaintiff,
1737 First National Bank Building, Chicago, Illinois.

Dated, December 12, 1924.

ORDER ALLOWING APPEAL.

The above petition for appeal is allowed, and the prayer of the plaintiff herein is granted, upon the filing by petitioner of a bond in the sum of two hundred and fifty dollars ($250) with sufficient sureties to be conditioned as required by law.

(Sgd.) CHARLES F. LYNCH,
United States District Judge.

Dated, Newark, New Jersey,
December 12, 1924.

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, BEECH-NUT PACKING COMPANY, as principal, and UNITED STATES FIDELITY AND GUARANTY COMPANY, as sureties, are held and firmly bound unto P. LORILLARD COMPANY, in the full and just sum of two hundred fifty dollars ($250), to be paid to the said P. LORILLARD COMPANY attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this twelfth day of December, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at a session of the District Court of the United States for the District of New Jersey, in a suit pending in said court, between BEECH-NUT PACKING COMPANY, plaintiff, and P. LORILLARD COMPANY, defendant, a decree was rendered against the said BEECH-NUT PACKING COMPANY and the said BEECH-NUT PACKING COMPANY having obtained from said court an

order allowing an appeal to the United States Circuit Court of Appeals for the Third Circuit, and filed a copy thereof in the clerk's office of the said court to reverse the decree of the aforesaid suit, and a citation directed to the said P. LORILLARD COMPANY citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Third Circuit, to be holden at Philadelphia, Pennsylvania, within thirty days from the date hereof.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said BEECH-NUT PACKING COMPANY shall prosecute its said appeal to effect, and shall answer all damages and costs that may be awarded against it if it fails to make its plea good, then the above obligation be void; otherwise to remain in full force and virtue.

BEECH-NUT PACKING COMPANY,
By F. E. BARBOUR, (SEAL)
Vice-President.

Sealed and delivered in presence of:
W. C. ARPELL, (SEAL)
Secretary.
G. W. SHARPE.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN B. GEYLER,
Attorney-in-Fact.

Attest:
PERCY A. S. ROGERS,
Attorney-in-Fact.

Approved by:

.....

.....

PLAINTIFF'S PRÆCIPE.

To the Clerk of the District Court of the United States, for the District of New Jersey:

You are hereby requested to prepare a transcript of the record and proceedings in the above-entitled case, to be filed in the United States Circuit Court of Appeals for the Third Circuit for use in an appeal heretofore allowed, and to include in such transcript of record the following:

Docket entries.

Printed "Plaintiff's Record," already printed and filed in your court.

Printed "Record of Defendant P. Lorillard Company" (two volumes), already printed and filed in your court.

Printed "Testimony in Behalf of Beech-Nut Packing Company" in the United States Patent Office, Trade-Mark Opposition No. 2805, P. Lorillard Company v. Beech-Nut Packing Company, already filed in your court.

Printed "Testimony on behalf of P. Lorillard Company," in the United States Patent Office, Trade-Mark Opposition No. 2805, P. Lorillard Company v. Beech-Nut Packing Company, already filed in your court.

Printed "Transcript Trial Record," already printed and filed in your court.

Opinion of the Court.

Final decree.

Petition for appeal, and order allowing appeal.

Assignment of errors.

Bond on appeal.

Citation.

This præcipe.

Clerk's certificate.

You are also requested to forward with the papers listed the original exhibits of both parties used in your court, and the original exhibits of both parties used in the United States Patent Office Trade-Mark Opposition No. 2805, entitled "P. Lorillard Company versus Beech-Nut Packing Company."

Respectfully,

(Sgd.) OFFIELD, MEHLHOPE, SCOTT & POOLE,
(Sgd.) WALTER A. SCOTT,
(Sgd.) JAMES R. OFFIELD,
(Sgd.) H. McCLURE JOHNSON,
Solicitors for Plaintiff.

Newark, New Jersey,
December 12, 1924.

Service of the above præcipe and receipt of copy thereof on this twelfth day of December, 1924, is hereby acknowledged.

(Sgd.) JOHN MILTON,
Solicitor for Defendant.

CITATION.

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES,
To P. Lorillard Company,

GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals, for the Third Circuit, to be holden at Philadelphia, Pennsylvania, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office of the

District Court of the United States for the District of New Jersey, wherein BEECH-NUT PACKING COMPANY is appellant and you are appellee, to show cause, if any there be, why the final decree rendered against the said Beech-Nut Packing Company as in the said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the HONORABLE CHARLES F. LYNCH, Judge of the District Court of the United States, this 12th day of December, in the year of our Lord one thousand nine hundred and twenty-four.

CHARLES F. LYNCH,
Judge.

Service hereby acknowledged this December 12, 1924.

(Sgd.) JOHN MILTON,
Attorney for P. Lorillard Company.

ORDER: CONCERNING TRANSCRIPT OF RECORD ON APPEAL.

Before the Honorable Charles F. Lynch, United States District Judge:

It appearing that the testimony in this case for both parties is of such character that it cannot be properly condensed and stated in narrative form and should be preserved for the Appeals Court in the same form in which taken and printed in this court; and it appearing that the record in this court up to and through the trial of the case herein has already been printed and filed in this court;

Now, on motion of plaintiff by its solicitor, H. McClure Johnson, and both plaintiff's and defendant's solicitors being present,

It is hereby ORDERED:

That in the transcript of record on appeal, to be certified to the United States Circuit Court of Appeals for the Third Circuit, the testimony of the witnesses of both parties, no matter how taken, whether in open court, or by deposition or stipulated, shall be reproduced in full in the form in which it was taken and printed in this court;

That the requirements of paragraph (b) of Equity Rule No. 75 in regard to the condensing and stating the evidence in narrative form shall be set aside and waived for the preparation of the transcript of record on appeal in this case;

That the printed transcript of record as already printed and filed in this court, and the printed transcript of the record printed in the United States Patent Office Trade-Mark Opposition No. 2805, P. Lorillard Company versus Beech-Nut Packing Company, made by stipulation a part of the record herein and already filed in this court, may be used as the transcript of record on appeal for everything therein contained.

That the clerk of this court shall prepare and certify the transcript of record on appeal in this case in accordance with this order; and the transcript of record on appeal so prepared and certified is hereby approved.

CHARLES F. LYNCH,
United States District Judge.

Dated: Newark, New Jersey,
December 19, 1924.

DEFENDANT'S PRÆCIPE.

(Filed December 29, 1904.)

To the Clerk of the District Court of the United States, for the District of New Jersey:

In addition to the papers, documents and records set forth in the præcipe, heretofore filed by the plaintiff in the above-entitled cause, to be included by you in the transcript of the record to be filed in the United States Circuit Court of Appeals for the Third District for use on appeal of said cause, in order that there may be no essential omission, you are hereby requested to include in said transcript the following portions of said record:

All the pleadings filed in said cause.

All orders and decrees entered and all stipulations made in said cause.

All evidence introduced in said cause, including the testimony of all witnesses, whether taken in open court or by deposition or by stipulation.

All and each of the exhibits referred to in the printed "Testimony on behalf of Beech-Nut Packing Company" in the United States Patent Office, Trade Mark Opposition No. 2805, P. Lorillard Company v. Beech-Nut Packing Company.

All and each of the exhibits referred to in the printed "Testimony on behalf of P. Lorillard Co." in the United States Patent Office, Trade Mark Opposition No. 2805, P. Lorillard Company v. Beech-Nut Packing Company.

All and each of the exhibits of each of the parties to this cause whether introduced during the trial of said cause or referred to in any of said testimony of any of said witnesses.

Respectfully,

Newark, New Jersey, JOHN MILTON,

Service of the above præcipe and receipt of copy thereof on this eighteenth day of December, 1924, is hereby acknowledged.

H. McCLURE JOHNSON,
Solicitor for Plaintiff.

AMENDMENT TO PLAINTIFF'S PRÆCIPE.

(Filed December 19, 1924.)

To the Clerk of the District Court of the United States, for the District of New Jersey:

In addition to the papers, original exhibits and other material specified in plaintiff's præcipe, dated December 12, 1924, you are hereby requested to include in the transcript of record on appeal the following:

Order: Concerning transcript of record on appeal.

This amendment to plaintiff's præcipe.

Respectfully,

OFFIELD, MEHLHOPE, SCOTT & POOLE,
WALTER A. SCOTT,
JAMES K. OFFIELD,
H. McCLURE JOHNSON,
Solicitors for Plaintiff.

Newark, New Jersey,
December 19, 1924.

Service of the above amendment to plaintiff's præcipe and receipt of copy thereof on this nineteenth day of December, 1924, is hereby acknowledged.

(Sgd.) JOHN MILTON,
Solicitor for Defendant.

CLERK'S CERTIFICATE.

I, George T. Cranmer, clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the foregoing is a transcript of the record on appeal in the case of Beech-Nut Packing Company v. P. Lorillard Company, defendant.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Trenton, in said District this seventh day of January, nineteen hundred and twenty-five.

(Seal)

GEORGE T. CRANMER,
Clerk, U. S. District Court,
R. S. CHEVRIER,
Deputy.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

March Term, 1925. No. 3282 (List No. 59).

Beech-Nut Packing Company,
Appellant,

v.

P. Lorillard Co.,
Appellee.

And afterwards, to wit, on the thirtieth day of April and the first day of May, 1925, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Honorable Joseph Buffington, Honorable Victor B. Woolley and Honorable J. Warren Davis, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof,

And afterwards, to wit, on the eleventh day of September, 1925, come the parties aforesaid by their counsel aforesaid, and the Court, now being fully advised in the premises, renders the following decision:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE THIRD CIRCUIT.

March Term, 1925. No. 3282.

Beech-Nut Packing Company,
Plaintiff-Appellant,

v.

P. Lorillard Company,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES, FOR THE DISTRICT OF NEW JERSEY.

OPINION OF THE COURT.

(Filed September 11, 1925.)

Before BUFFINGTON, WOOLLEY and DAVIS, *Circuit Judges:*

DAVIS, *Circuit Judge.*

The Beech-Nut Packing Company brought suit in the District Court against the P. Lorillard Company for alleged infringement of its trade-mark, "Beech-Nut," and for unfair competition, and prayed for profits and damages. Defendant admits the use of the trade-mark on a brand of its scrap tobacco and on a brand of cigarettes, but insists that it has the right so to use the trade-mark and that such use does not constitute infringement of the trade-mark or unfair competition.

This is an appeal from the decree of the District Court dismissing the plaintiff's bill on the ground that the defendant had not infringed the trade-mark.

The word "Beech-Nut" as a trade-mark for food products was originated by plaintiff's predecessor, the Imperial Packing Company, in or about 1891. In 1899 the Beech-Nut Packing Company, the plaintiff, was incorporated and acquired the assets, including the trade-mark, of the Imperial Packing Company. At first the word was used on ham and bacon only, but its use was gradually extended to other products, such as peanut butter, baked beans, chili sauce, catsup, jellies, mints, chewing gum, etc., until today it is used on most all leading food products. From a very small beginning in 1891, the business grew until, in 1921, its total sales amounted to more than $12,000,000.

The trade-mark is used in connection with a label which is oval-shaped with a red and white border. Within the upper part of the oval and correspondingly curved is the word "Beech-Nut," generally in large blue letters. Below this, in the center of the oval, is the picture of a beech-nut. There is also the picture of a beech-nut in the red border on each side of the oval. Within this border, at the top, in large white letters, are the words "Beech-Nut Brand," and at the bottom, is the word, "Bacon," or the name of the particular product contained in the package to which the label is attached.

The defendant and its predecessors have been in the tobacco business since 1760. In 1897, the Harry Weissinger Tobacco Company, of Louisville, Kentucky, originated a brand of scrap tobacco, called "Beechnut Chewing and Smoking Tobacco," and registered the word, "Beechnut," as its trade-mark. This brand of tobacco was sold under this trade-mark by that company and its successors until in the year 1910. The Weissinger Company, however, in 1903, sold and transferred its entire assets, including its business, good will, and the "Beechnut" trade-mark, to the Continental Tobacco Company, a corporation of

New Jersey. The Continental Tobacco Company, in that year, sold and transferred the trade-mark and other assets, to the Luhrman & Wilbern Tobacco Company, of Middletown, Ohio, for its issued share capital. The next year, the Continental Tobacco Company was merged with the American Tobacco Company. The Government began a suit in equity in 1907 under the Anti-Trust Act of July 2, 1890, against the American Tobacco Company, and its affiliated companies, as an unlawful combination, in restraint of interstate commerce in tobacco. It prevailed and in accordance with the directions of the decree dissolving the American Tobacco Company, in 1911, the defendant company was organized and to it was transferred in that year the capital stock of the Luhrman & Wilbern Company, and the trade-marks and brands belonging to it, including the "Beechnut" trade-mark. From the small beginning of Pierre Lorillard, in 1760, the business constantly grew, until, in 1919, the retail value of the defendant's output was over $80,000,000.

The demand for particular brands of tobacco seems to rise and fall in accordance with the changing tastes of consumers. The defendant company, after personal investigation, discovered, in 1914, that the sweeter brands were the more popular and that sales of brands not so sweet were decreasing. Consequently it decided that it would "get up" a new and sweeter brand which would suit the changed taste of consumers at that time. After experimenting quite a while it worked out what seemed to it to be the "ideal product to put out."

It was then confronted with the problem of selecting a suitable name and label for the new brand. It examined the list of brands it received from the American Tobacco Company. It had before selected names for brands from that list, such as "Comet," "Pioneer" and "Yacht Club." On the Luhrman & Wilbern

list there were the names of "Bagpipe," "Beechnut," "Honest Scrap," "Natural Leaf," "Old Nut," "Polar Bear" and "Scrap Iron." All of these were actively selling except "Beechnut" and this was a dormant brand, not having been sold since 1910. "Beechnut" was thereupon selected and used on this new brand of "scrap" tobacco. The word had been written without a hyphen between "Beech" and "Nut," but the defendant added one and wrote it "Beech-Nut." This change made the trade-mark identical with the plaintiff's.

For a label it selected an oval with a small deep blue border from which extended on all sides red bars or stripes called a sunburst. At the top of the label written in blue letters is the word "Lorillard's." Within the oval at the top is the trade-mark "Beech-Nut" in large blue letters. In the middle of the oval is the picture of two beechnuts, inverted, and below them the word "Chewing" and at the bottom, the word "Tobacco." Weissinger's label was rectangular. Near the center was the picture of a squirrel eating a nut. At the top, printed in large white letters, was the word "Beechnut," and below the squirrel the words "Chewing and Smoking Tobacco." The oval shape of the label which the defendant adopted "had been used on many brands of tobacco in order to give more space for the name." If a circle had been used, the defendant would have been compelled "to pinch the name of the brand down to a point where it would make it less conspicuous." The twin beechnuts, represented in the center of the oval, were actually copied from beechnuts picked up on the New Jersey farm of the president of the defendant company.

The "Beech-Nut" brand of tobacco came out early in 1915 and met with great success. The sales of this single brand, a ten-cent package, have exceeded year by year since 1916 the sales of all the combined prod-

ucts of the plaintiff. In 1919 the sales of the plaintiff's entire output amounted to $8,979,586.35, while the sales of the "Beech-Nut" scrap chewing tobacco amounted to $14,650,865.63.

It appears that some people thought that the plaintiff was putting out the "Beech-Nut" scrap tobacco and cigarettes and wrote, inquiring about it. These inquiries for a time were sent by the plaintiff to the defendant. Correspondence arose between them regarding their rights in the use of the word "Beech-Nut" as a trade-mark for their commodities. Their respective contentions resulted in this litigation.

The Act of February 20, 1905 (35 Stat. 724; Compiled Statutes Section 9490), authorizing the registration of trade-marks, provides that the owner of a trade-mark may obtain registration of it by filing in the Patent Office an application therefor addressed to the Commissioner of Patents, specifying, among other things, "the *class* of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated." It further provides, "That trade-marks which are identical with a registered or known trade-mark owned and in use by another, and appropriated to merchandise of the same *descriptive properties* . . . shall not be registered." Merchandise of the same descriptive properties is merchandise of the same class. The implication in the statute is that a trade-mark which is identical with a registered trade-mark owned and in use by another may be registered if it is *not* appropriated to merchandise of the same class. Therefore the owner of a trade-mark does not have the exclusive right to the use of a name as a trade-mark, except in the class of merchandise to which it is appropriated in an existing business. A trade-mark is merely a protection of good will, and not the subject of property except in connection with an existing business.

Hanover Star Milling Company v. Metcalf, 240 U. S. 403, 413, 414. Judge Woolley in his comprehensive exposition of the law of trade-marks said with reference to the property right of an owner in the mark: "If property, it is property of a qualified nature, for it is settled that no absolute ownership in or exclusive right to use a name as a trade-mark is vested in anyone." Rosenberg Bros. & Co. v. John F. Elliot, Fed. . In other words, what gives the owner a property right in a trade-mark is its connection with an existing business of the *class* to which it is appropriated. "The general rule of law on this subject is that the owner must have used his trade-mark on the same *class* but not necessarily on the same species of goods as the alleged infringer in order to entitle him to its protection against infringement." Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35, 37. In the case of Atlas Manufacturing Co. v. Street & Smith, 204 Fed. 398, the complainant registered the words "Nick Carter" as his trade-mark and in compliance with the requirement of the statute described the goods to which it was appropriated as "a weekly periodical devoted to fiction." The Court held that he might not restrain the use of the term "Nick Carter" as the name of a personage shown in moving pictures, because weekly periodicals and moving pictures do not belong to the same *class* of business. The owner of a trade-mark has the right to its exclusive use, not only on the goods which he has produced, but also on the goods of different species which he may desire in the future to produce if they belong to the same class. William Waltke & Co. v. George H. Schafer & Co., 263 Fed. 650. The reason why the same mark may be used by different persons when appropriated to different classes of goods is because the goods, being of different classes, do not come into competition with each other. Borden Ice Cream

Co. v. Borden's Condensed Milk Co., 201 Fed. 510; Atlas Manufacturing Co. v. Street & Smith, *supra;* Paul F. Beich Co. v. Kellogg Toasted Corn Flakes Co., 262 Fed. 640.

The crux, therefore, of the trade-mark branch of this case is whether or not the products of the plaintiff and defendant belong to the same class or belong to distinct and unrelated classes, not having the "same descriptive properties."

It is undisputed that the plaintiff and its predecessor in business have always dealt in food products only and that the defendant and its predecessors have always manufactured and sold tobacco and have never dealt in food products. All the witnesses at the trial in the District Court testified in the most positive terms that food and tobacco products belong to different classes. Foods and tobacco are classified as distinct and unrelated products under the Trade-Mark Act. Tobacco Products are in Class No. 17; while "Foods and Ingredients of Foods" belong to Class No. 40. The Treasury Department treats them as of different classes. It has always taxed tobacco products just as it did liquor products, but it has never taxed food products.

The Examiner of Interferences in the Patent Office found that tobacco and food do not possess the "same descriptive properties" and so belong to different classes. This view was also held by the examiner, the Acting Commissioner of Patents and the District Judge. Food promotes the growth of animal or vegetable life. There is no nutrition in tobacco. It is merely a narcotic. Foods are used by all mankind as a matter of necessity, but this is not true of tobacco. State v. Ohmer, 34 Mo. App. 115; Liggett & Myers Tobacco Co. v. Cannon, 132 Tenn. 419.

The merchandise of the plaintiff and defendant belonged, therefore, to different classes. As the owner

of a trade-mark, both on authority and reason, may not be restrained from its use on goods of one class, notwithstanding the identical trade-mark is used on goods of another class, we conclude that the defendant did not infringe plaintiff's trade-mark and so may not be restrained from using its trade-mark on tobacco products.

Although it did not infringe the trade-mark, is it guilty of unfair competition? Generically, the term "unfair competition," presupposes competition of some kind. Borden Ice Cream Company v. Borden's Condensed Milk Co., 201 Fed. 510, 514. And so courts have held that there must be a real, present or prospective competition; that is, an endeavor to get the same trade from the same people at the same time; and that endeavor must on the defendant's part be unfair. National Picture Theatres v. Foundation Film Corporation, 266 Fed. 208, 211.

There is no evidence that the defendant ever intended presently or prospectively to compete for the trade of the plaintiff. It could not have done so as long as they continued their distinct and unrelated lines of business and there is no evidence that a change was ever contemplated by either. There was, therefore, no competition between them unfair or otherwise.

We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word "unfair" rather than "competition." If by unfair and fraudulent means, the plaintiff is injured and the public deceived, equity will enjoin whether the injury comes through competition or in some other way. Aunt Jemima Mills Co. v. Rigney, *et al.*, 247 Fed. 407; Vogue Co. v. Thompson-Hudson Co., *et al.*, 300 Fed. 509, 512. Within the principles announced in these cases, or in any other way, has the defendant injured the plaintiff in its property or reputation?

We are satisfied that it has not. It has not tried to palm off its products as those of the plaintiff. It would not have been profitable to do so. The evidence shows that no company ever combined the manufacture and sale of food and tobacco. They belong to unrelated classes and the union of the two would be incongruous and historically contrary to the experience and business judgment of those engaged in manufacturing or selling either class. In the correspondence between the parties defendant wrote plaintiff: "It could be of no conceivable advantage to us to have the public think that our tobacco product was manufactured by a packing establishment. Our concern has been in business for more than 150 years and in that length of time has built an enviable reputation for the excellence of its tobacco products." The plaintiff's evidence on this subject consisted of indefinite and unauthorized statements of unidentified persons alleged to be defendant's salesmen. The evidence shows that its goods have in no way been confused with those of the plaintiff so that when a purchaser desired a certain brand of plaintiff's goods, he in fact secured those of defendant. Defendant carefully made prominent in its label the Lorillard origin of its products. The difference between their labels is so great and distinct that any purchaser paying ordinary attention need not and should not be mistaken and certainly not deceived. In his opinion in the District Court, Judge Lynch said: "If one should eliminate the word 'Beech-Nut' from both labels, it would be extremely difficult to locate any similarity at all between them. And each party has the right to the word 'Beech-Nut' for its distinct product."

The only injury, real or fancied, which the evidence indicates the plaintiff might sustain is that some of its customers are prejudiced against the use of tobacco and made inquiry to ascertain if it had em-

barked in the tobacco business and threatened to stop dealing with it in case it had. This resulted from the similarity of trade-marks on distinct and unrelated classes of merchandise. But from confusion and injury caused by similarity of names, courts will not relieve. The defendant had the right to use its trade-mark if it did so reasonably and honestly. It is not the use, but dishonesty in the use, that is condemned and it is a question of evidence in every case whether the name or trade-mark has been used honestly or fraudulently. In other words, where persons or corporations have the right to use a name or trade-mark, Courts will not interfere where the only confusion results from a similarity of names and not from the manner of the use. "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails." Howe Scale Co. v. Wyckoff, Seamans & Benedict, 198 U. S. 118, 140. Mr. Justice Strong, in the case of Canal Company v. Clark, 13 Wall, 311, 327, said:

> "It is only when the adoption or imitation of what is claimed to be a trademark amounts to a false representation, express or implied, designed or incidental, that there is any title to relief against it. True it may be that the use by a second producer, in describing truthfully his product, of a name or a combination of words already in use by another, may have the effect of causing the public to mistake as to the origin or ownership of the product, but if it is just as true in its application to his goods as it is to those of another who first applied it, and who therefore claims an exclusive right to use it, there is no legal or moral wrong done. Purchasers may be mistaken, but they are not deceived by false representations, and equity will not enjoin against telling the truth."

These principles founded alike on reason and authority, when applied to the facts of this case, are decisive of the issues involved. The evidence, in our opinion, conclusively shows that both parties have acted in perfect good faith. Both have used the word "Beech-Nut" on their respective, but very different labels because they thought that they had the legal right to do so. The plaintiff adopted its trade-mark without knowledge of the "Beechnut" trade-mark of the Harry Weissinger Tobacco Company. The defendant naturally adopted the "Beech-Nut" trade-mark for its products because it owned the old Harry Weissinger trade-mark and thought it was acting within its legal rights. The plaintiff is proud of its "position substantially at the top of a highly competitive industry." The defendant is one of the great tobacco companies of this country, with a Lorillard reputation stretching back into three centuries. Neither needed nor desired the reputation of the incompatible business of the other.

The evidence does not disclose anything on which infringement of the trade-mark or unfair competition can be based. This conclusion relieves us from the consideration of much that was pressed upon us at the argument.

The decree dismissing the bill is accordingly AFFIRMED.

ORDER AFFIRMING DECREE.

(Filed September 11, 1925.)

Appeal from the District Court of the United States, for the District of New Jersey.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs.

J. WARREN DAVIS,
Circuit Judge.

Philadelphia,
September 11, 1925.

MANDATE.
(Filed October 13, 1925.)

UNITED STATES OF AMERICA, *ss.:*

THE PRESIDENT OF THE UNITED STATES OF AMERICA,

To the Honorable the Judges of the District Court of the United States for the District of New Jersey:

GREETING:

WHEREAS, lately in the District Court of the United States for the District of New Jersey, before you or some of you, in a cause between Beech-Nut Packing Company (plaintiff below), appellant, and P. Lorillard Company (defendant below), appellee, a decree was entered in the District Court on the seventeenth day of June, 1924, which decree is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same is hereby expressly made a part hereof.

as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit by virtue of an appeal agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, in the term of March, in the year of our Lord one thousand nine hundred and twenty-five, the said cause came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record and was argued by counsel:

ON CONSIDERATION WHEREOF, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby affirmed, with costs; and that the said appellee, P. Lorillard Company, recover against the said appellant, Beech-Nut Packing Company, in the sum of twenty dollars ($20) for its costs herein expended, and have execution therefor;

Philadelphia,
September 11, 1925.

You, therefore, are hereby commanded that such execution and further proceeding be had in said cause, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the Supreme Court of the United States, at Philadelphia, the thirteenth day of October, in the year of our Lord one thousand nine hundred and twenty-five (1925).

Costs of P. Lorrillard Company:

Clerk, . . .	$.....
Printing Record	$.....
Attorney . .	$20.00 ....
	$20.00 ....

SAUNDERS LEWIS, JR.,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *Set.:*
THIRD JUDICIAL CIRCUIT.

I, Saunders Lewis, Jr., clerk of the United States Circuit Court of Appeals, for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record, Vols. I, II, III, IV, V, and proceedings in this court, in the case of: Beech-Nut Packing Company, appellant, v. P. Lorillard Company, appellee, No. 3282, on file, and now remaining among the records of the said court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this thirtieth day of October, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States the one hundred and fiftieth.

SAUNDERS LEWIS, Jr.,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

Watch all margins

Vol. VI

TRANSCRIPT OF RECORD

133

Supreme Court of the United States

OCTOBER TERM, 1926

No. 249

213

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

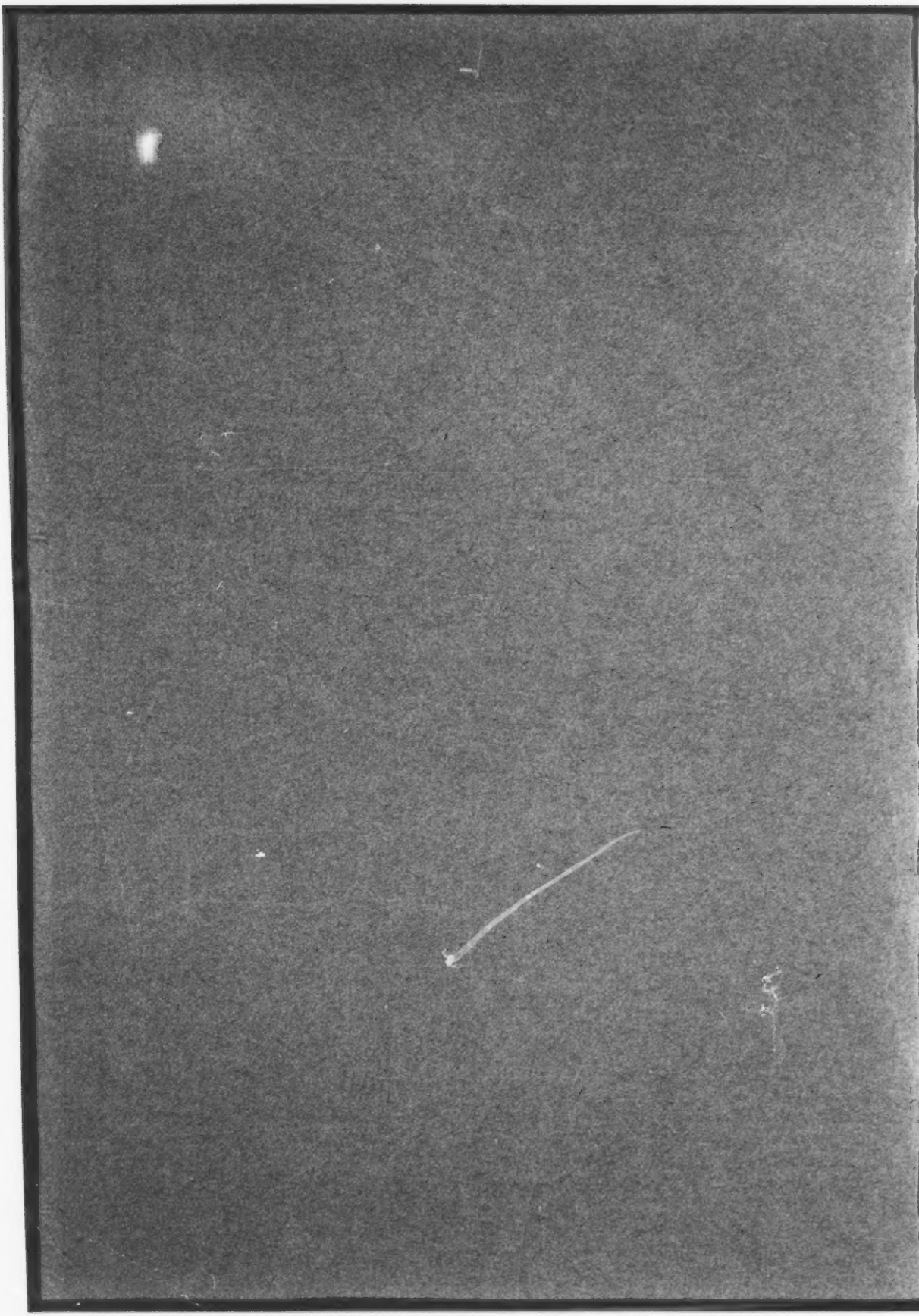
P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 8, 1925

CERTIORARI GRANTED JANUARY 11, 1926

(31,557)



(31,557)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926

No. 249

BEECH-NUT PACKING COMPANY, PETITIONER,

vs.

P. LORILLARD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

VOLUME VI

INDEX

	Page
Plaintiff's Exhibit No. 1—Package of Beech-Nut cigarettes	2708
Plaintiff's Exhibit No. 2—Photograph, West Haven drug store window display	2710
Note re Plaintiff's Exhibit No. 3	2712
Plaintiff's Exhibit No. 11—Allied Tobacco Industries Exposition letter	2712
Plaintiff's Exhibit No. 12—Scrap-book of circulars, letters, etc., A to A-24, inclusive	2714
Plaintiff's Exhibit No. 13—Photograph, Pennell's cigar store window display	2762
Plaintiff's Exhibit No. 14—Receipt signed "E. L. Larson"	2764
Plaintiff's Exhibit No. 15—Photograph, collection of Beech-Nut Packing Company products, 1922	2766
Plaintiff's Exhibit No. 16—Portion of shipping carton used by Beech-Nut Packing Company	2768
Plaintiff's Exhibit No. 17—P. Lorillard Company Beech-Nut cigarettes carton	2768

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 1, 1926

J45-96

Page

Plaintiff's Exhibit No. 18—Publication Bon Jour of December 4 and 5, 1891 2770
Plaintiff's Exhibit No. 19—Photograph, scrap-books of Beech-Nut Packing Company periodical advertising, 1911-1915 2772
Plaintiff's Exhibit No. 27—Beech-Nut chewing-gum display box 2774
Plaintiff's Exhibit No. 28—Board, Beech-Nut labels displayed before the public, 1891-1921 2777
Plaintiff's Exhibit No. 31—Imperial Packing Company box of 1891 .. 2780
Plaintiff's Exhibit No. 32—Collection of Lorillard posters and signs .. 2782
Plaintiff's Exhibit No. 35—Summary of Beech-Nut Packing Company products 2784
Plaintiff's Exhibit No. 36—Advertisement of Beech-Nut cigarettes, New York Evening Sun 2815
Plaintiff's Exhibit No. 38—Berry photograph of Auster window display, Baltimore 2816
Plaintiff's Exhibit No. 40—The National Financial News of May 28, 1923 2818
Plaintiff's Exhibit No. 41—Certified copy, decision of examiner of interferences, opposition No. 2805 2821
Plaintiff's Exhibit 42—Certified copy, decision of Assistant Commissioner of Patents, opposition No. 2805 2830
Beech-Nut Exhibit—Certified copy, certificate of incorporation of Beech-Nut Packing Company 2835
Beech-Nut Exhibit—Stationery of 1892, Imperial Packing Company .. 2839
Beech-Nut Exhibit—Correspondence 2841
Beech-Nut Cross-exhibit No. 1—P. Lorillard Company "Polar Bear" scrap tobacco bag 2850
Beech-Nut Cross-exhibit No. 1-A—Luhrman & Wilbern "Polar Bear" scrap tobacco bag 2851
Beech-Nut Cross-exhibit No. 2—P. Lorillard Company "Scrap Iron" scrap tobacco bag 2854
Beech-Nut Cross-exhibit No. 2-A—Luhrman & Wilbern "Scrap Iron" scrap tobacco bag 2855
Beech-Nut Cross-exhibit No. 2-C—P. Lorillard Company "Scrap Iron" scrap tobacco bag, bearing words "Stock owned by P. Lorillard Co." in rubber stamp 2858
Beech-Nut Cross-exhibit No. 2-D—P. Lorillard Company "Scrap Iron" scrap tobacco bag, bearing words "Stock owned by P. Lorillard Co." printed 2859
Beech-Nut Cross-exhibit No. 3—P. Lorillard Company "Old Nut" scrap tobacco bag 2861
Beech-Nut Cross-exhibit No. 4—P. Lorillard Company "Bag Pipe" scrap tobacco bag 2863
Note re Beech-Nut Cross-exhibit 2864
Beech-Nut Cross-exhibit—Trade-mark registration No. 89,613 of December 31, 1912 2867
Defendant's Cross-exhibit No. 1—Package of Beech-Nut scrap tobacco 2870
Defendant's Cross-exhibit No. 2—Package of Beech-Nut chewing gum. 2872

Page

Defendant's Cross-exhibit No. 5—Advertisement of Beech-Nut cigarettes, Boston Herald of August 18, 1921 2874
Defendant's Cross-exhibit No. 6—Package of Beech-Nut peppermints. 2876
Defendant's Cross-exhibit No. 8—Beech-Nut bacon label 2878
Defendant's Exhibit No. 10—P. Lorillard Company order blanks A, B, and C 2880
Defendant's Exhibit No. 11—Photograph West Haven drug store display 2882
Defendant's Cross-exhibit No. 16—Beech-Nut Packing Company's Erie brand label 2882b
Defendant's Cross-exhibit No. 17—Beech-Nut Packing Company's holly brand label 2884
Defendant's Exhibit No. 18—Pamphlet entitled "Correspondence—Beech-Nut Packing Company and P. Lorillard Company in re 'Beech-Nut' Trade-mark" 2886
Defendant's Exhibit No. 30—Newton's list of trade-mark registrations 2924
Defendant's Exhibit No. 34—Patent Office pamphlet showing trade-marks classification 2941
Defendant's Exhibit No. 35—List of brands 2942
Defendant's Exhibit No. 36—Assignment, American Tobacco Company to P. Lorillard Company, December 1, 1911 2956
Defendant's Exhibit No. 37—Package of Bagley's "Hazel Nut" tobacco 2960
Defendant's Exhibit No. 45—Lorillard specimen wrapper design for Beech-Nut cigarettes 2962
P. Lorillard Co. Exhibit No. 1—Statement of sales of Beech-Nut tobacco products by Luhrman & Wilbern Tobacco Co. and P. Lorillard Co. from 1904 to 1919 2965
Note re P. Lorillard Co. Exhibit No. 2 2970
P. Lorillard Co. Exhibit No. 5—Luhrman & Wilbern "Beech-Nut" tobacco bag 2971
P. Lorillard Co. Exhibit No. 6—Package of Lorillard's Beech-Nut cigarettes 2973
P. Lorillard Co. Exhibit No. 7—Letter, August 25, 1916, from Walcutt Brothers Co. to P. Lorillard Co 2975
P. Lorillard Co. Exhibit No. 8—Order for Beech-Nut cigarette shells. 2976
P. Lorillard Co. Exhibit No. 9—"Broecker" correspondence 2977
P. Lorillard Exhibit No. 10—"Schutz" correspondence 2980
P. Lorillard Co. Exhibit No. 14—Harry Weissinger Tobacco Co. "Beech-Nut" tobacco bag 2981
Notes re P. Lorillard Co. Exhibits 16 and 17 2983
P. Lorillard Co. Cross-exhibit No. 20—Certified copy, certificate of incorporation of Imperial Packing Company 2983
P. Lorillard Cross-exhibit No. 21—Trade-mark registrations No. 19,838, No. 24,978, No. 35,371, and No. 36,444 2987
P. Lorillard Co. Cross-exhibit No. 22—Beech-Nut Packing Company's "Beech-Nut Cigarettes" label 2999

Page

P. Lorillard Co. Exhibit A—Book showing revenue stamps used on tobacco brands, 1904-1906 3001
P. Lorillard Co. Exhibit B—Book showing revenue stamps used on tobacco brands, 1906-1910 3009
P. Lorillard Co. Exhibit C—Sales sheets showing shipments Beech-Nut, 1904-1910 3019
P. Lorillard Co. Exhibit D—Memorandum book of shipments 3023
P. Lorillard Co. Exhibit E—Copies of Beech-Nut invoices, P. Lorillard Co. 3031
P. Lorillard Co. Exhibit F—Portion of the original Weissinger "Beech-Nut" tobacco wrapper 3049
P. Lorillard Co. Exhibit H—Weissinger formula book 3050
P. Lorillard Co. Exhibit I—Orders to Summers from Weissinger 3050
P. Lorillard Co. Exhibit J—Letters produced by Summers 3051
P. Lorillard Co. Exhibit K—Box list 3054
Clerk's certificate 3055
Order allowing certiorari 3056

Part I.

PLAINTIFF'S EXHIBITS.

PLAINTIFF'S EXHIBIT NO. 1—PACKAGE OF BEECH-NUT CIGARETTES.

[NOTE: Replica of lithographed wrapper and glassine paper outer wrapper as on the Exhibit package:]

PLAINTIFF'S EXHIBIT NO. 2—PHOTOGRAPH, WEST HAVEN DRUG STORE WINDOW DISPLAY.

PLAINTIFF'S EXHIBIT NO. 3—PACKAGE OF BEECH-NUT SCRAP TOBACCO.

[NOTE: The wrapper of this Exhibit package is identical with Exhibit 2 in Bill of Complaint,—which see (Plaintiff's Record, page 17). The package is identical with Defendant's Cross Exhibit No. 1, photograph of which is shown *post*.]

PLAINTIFF'S EXHIBIT NO. 11—FAIRFIELD ALLIED TOBACCO INDUSTRIES EXPOSITION LETTER.

[Letterhead.]

ALLIED TOBACCO INDUSTRIES EXPOSITION,
COLISEUM, CHICAGO,
September 2nd to 10th, 1921.

Address all communications to Allied Tobacco Industries Exposition, Room 810, 417 South Dearborn Street, Chicago.

TELEPHONE—Harrison 1870

FRED W. PAYNE
MILO E. WHITEMORE } Managers

June 1st, 1921.

SYRACUSE, N. Y.

Gentlemen:

Owing to the nationwide agitation against smoking and from the standpoint of self preservation all persons interested in the Tobacco business must get together and inaugurate a campaign to combat the work of the "Anti-Ites."

To accomplish this and bring about a better understanding with the general public and thereby enroll their support in advancing the slogan "Tobacco is Harmless" it has been decided to hold the Allied Tobacco Industries Exposition in Chicago next September where

manufacturers will have the opportunity of exhibiting their cigars, cigarettes, tobaccos, pipes and allied lines to jobbers and dealers from all parts of the country, as well as to the general public.

It is also essential that manufacturers of machinery, appliances and accessories used in producing, packing and marketing of cigars, cigarettes, tobaccos, pipes and allied commodities should exhibit for the benefit of the visiting producers of these products.

During the week of the Exposition important conferences will be held, in which all trade associations have been invited to participate. The Exposition and Conferences will be advertised very extensively and everything done to bring out the greatest gathering ever held of manufacturers, jobbers, distributors and retailers.

To make the Exposition thoroughly representative of the entire industry we want your company to make an exhibit, not only for the large amount of new business you will secure, but also to help us impress upon the minds of the general public the magnitude and importance of this great industry now being bitterly attacked.

Trusting to hear promptly from you in order that we may submit diagram showing arrangement, dimensions and cost of exhibit spaces for your further consideration, we remain

Yours very truly,

ALLIED TOBACCO INDUSTRIES EXPOSITION,

FWP*IB

Manager.

PLAINTIFF'S EXHIBIT NO. 12 (A TO A-24, INCLUSIVE)—SCRAP BOOK OF CIRCULARS, LETTERS, ETC.

Plaintiff's Exhibit No. 12-A.

P. LORILLARD COMPANY

New York City, N. Y., June 22, 1921.

TAYLOR, MCLEISH & Co.

Gentlemen:

We are now prepared to accept orders from our customers located in your State for BEECH-NUT 20s/200 cigarettes, our new brand, foil packed, which will be invoiced to our customers at $6.00 per M, less 10%, less the usual 2% cash discount, and are intended to go to the retailer at $6.00 per M less 2% for cash and to the consumer at 15¢ per package of 20 cigarettes.

As we anticipate working and advertising this brand throughout your territory effective as of July 5th, we strongly recommend that you place your order promptly for a small quantity of BEECH-NUT Cigarettes, but under no circumstances do we desire BEECH-NUT Cigarettes offered to the retail trade prior to the date herein referred to.

In the event that you do place an order for this brand we offer as an extra inducement for your salesmen to secure an immediate distribution, commencing July 5th, on BEECH-NUT Cigarettes and for them to induce retail dealers to display the same prominently on their counters, 25¢ per M or 5¢ per carton, on their sales of BEECH-NUT cigarettes during the months of July and August, 1921. However, we wish to call your particular attention to the fact that this offer is made exclusively for the benefit of your salesmen and if used otherwise, payment with be withheld. Furthermore, we respect-

fully request that none of your customers be sold at any one time a quantity in excess of 5M BEECH-NUT cigarettes, and at the expiration of the period referred to, we would appreciate your mailing a report of the sales made by each individual salesman, addressing the same to BEECH-NUT CIGARETTE DEPARTMENT, P. Lorillard Co., 119 West 40th St., New York City.

Please note that such report is to be mailed us on or before September 10, 1921, and as we have not arranged to supply blanks for this purpose, we would thank you to simply furnish by letter the names of the individual salesmen and the quantity sold by each.

We will very much appreciate your co-operation as well as such support you may see fit to give us in placing BEECH-NUT Cigarettes favorably before the public.

Very respectfully,

E. J. BUSH

For P. LORILLARD COMPANY, INC.

P. S. As BEECH-NUT Cigarettes have not been offered to the trade in the States of Indiana, Illinois, Wisconsin, Kentucky (except Covington and Newport) or the Northern Peninsular of Michigan, we would thank you to make no shipments or deliveries either directly or indirectly to dealers in those States until advised it will be satisfactory to do so. Your co-operation in this respect will avoid considerable embarrassment to us.

Plaintiff's Exhibit No. 12-B.

[Letterhead of
P. LORILLARD COMPANY,
119 West 40th Street.]

EJB/MJO New York, August 4, 1921.

At the time BEECH-NUT Cigarettes were introduced in your territory we offered your salesmen, as an extra inducement for them to assist in securing a quick distribution and prominent counter displays on the brand, 25¢ per thousand on their sales of BEECH-NUT Cigarettes.

On account of the very great interest and enthusiasm manifested by jobbers' salesmen in such offer and due to our having received from our customers numerous requests to renew the same, we are prompted to offer your salesmen as an extra inducement to interest dealers in selling and displaying the brand, 10¢ per thousand, or 2¢ per carton, on their sales of BEECH-NUT Cigarettes, the same effective as of this date, August 4, 1921, and continuing for a limited time only. In order to avoid congestion, we respectfully request however, that none of your customers be sold at any one time a quantity in excess of 10,000 BEECH-NUT Cigarettes.

Promptly upon receipt of notice of withdrawal of this offer, please mail to the BEECH-NUT CIGARETTE DEPARTMENT, P. Lorillard Company, 119 West 40th St., New York City, report showing the names of your salesmen and the quantity of BEECH-NUT Cigarettes sold by each during the period this offer is in effect As we will not supply blanks for such report of sales, we would thank you to simply furnish the desired information by letter.

We will make no payment of this allowance on any BEECH-NUT cigarettes reported by you under the offer in excess of the total quantity of BEECH-NUT Cigarettes shipped by us for your account during the life of the offer—therefore, in order that your salesmen may participate to the fullest extent on their sales, it will be necessary that you have shipped by us for your account during the life of the offer as many BEECH-NUT Cigarettes as you report sold by them.

Inasmuch as BEECH-NUT Cigarettes have become firmly established in your territory and in view of the present demand for the brand, we feel that the offer of 10¢ per thousand herein mentioned will result in as much, or greater benefit to your salesmen as did our previous offer to them.

Trusting our action meets with your entire approval, and thanking you for the support you have rendered in the marketing of BEECH-NUT Cigarettes as well as for a continuation of such support, we remain,

Very respectfully,

E. J. BUSH

For P. LORILLARD COMPANY, INC.

Plaintiff's Exhibit No. 12-C.

Circular No. 1386

[Letterhead of

P. LORILLARD COMPANY,

119 West 40th Street.]

NEW YORK, October 27, 1921.

BEECH-NUT

CIGARETTES

TO OUR CUSTOMERS in the States of North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi and Louisiana:

We take pleasure in announcing that we are now in position to offer BEECH-NUT Cigarettes to our customers in the States above mentioned.

BEECH-NUT Cigarettes are foil packed in oval packages of 20, cartons of 200, and are invoiced to our customers at $6.00 per M. less 10% trade discount and less the usual 2% cash discount, and are intended to go to the retailer at $6.00 per M. less 2% for cash, and to the consumer at 15¢ per package of 20 cigarettes. A sample carton of BEECH-NUT Cigarettes is being mailed to you.

BEECH-NUT Cigarettes have met with unusual success in the states in which they have been offered and we predict the brand will meet with similar success in your state.

We offer as an extra inducement to encourage a full distribution being quickly secured and maintained on BEECH-NUT Cigarettes, 25¢ per M. on all BEECH-NUT Cigarettes shipped by us for your account during October, November and December, 1921, less the quantity of BEECH-NUT Cigarettes you have on hand and in transit at the close of business December 31, 1921.

It will not be necessary for you to keep account of your sales of BEECH-NUT Cigarettes during October, November and December, as all we require is that you report to us by January 5, 1922, the total quantity of BEECH-NUT Cigarettes you had on hand and in transit at the close of business December 31, 1921, and we will promptly audit your account and send check for the amount due you under this offer.

We will very much appreciate an initial order and such cooperation and support you may see fit to give us in placing BEECH-NUT Cigarettes favorably before the public in the territory covered by your salesmen.

All orders subject to acceptance by our New York Office, and if accepted will be filled at prices ruling on day of shipment.

No representative or employee of this Company has authority to change any circular, letter or price list issued by this Company.

Very respectfully,

P. LORILLARD COMPANY,
Incorporated.

Plaintiff's Exhibit No. 12-D.

OAKLAND ENQUIRER
OAKLAND, CALIFORNIA.

Office of the President and Publisher.

July 19, 1921.

My Dear Mr. Van Wie:

I have written the enclosed editorial, which appears in the Oakland Enquirer today. This publication goes into the homes of twenty five thousand and is read by over one hundred thousand daily in this very important trans-bay section.

While owner and publisher of the Seattle Post-Intelligencer, for a period of eight years just before I took over the San Francisco Morning Call, I had the "powers

to be," while the legislature was in session at Olympia, come over to my home in Seattle on a Saturday night a few days before the adjournment, to discuss the anti-cigarette law, which I considered a ridiculous and uncalled-for piece of legislation.

I personally was instrumental in having the law repealed, for I insisted before the Post-Intelligencer supported other measures they would have to repeal this act. I believe you are familiar with these facts.

I have always felt very close to the tobacco people throughout the East as well as the Pacific Coast and have always been against this uncalled-for freak tobacco legislation.

I trust these few remarks in the Enquirer today will meet with your approval and support.

If at any time I can be of help to you and your Company, irrespective of any advertising, do not hesitate to advise us for the Enquirer which is published in this transbay section of over four hundred thousand prosperous people is a very important factor in this community.

Very truly yours,

W. W. CHAPIN,
President.

MR. STANTON E. VAN WIE,
Beechnut Cigarettes
Canajoharie, N. Y.

WWC:D

OFFICIAL PAPER OF THE CITY OF OAKLAND AND THIS TRANSBAY SECTION COVERING A POPULATION OF OVER 450,000 PEOPLE

[Envelope.]

Return in Ten Days to
THE OAKLAND ENQUIRER
Oakland, California.

[Postmark.]
July 19, 1921, 8 P. M.
Oakland, Calif.,

Mr. Stanton E. Van Wie,
Beechnut Cigarettes,
Canajoharie, N. Y.

Plaintiff's Exhibit No. 12-E.

[From Oakland (Calif.) Enquirer of July 19, 1921.]

Editorial
Page

OAKLAND ENQUIRER
Established 1886
AN INDEPENDENT NEWSPAPER
W. W. CHAPIN, Publisher JOHN F. CONNERS, Editor

CRAZY LEGISLATION.

The State of Utah is making a strong bid for national leadership among the communities which tell the world that they do not desire enterprising men of common sense to come there to live or invest their money.

The writer was instrumental in having repealed a similar attempt of fanatics in the State of Washington to "Compound for sins they are inclined to by damning those they have no mind to." His efforts were put forth not because of any personal grievance, but because he happened to be in a position to learn how injurious to the community's growth and advancement is such silly lawmaking. The injuries of such crazy legislation are tenfold more probable now than then.

Business all over the country confronts the same condition. It's a "buyer's market," for both trade and investment. Men with money to invest are not hunting opportunities. They have no need whatever to take chances in communities which by fanatic attacks upon any legitimate business virtually serve notice that no line of business or form of property is safe from confiscation through public toleration of cranks who insist upon persecuting all disagreement with their personal ideas, and are armed with the power of a penal statute.

The sum of the matter is that the tobacco business is entirely legitimate, and the cigarette end of it is notoriously conducted with scrupulous regard for public safety through cleanliness and sanitary surroundings. It has never been proved that the cigarette use of tobacco is more injurious than any other. The weight of medical testimony is the other way. Hence, anti-cigarette laws, such as those of Nebraska, Nevada, and especially Utah, may well be regarded as notice to all that these States are dominated by crazy fanatics who may be expected to go on to any excess against personal or property rights.

The Enquirer is not directly concerned with the follies of Utah. But it is directly concerned to resist, now and always, any further spread of the contagion of crazy legislation to California.

Plaintiff's Exhibit No. 12-F.

OAKLAND ENQUIRER

OAKLAND, CALIFORNIA.

Office of the
President and Publisher.

August 25, 1921.

My dear Mr. Van Wie:

Will you kindly look over the Enquirer under date of August 20th, which I am sending under separate cover? Always glad to co-operate with you and your interests.

Very truly yours,

W. W. CHAPIN,
President.

MR. STANTON E. VAN WIE,
Beechnut Cigarette Co.
Canjoharie, N. Y.

OFFICIAL PAPER OF THE CITY OF OAKLAND AND THIS TRANSBAY SECTION COVERING A POPULATION OF OVER 450,000 PEOPLE

[Envelope.]

Return in Ten Days to
THE OAKLAND ENQUIRER
Oakland, California.

[Postmark]
OAKLAND, Calif.,
Aug. 25, 1921
5:30 P. M.

Mr. Stanton E. Van Wie,
Beechnut Cigarette Co.
Canjoharie, N. Y.

Personal.

Plaintiff's Exhibit No. 12-G.

[From Oakland (Calif.) Enquirer of August 20, 1921.]

DOWN WITH NICOTINE!

In the opinion of the W. C. T. U., my Lady Nicotine has always been a woman of easy virtue—a fit associate for none except poor old Jack Barleycorn. So it is not surprising to find the present annual convention taken up with the problem of abolishing tobacco in all its forms.

I wonder why women of a certain type are so inimical to tobacco? Is it because of a certain masculine attitude toward the weed expressed by Kipling in the immortal insult:

"A woman is only a woman,
But a good cigar is a smoke"?

Whatever it be, certain it is that some women hate tobacco with the deadly hatred of King James I who wrote the famous bit of anti-nicotine propaganda called "A Counterblast Against Tobacco."

So intent are the white ribboners on downing the weed that one suspects them of intending to use their one million members—if they get them—to exterminate the cigar, the cigarette, the pipe and the quid, to say nothing of the wicked pinch of snuff.

Can you imagine the United States without tobacco? Or rather, can you imagine the condition which would be brought about should another amendment to the Constitution forbid tobacco as the eighteenth amendment forbids liquor?

Think of the smuggling that would go on between Cuba and this country! Think of the surreptitious sales of tobacco in the nicotian equivalent of the bootleg joint! And think, oh think how the price of Bull Durham would go up, and how we should cultivate the lucky man who had a humidor full of illegal perfectos!

The shock troops of the W. C. T. U. have their work cut out for them in this drive against the weed. But these are Amazons not easly dismayed. The "wild women" of the suffrage agitation were more speclacular but not more determined than the followers of Frances Willard.

Plaintiff's Exhibit No. 12-H.

THE PITTSBURGH POST
MORNING AND SUNDAY

THE PITTSBURGH SUN
EVENINGS EXCEPT SUNDAY

J. E. TROWER
VICE PRESIDENT AND
MANAGER OF ADVERTISING

PHILADELPHIA, PA. 7/19-1921.

MR. BARTLETT ARKELL, President
Beech-Nut Packing Co.,
Conajoharie, New York.

Dear Sir:—

Your many products suitable for our plan, prompted me writing you. Particularly, Beech-Nut Cigarettes and Beech-Nut Gum. These two articles, if entered at once would be exclusive in their line.

The Pittsburgh Post and The Pittsburgh Sun, will award cash prizes amounting to $5,000.00 in gold to Schools, Hospitals, Churches, Lodges and Charities in Pittsburgh and surrounding territory, receiving the largest number of votes by saving the wrappers, labels, cartons, etc., from the manufactured products entered in this gigantic selling campaign.

The prime motive of the unusual campaign is to develop the sale of certain manufactured products used daily in every home, office or on the street, and to establish new fields of direct distribution, with the assurance of your goods moving rapidly from the retailer's shelf.

Beginning September—and closing sixteen weeks thereafter, large newspaper copy similar to the rough lay-out enclosed will appear in the morning, afternoon and Sunday issues of the Post and Sun, during September, October, November and December. Approximately $7,000.00 worth of newspaper space will be used containing an illustration of your products. The Post and Sun also agree to give its news columns to such an extent as to sustain a lively and continued interest among the organizations participating for this large sum of money.

The manufacturer's share of the expenses in this campaign is $475. One half to be paid upon the representation of the Post and Sun, showing the first announcement in the September issue; the other half within sixty days thereafter. Each product entered will be exclusive in its line.

Retail order blanks will be issued by the Post and Sun, to secure stores not handling your products. Certain days will be devoted in clubbing three or four articles together and offering extra bonus votes. This alone will stimulate and show positive proof of splendid results.

This campaign will be run by the newspaper's regular staff men, thus avoiding doubtful contacts and un-

worthy advertising promoters. Only thirty to thirty five products are essential to defray all expenses and I shall remain East until sufficient contracts are secured, at the same time take my regularly summer vacation. Kindly return the copy lay-out to the below mentioned address, but send package of your product for illustration in all campaign copy to the newspaper direct.

Yours truly,

D. J. Waters, Jr.

#2225 North 10th St., Phila, Pa.

DJWaters,Jr—M.

Plaintiff's Exhibit No. 13-L.

New York Evening Journal. CIRCULATION 240,000 DAILY 1,000,000 SUNDAY

ADVERTISING DEPARTMENT

July 20th, 1923.

Bauer-Nye Chemicals,

Canajoharie, New York.

Gentlemen:

Here is a marked copy of Drug Trade News. You will be interested in page 6.

That's the difference between an advertiser like yourself and the 6,700 druggists and confectioners who get Drug Trade News. You are chiefly interested in your own advertisement or article and those of your competitors. But the 6,700 dealers are interested in every page of Drug Trade News.

It is kept newsy, readable and as full of human interest as possible. We are glad to see it quoted every little while by Drug papers in other parts of the country. That sort of advertising helps us all.

It is this reader interest which makes Drug Trade News different to the usual sort of Trade paper. We are try-

ing—(and we think we are succeeding in doing it)—to make Trade News a mighty valuable advocate of better retail salesmanship as well as a dependable "second barrel" for the advertiser's shot gun. Your Journal advertising brings down the consumer—your Journal copy and your article appearing again in Drug Trade News gives you a shot at 6,700 dealers.

All baymen know, and most amateurs admit, that the second barrel makes the bag bigger.

If you have any suggestions as to how we can make Drug Trade News more effective in backing up your New York Evening Journal advertising, we shall be glad to get them and see if we cannot follow them out.

Very truly yours,

WILLIAM N. CALLENDER,
Manager Foreign Advertising.

Plaintiff's Exhibit No. 12-J.

[Card.]

[Cut: picture.]

YOUR "AD" IN EVERY HOME

Our "STICK-ON" WINDOW LOCK POSTER should be on every window, protecting life and property and at the same time continually advertising your products. Cost small, Service continuous.

Sample and particulars upon request.

"STICK-ON" WINDOW LOCK CO.

176 Fulton Street New York City

Phone Cortland 1427

PREVENTS RATTLING
Put on in a jiffy—no screws or tools needed. Keep windows up if sash rope breaks.

[Note: Pasted to above card in this exhibit is a newspaper clipping advertisement of Beech-Nut Cigarettes.]

[Envelope.]

"STICK ON" WINDOW LOCK CO.
176 Fulton Street
New York, N. Y.

[Postmark.]
Hud. Term. Sta., N. Y.
Sep. 14, 2 p. m., 1921.

Beech Nut Co.,
Canajaharo, N Y

Mgr Adv Dept.

Sole Mfrs. of the "STICK-ON" WINDOW LOCK (Patented)
"Stick-On," Reg. U. S. Pat. Off.

Plaintiff's Exhibit No. 12-K.

[Post Card.]

Office of
THE WILLIAM TRIMBEY CO.
Wholesale Grocers
141 Hotel St.

Utica, N. Y., June 17, 1920.

Please send us:
1 Case B/N Gum
10 " Med. B/N Scrap.

Respectfully yours,
THE WILLIAM TRIMBEY CO.

[Address.]

The Beech Nut Packing Co.,
Canajoharie, N. Y.

[Letter.]

ERVIN C. FIELD W. HENRY START

FIELD & START Inc.

WHOLESALE GROCERS

310-316 John St.

UTICA, N. Y. May 23, 1921.

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:—

Kindly ship direct to Emporium Forestry Company, Conifer, N. Y., via R. R. to Childwold, C/o Grasse River R. R., the following:

6 Gross Beechnut scrap

and charge the same to our account.

Yours very truly,

J/D FIELD & START, INC.,

Plaintiff's Exhibit No. 12-L.

Established 1855

AUSTIN, NICHOLS & CO.

(Incorporated)

Formerly Johnson & Murray, Inc.

Importers, Exporters, Manufacturers and Wholesale Distributers of

FOOD PRODUCTS

UTICA, N. Y. October 21, 1921.

BEECHNUT PACKING COMPANY,
Canajoharie, N. Y.

Gentlemen;

Kindly ship to

M. J. Davenport, Eaton, N. Y.

6 Gross Beech Nut Scrap.

Yours very truly,

C. AUSTIN, NICHOLS & COMPANY, INC.

Plaintiff's Exhibit No. 12-M.

[Letterhead of
PEARL WAIST CO., INC.]

COHOES, N. Y. June 4, 21.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

I understand you are making cigaretts, if so kindly send me a carton, and enclosed find check for $1.50.

And oblige,

JOHN F. QUINN,
286 Remsen St.,
Cohoes, N. Y.

[Check.]

50—202

No. 116 COHOES, N. Y., June 4 1921.

THE NATIONAL BANK OF COHOES

Pay to the order of Beechnut Packing Co. $1-50/100

Pay $1 and 50 cts. Dollars.

JOHN F. QUINN

Plaintiff's Exhibit No. 12-N.

[Letterhead of
LAUDERBACH-ZERBY CO.
Wholesale Grocers.]

PHILIPSBURG, PA. Feb. 7, 1921

BEECHNUT PACKING CO.

Note on bill this number and where shipped

Ship to Lauderbach-Zerby Company.
Ship via P R R Indiana, Pa. No. 1873
Mail Bill to L.-Z. Co., Philipsburg, Pa.
Terms Attach shipping receipt to bill

25 Cs Beechnut Scrap 2 Gross per case
This is in addition to our standing order

LAUDERBACH-ZERBY COMPANY.

Original bill of lading must be attached to invoice, otherwise payment will be withheld until received

All bills of every nature for all our branches are paid from Philipsburg office

Plaintiff's Exhibit No. 12-O.

[Letterhead of
LAUDERBACH-ZERBY CO.
Wholesale Grocers.]

PHILIPSBURG, PA. Dec. 20, 1920

BEECHNUT PACKING CO.

Note on bill this number and where shipped

Ship to Lauderbach-Zerby Company.
Ship via BR & P Punxsutawney, Pa. No. 402
Mail Bill to L.-Z. Co., Philipsburg, Pa.
Terms Attach shipping receipt to bill

50 Cs Beechnut Scrap Tobacco 2/3 Gross
25 Cs " " " 2 "

LAUDERBACH-ZERBY COMPANY.

Original bill of lading must be attached to invoice, otherwise payment will be withheld until received

All bills of every nature for all our branches are paid from Philipsburg office

Plaintiff's Exhibit No. 12-P.

[Order Sheet of
VALLEY SUPPLY CO.]
Importers and Jobbers
GENERAL MERCHANDISE
A Full Line of Steamboat Supplies
Market and Water Streets

No. D 1328

PITTSBURGH, PA. 8-13 1920

BEECHNUT PACKING CO.
Canajoharie, N. Y.
Please ship
1 Case Beechnut Tobacco
Show number of order on invoice.

Render bill in duplicate to:
VALLEY SUPPLY CO.
Per MPB

Plaintiff's Exhibit No. 12-Q.

[Post Card.]

JOHNSTOWN, PA., Aug 13 1920.

Dear Sirs:

Please ship us at once via Penna R R
25 Cs. Beechnut Tobacco, 2 Grs per Cs.

Very truly yours,
DOWLING & Co.

[Address.]

BEECH NUT PACKING Co.
Canajoharie, N. Y.

[Post Card.]

JOHNSTOWN, PA., Jan. 10th 1921

Dear Sirs:

Please ship us at once via P R R
25 Cs. 2 Gross 10 cent Beechnut Tobacco

Very truly yours,
DOWLING & Co.

[Address.]

BEECH NUT PACKING Co.
Canajoharie, N. Y.

Plaintiff's Exhibit No. 12-R.

[Letterhead of
REYNOLDS-DAVIS GROCERY CO.]

No. 1429 C
FORT SMITH, ARK. 12-2-21

BEECHNUT COMPANY,
Canajoharie, N. Y.
Please ship according to
the following terms and specifications
To Reynolds Davis Grocery Co.,
Weleetka, Okla.
F. O. B. Via

10 Gross Beechnut Tobacco

Goods shipped to our branch houses must be invoiced in duplicate.

All papers to Fort Smith. REYNOLDS-DAVIS GROCERY CO.

Plaintiff's Exhibit No. 12-S.

PARSONS & SCOVILLE CO.
Incorporated

Branch House
Bowling Green, Ky.

EVANSVILLE, IND. Jan. 12, 1921.

IMPORTANT
Send original bill of lading with invoice or we shall assume your willingness to be charged direct for any loss or damage.

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.
Gentlemen:
Please send us:
10 gross Beech-Nut Scrap Tobacco.

Yours truly,
AWS:EH PARSONS & SCOVILLE CO.

Plaintiff's Exhibit No. 12-T.

Purchase Order

Show this number on invoice and packing slip

Order No. 3570.

Date, October 31, 1921.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Please enter our order as follows:

Ship Delivery

---

8 cs 10 cent Beechnut Scrap.
2 cs 10 cent Honest Scrap.

For Shipment to SMITH, LICHTY & HILLMAN CO.,
Waterloo, Iowa.

Per A. J. B.

Plaintiff's Exhibit No. 12-U.

[Letterhead of
OHIO VALLEY GROCERY CO.
Wholesale Only.]
822 West Main Street

LOUISVILLE, KY. Oct. 5th, 1921.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Please ship us as soon as possible ten gross Beechnut Scrap Tobacco and ten thousand Beechnut Cigarettes.

Yours truly,
OHIO VALLEY GROCERY COMPANY,
By H. C. RAYMOND, *Mgr.*

HCR:LS

Plaintiff's Exhibit No. 12-V.

[Letterhead of
FULLER-HOLWAY COMPANY.]
Wholesale Grocers
and
Grain Dealers

AUGUSTA, ME., June 7, 1921.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Please ship at once, 30 M Beechnut Cigarettes, and oblige.

Yours truly,
FULLER-HOLWAY COMPANY,
E. P. ROBBINS,
Vice President.

EPR—EML

Plaintiff's Exhibit No. 12-W.

[Purchase Order of
HENRY KING & COMPANY.]
Wholesale Grocers
Complete Stocks at Murfreesboro,
Tullahoma and McMinnville

Order No. 541.

MURFREESBORO, TENN., 10/1/21.

To BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Please ship at once to Murfreesboro 5 M Beechnut Cigarettes 20s.

HENRY KING & COMPANY,
By SMOTHERMAN.

Plaintiff's Exhibit No. 12-X.

[Letterhead of
AMERICAN GROCERS SOCIETY, INC.]
Branch Offices in Principal Cities
General Office
NEWARK, NEW JERSEY

NEW YORK, June 26, 1920.

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

In reply to the attached letter regarding order for Beech-Nut Scrap Tobacco, sent to you in error, we are enclosing a stamped envelope and would ask you to kindly enclose the order mailed to you by mistake and mail to the P. Lorillard Co., New York.

Yours very truly,
AMERICAN GROCERS SOCIETY, INC.

FA:AH

[Letterhead of
BEECH-NUT PACKING COMPANY.]
CANAJOHARIE, N. Y.]

In your reply refer to WCA-H of 6/23/20.

AMERICAN GROCERS SOCIETY,
9 Clinton St.,
Newark, N. J.

Gentlemen:

Your order for 5 gross of Beech-Nut Scrap Tobacco has been received. We respectfully refer you to the P. Lorillard Company, New York, who manufacture this product.

Yours very truly,
BEECH-NUT PACKING COMPANY.
W. C. ARKELL.

Plaintiff's Exhibit No. 12-Y.

[Letterhead of
GENERAL CIGAR CO., INC.]

Distributing Branch 4637 St. Aubin Ave.

DETROIT, MICH., March 29th, 1921.

BEECHNUT PACKING Co.,
Canajoharie, N. Y.

Gentlemen:

Kindly cancel until further notice our standing order for Beechnut Scrap.

Yours very truly,
GENERAL CIGAR COMPANY, INC.

WGW:D WM. G. WEEKS.

Plaintiff's Exhibit No. 12-Z.

Office of
JOHN H. GOESER & CO.
WHOLESALE GROCERS

Danville Hazleton Tamaqua

DANVILLE, PA., Feb. 4, 1921.

BEECH-NUT PACKING Co.,
Canajoharie, N. Y.

Gentlemen.

We have about (1) gross of Beech-Nut Scrap which is in a moldy condition.

Please advise us what we should do with this.

Respectfully yours,
J. H. GOESER & Co., INC.

KTG:M

Plaintiff's Exhibit No. 12-A-1.

[Letterhead of
LOUISIANA RAILWAY & NAVIGATION COMPANY.]

OFFICE OF AGENT

St, Maurice, La Nov/17/1921

Beech-Nut Packing Co.,
Canajoharie, N. Y.

Dear sir;

Please send me your price list on Beech-Nut cigarettes per 1.000 as the dealers here don't carry them in stock

And also let me know if you can sell to me at wholesale price

I am.

Yours truly.

W. H. Jackson,
Box 62.

Plaintiff's Exhibit No. 12-A-2.

Buick Automobiles
Fours and Sixes

Farm Machinery
Of All Kinds

D. J. EPPS & SON
Le Roy S. Epps, Manager
Everything for the Motor Car
And Farm

Kingstree, South Carolina Jan. 6th, 1922.

Beech Nut Packing Co.
Brooklyn N. Y.

Gentlemen:—

The writer was informed to-day by a traveling salesman that you were now manufacturind a very tastefull Cigarette.

I would ask that if the above statement be true that you please mail me two sample packages, thanking you in advance for the above favor.

very truly yours

D. J. EPPS & SON
LE ROY S. EPPS
Mgr.

L/S/E.

Plaintiff's Exhibit No. 12-A-3.

[Letterhead of
LAMONT, CORLISS & COMPANY.]
Agents for Manufacturers
131 Hudson St.

NEW YORK August 23rd, 1920.

BEECHNUT PACKING COMPANY,
650 Hudson Street,
New York City.

Dear Sirs:

The bill poster who is working in New York on Beechnut Chewing Tobacco is so ambitious that he pasted his posters all over our Receiving Platform.

We are sure that this is not done under your instructions, and we would greatly appreciate your getting in touch with the Company doing this work. You will doubtless wish to have this practice discontinued in order to avoid repetition in other places.

Very truly yours,

LAMONT, CORLISS & COMPANY.
R. L. TRIMMER
Traffic Manager.

RLT:CRM

Plaintiff's Exhibit No. 12-A-4.

[Letterhead of
ENGLES EXPRESS CO.]
38 Pearl Street

NEW YORK, April 5, 1921.

BEECHNUT PACKING CO.,
650 Hudson Street,
New York City.

Gentlemen:

We notice that one of your advertising posters has been affixed to the doorway of our warehouse situated at #76 Pearl Street, and we would ask that you have same removed immediately.

We consider it entirely out of order for this to have happened, and we request your immediate attention to the matter.

Very truly yours,
ENGELS EXPRESS CO.,
O. ENGELS, Jr.

OE—Jr/KA

[Note: Pasted to above letter in this exhibit is a torn poster bearing the words:

"Quality Made
Beech-Nut
Chewing Tobacco
Famous"]

Plaintiff's Exhibit No. 12-A-5.

[Salesman's Letter of
ARBUCKLE BROTHERS, NEW YORK.]

City Danville State Ill.
To New York. Date Oct. 16, 1920

Subject:

BEECHNUT PACKING CO
Canajoharie, N. Y.

Dear Sirs:

In making my territory as salesman for Arbuckle Bros I do considerable advertising by tacking signs. I also notice that Beech Nut Chewing gum is advertised heavily to the extent that Beech Nut Chewing gum signs are pasted on over my signs. As my advertising is not doing me any good when some one covers it up I will ask you if there are any steps that can be taken by you to prevent this.

It seems like the one that is doing that should have regard for another mans advertising. If I see a place taken up with other advertising I pass it up and hunt a place where I will not have to cover any one else up. Please let me hear from you in regard to this. This happened chiefly in Clinton, Ind.

ERNEST D. WINTROWD
Box 367
Danville, Ill.

GWS/MH 10/30/20

MR. ERNEST D. WINTROWD,
Box 367,
Danville, Ill.

Dear Sir:

Following our letter of October 18, in answer to yours of October 16, we will be pleased to have you give us an idea of just what Beech-Nut Advertising signs are being placed over those put up by yourself.

We were not aware that any of our men had any material for advertising Beech-Nut Gum and if it is advertising for Beech-Nut Scrap Chewing Tobacco we would like to know it.

Your good attention to this matter will be appreciated by us as we have no desire to have our men put up advertising material to the detriment of other concerns.

Awaiting your early reply, we are

Yours very truly,
BEECH-NUT PACKING CO.
Sales Dept.

ARBUCKLE BROTHERS
NEW YORK

DANVILLE, ILL NOV. 6, 1920

Subject:

BEECH-NUT PACKING CO.
Canajoharie, N. Y.

Gentlemen.

Since receiving your letter of Oct. 30 and also one from your Sales Mgr. in Indianapolis Ind. concerning Beech Nut signs tacked over Arbuckle Coffee signs, I have dis-

covered my mistake as it is Beech Nut Chewing Tobacco signs instead of Chewing Gum signs.

I am very sorry to have caused you any inconvenience whatever in my mistake.

Yours very truly

ERNEST D. WINTROWD
Box 367

Plaintiff's Exhibit No. 12-A-6.

[Letterhead of
ALFRED W. ZOEBISCH.]

Holbrook, Mass.
Wednesday,
Nov. 9th, 1921.

BEECH-NUT PACKING CO.,
Canajoharie
New York, U. S. A.

Dear Sirs:

Will you please mail me one of your advertising cards relating to your Bacon, etc. I have a small store hear in the town of Holbrook, Norfolk County, and am willing to pay postage for same.

Also sell your Beech-Nut Brand Chewing Gum—Cigarettes.

Thanking you in advance, I remain

Very truly yours,
ALFRED W. ZOERISCH.

Plaintiff's Exhibit No. 12-A-7.

NEW YORK, Nov. 3rd, 1921.

THE BEECHNUT PRODUCTS
New York.

Gentlemen:

I have been looking about for a Tobacco Firm to become interested to the extent of making a cigarette named after Ed Wynn—"The Perfect Fool."

This comedian is now ranked among the foremost entertainers in America. Mr. Wynn opens in his latest musical riot, which Mr. A. L. Erlanger chooses to call "The Perfect Fool" at the George M. Cohan Theatre, New York City, Monday night, November the 7th. After closing in New York, which we hope will be a few months away, Mr. Wynn tours the country from coast to coast. I have several ideas in mind for the distribution and sale of a cigarette or a cigar named after Ed Wynn, The Perfect Fool.

If you are interested I would be pleased to hear from you, at your convenience.

Yours very truly,
H. P. HILL,
Bus. Representative
Ed Wynn "The Perfect Fool" Co.
GEORGE M. COHAN THEATRE
N. Y. City.

Plaintiff's Exhibit No. 12-A-8.

DRIVER-HARRIS COMPANY.

Cable Address: Driver Newark

Electrical Resistance Wires
Special Alloys
and Pure Metals [Cut: picture]
For Electrical Mechanical and
Chemical Uses in the form of
Wire–Sheet–Strip–Strand–Castings

Nichrome Castings
Cold Rolled Strip Steel
Wire Rope
Flexible Heater Cord
Brass–Bronze–Monel Metal Wires
Pure Sheet Nickel

HARRISON, N. J. Sept. 29, 1921.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Attention: Advertising Manager

Gentlemen:—

As an enthusiastic user of Beechnut Bacon and some of your other products and as an advertising man, I am doubly interested to know whether your company is in any way connected with Beechnut Cigarettes.

I bought one package of these cigarettes on the strength of your Beechnut trade name, being under the impression that these cigarettes were one of your products, although, I must confess, it was surprising to me that you should add a cigarette to your products.

While I might have discovered sooner or later that another company's name appeared on the package, I did not do so at once and not until it was called to my attention. Incidentally I might say that the cigarettes, in my mind, did not come up to the high standard of your Beechnut products.

I am very much interested to know whether the Beechnut Packing Co. is in any way connected with this cigarette and if not whether they are contemplating any ac-

tion in what seems to be an attempt to capitalize the name which has a very high commercial value.

Yours very truly,

DRIVER HARRIS COMPANY

G. A. RICKERT

GAR:C Advertising Manager. C

Plaintiff's Exhibit No. 12-A-9.

[Letterhead of

DIAMOND TIRE & SUPPLY CO.]

130 Oneida Street

MILWAUKEE, October 4, 1921.

BEECH NUT PACKING COMPANY,
Canajoharie, N. Y.

Gentlemen:—

For sometime past, the writer has been more than pleased with the very excellent quality of your products, having used your gums, candies, etc., etc., In fact, I have been a real booster for "Beech Nut" merchandise.

The other day, I deviated from my usual practice and purchased a package of Beech Nut cigarettes expecting to receive a product of unusually high standard.

After smoking three or four of these cigarettes, and passing a few around to some friends, we have all reached the conclusion that the "Beech Nut" standard has been greatly reduced.

I believe you will accept this criticism from a constructive view point, and beg to remain

Very truly yours,

B. M. REILLY

Plaintiff's Exhibit No. 12-A-10.

[Letterhead of
A. G. MORSE CO., INC.]
Chocolates and Fancy Packages
High Grade CHOCOLATES a Specialty
210 to 220 N. Halsted Street

CHICAGO, Oct. 20th, 1921.

BEECH-NUT PACKING Co.,
Canajoharie, N. Y.

Gentlemen:

The writer would appreciate your settling an argument.

Is the Beech-Nut Packing Co., of Canajoharie, N. Y. controlling all the products under the name of Beech-Nut such as bacon, catsup, cigarettes, peanut butter, chewing gum and mints.

Appreciating your response, we are

Yours truly,
E. F. CHAMBLISS.

EFC:ML.

Plaintiff's Exhibit No. 12-A-11.

Established 1862

E. HALLOCK

(Chas. H. Hallock, Proprietor)

Fancy Groceries and Every Variety of Merchandise

Freight or Express
Mastic Station
L. I. R R., N. Y.

P. O. Moriches, New York, Oct. 8, 1921.

Beech-Nut Packing Co.,

My Dear Sirs:

I have not seen, but I have heard of "Beech Nut" Cigarettes, but I cannot *believe* your *wonderful* firm has come down to the low, beggarly business of making cigarettes, *one* of the lowest things on earth, to my mind—

I have lost two friends through smoking cigarettes, so I am *DOWN DOWN* on them. And I have yet to believe that the wonderful "Beech Nut Packing Co." have come down to that greasy, dirty body killing cigarette business.

Let me hear the TRUTH, please.

Yours truly,

Chas. H. Hallock.

If you are "not guilty" and I do not believe you are, would you allow me to have your reply printed or to have some circulars printed for distribution?

C. H. H.

Plaintiff's Exhibit No. 12-A-12.

ADAMS & SONS GROCER CO.

Wholesale Grocers.

This Number Must Show on Your Invoice — No. 24886

CHILLICOTHE, Mo., 1-16-22, 192--.

BEECH NUT PACKING CO.,
Canajoharie, N. Y.

Ship to us at Chillicothe, Mo.———— Via————

The following goods, F. O. B.— Days net or Less—% Discount in—Days

Quantity	Articles
20	M Beechnut Cigarettes

ADAMS & SONS GROCER CO.
Per Ray F. Chase.

Please acknowledge receipt of this order and state when you will ship.

Send all Invoices with Bill of Lading to Our Chillicothe Office.

Plaintiff's Exhibit No. 12-A-13.

WAR DEPARTMENT.

WASHINGTON GENERAL INTERMEDIATE DEPOT

Office of the Quartermaster Supply Officer

Address Reply to
Q. M. Supply Officer
20th & C. Sts. N. W.
Washington, D. C.

WASHINGTON, D. C. 3/27/22

No. 400-P (Reqn No.)

From: Quartermaster Supply Officer, Washington, D. C.

To: Beechnut Packing Co., Canajoharie, N. Y.

Subject: Quotation.

1. Your quotations are requested on the following items for immediate delivery to the General Sales Store, 21st & C Sts., N. W., Wash. D. C.

2. Quotations should be submitted f. o. b. destination and reach this office at the earliest possible date.

By authority of the Quartermaster Supply Officer.

C. B. ECKELS,
Major, Quartermaster Corps.

Quantity	Unit	Article	Unit Price	Del'y.
		Tobacco, Chewing, Scrap, Beechnut, 2¼ oz.		

———% discount ———days

.....
Signature of Bidder.

.....
Place and Date.

Plaintiff's Exhibit No. 12-A-14.

[Check.]

No. 37468

LOUGH-SIMPSON GROCERY CO.

WHOLESALE GROCERS CANNED GOODS A SPECIALTY

MORGANTOWN, W. VA., 3/20/1922

Pay to the order of Beech-Nut Tobacco Co. $38.95

—Thirty Eight Dollars Ninety Five Cents—

LOUGH-SIMPSON GROCERY CO.

R. A. LOUGH,

Manager-Treas.

To BANK OF THE MONONGAHELA VALLEY

69-92 MORGANTOWN, W. VA.

[Stub.]

No. 37468 MORGANTOWN, W. VA., 3/20 1922

M Beech-Nut Tobacco Co.

The attached check on Bank of the Monongahela Valley, is in settlement of our account as below.

Inv. 3/15	13 25
" 3/15	13 25
" 3/15	13 25
	39 75
Less Disct	80
	38 95

Yours Truly

LOUGH-SIMPSON GROCERY CO.

Per L

Kindly detach receipt and return

[Envelope.]

After 5 days, return to
LOUGH-SIMPSON GROCERY CO.,
Lock Box 618,
MORGANTOWN, W. VA.

[Postmark.]
Morgantown, W. Va.,
Mar 25 6:30 P M 1922

BEECHNUT TOBACCO COMPANY
Canojaharie N. Y.

Plaintiff's Exhibit No. 12-A-15.

THE AMSTER COMPANY
3500-3502 Woodland Ave.

CLEVELAND, OHIO. Mar. 22, 1922.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

We are making up a catalog of cigarette and tobacco products for our salesmen, and request that you mail us ten each of either package fronts or pictures of products of your manufacture for use in this connection.

Your assistance in getting this matter taken care of will be greatly appreciated.

Your very truly,

LE:MW THE AMSTER COMPANY.

Plaintiff's Exhibit No. 12-A-16.

[Letterhead of

ALLIED TOBACCO INDUSTRIES EXPOSITION.

COLISEUM, CHICAGO, June 10 to 17, 1922.]

Address all communications to Allied Tobacco Industries Exposition, 417 South Dearborn Street, Chicago

TELEPHONE—Harrison 1878.

February 11th, 1922.

BEECH NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

At last the tobacco industry is to have an exposition such as all other industries have and it is expected that the good accruing therefrom will do the same amount of good to our industry as does the auto show, shoe exposition, chemical show and numerous other expositions do to their respective industries.

The program will be highly educational and will be such as to attract men from all branches of the tobacco industry as well as the general public. The decision of the executive committee to hold the Allied Tobacco Industries Exposition starting June 10 and continuing until June 17 was reached after a careful survey was made by taking the matter up with a great many people prominently identified with the industry.

On the back of this letter will be found diagram showing spaces, arrangement, cost, etc. We request that you let us have your first, second and third choice as spaces will be allotted in the order in which we receive applications. Spaces one to forty inclusive have already been reserved.

Trusting we may include your firm among our representative list of exhibitors, we are

Yours very truly,

MILO E. WESTBROOKE,
Manager.

MEW:EN

Plaintiff's Exhibit No. 12-A-17.

CONTRACT FOR SPACE IN THE ALLIED TOBACCO INDUSTRIES EXPOSITION.

COLISEUM, CHICAGO, June 10th to 17th, 1922.

[Note: Blank contract form.]

Plaintiff's Exhibit No. 12-A-18.

F. M. BILL CO.
Wholesale Grocers
Importers and Coffee Roasters
360 Jackson Street

LOWELL, MASS., May 10, 1921.

BEECH-NUT PACKING CO.

Gentlemen:

Some days ago we received 10 m Beechnut Cigarettes without billing on same, and up to the time of writing we have received neither invoice or shipping receipt.

Kindly look this up and if shipped by you, mail invoice and shipping receipt.

Resp yours

F M BILL Co
L B

Plaintiff's Exhibit No. 12-A-19.

[Post Card.]

WAYNESBORO, TENN., June 2-22.

Dear Sirs:

I have noticed beech nut chewing tobacco in several places and would like to handle same if I knew where to get it. Please let me hear from you

I am yours

J. F. HETTASS.

[Address.]

BEECH-NUT PACKING CO.
Canajoharie, N. Y.

Plaintiff's Exhibit No. 12-A-20.

[Letterhead of
P. P. MARTINEZ.]
Wholesale Tobacconist
and Manufacturer of Smoking Tobacco.

DALLAS, TEXAS, May 31, 1922.

BEECHNUT PACKING CO.,
Canajoharie, N. Y.

Dear Sirs:

Please send me:

2 cases Beechnut Cigarettes.

Yours very truly,

P. P. MARTINEZ
Per M

L/M

Plaintiff's Exhibit No. 12-A-21.

[Post Card.]

Office of
THE KANAWHA DRUG CO.
Wholesale Druggists.

CHARLESTON, W. VA., June 21, 1922.

Gentlemen:

Please ship at once for us to Georges Creek Coal Co., Ethel, W. Va., invoicing to us in duplicate,

4 Gross Beechnut Tobacco.

Yours truly,
THE KANAWHA DRUG CO.
By Jr—R.

[Address.]

BEECHNUT PACKING CO.,
Canajoharie, New York.

Plaintiff's Exhibit No. 12-A-22.

W. L. de BLOIS-LEACH
COMMERCIAL AGENTS
Tobacconist's Specialties & Novelties
14 RUE CHALGRIN, PARIS, April, 18th, 1923.

Export Manager,
BEECHNUT PACKING CO.
New York,

Mr. BART ARKELL.

Sir,

Through the recommendation of Mr. L. L. Rounds, during one of his visits to Paris, I beg to enclose a copy

of the French Regie Regulations for the introduction of cigarettes into France, which may be of possible interest to you.

Should the introduction of your sales be within your consideration I shall be pleased to forward you all other necessary information, etc, with a view to taking up your agency and forthering your interests for this territory.

Your competitive lines are, Chesterfields, One Elevens, and Camels (just introduced).

Thanking you in anticipation for your reply in due course and the return of the regulations should they prove of no interest to you.

I am,
Sir,

Obediently yours,
W. L. de BLOIS-LEACH.

W. L. de Blois-Leach.

Plaintiff's Exhibit No. 12-A-23.

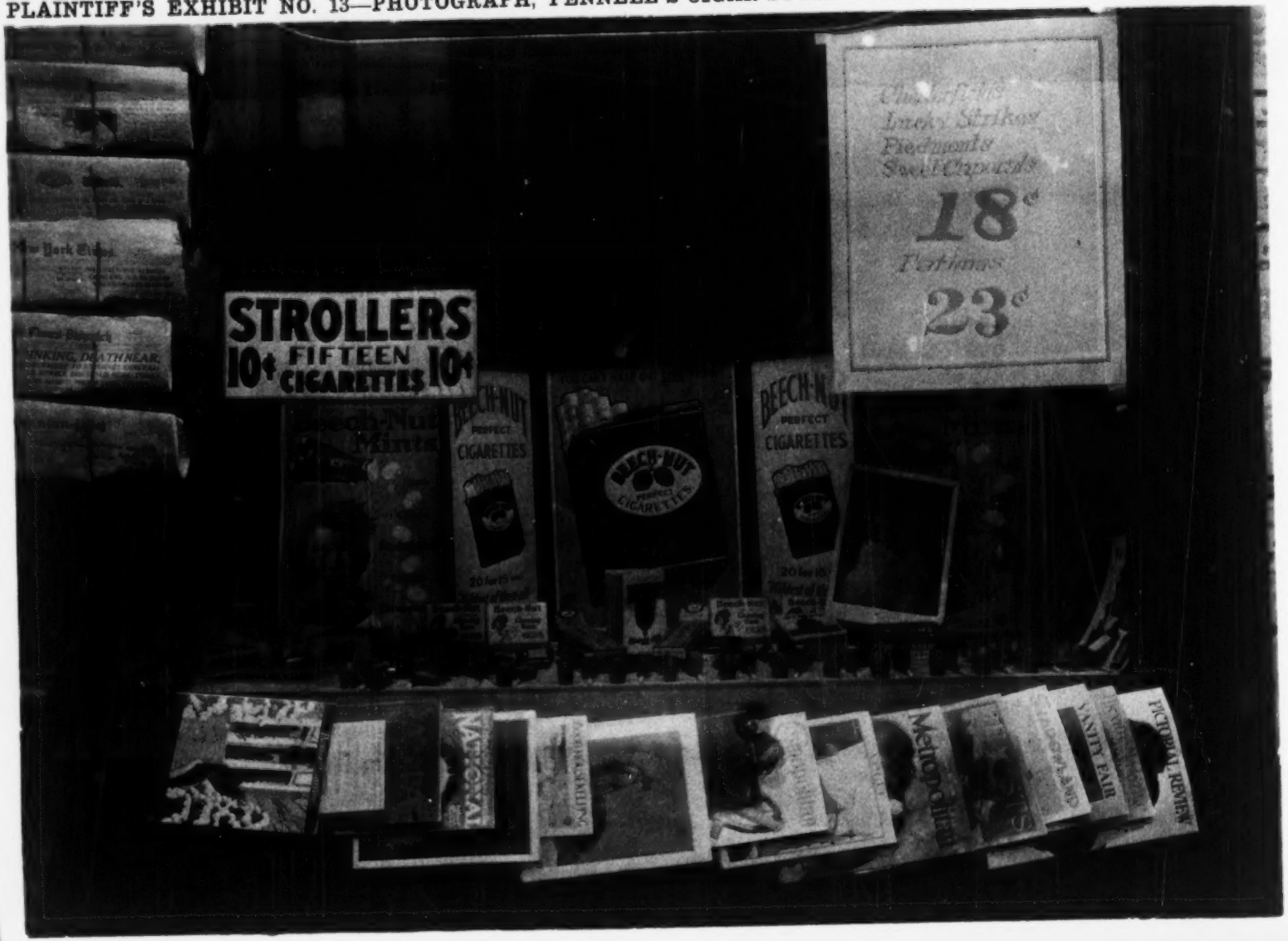
[Envelope.]

RETURN AFTER FIVE DAYS TO Leitchfield, Kentucky
THE JAMES GROCERY CO.
Wholesale Grocers

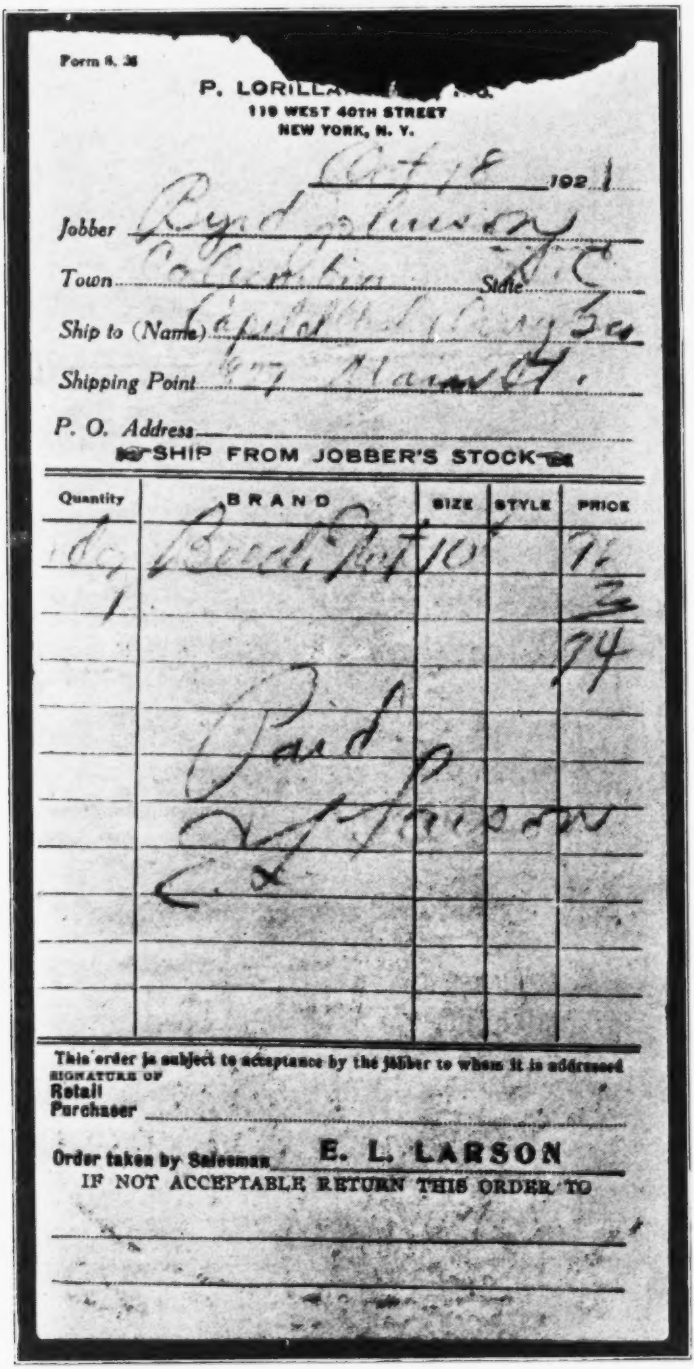
[POSTMARK]
Louisville, Ky.
Jun 17, 1923, 8 P. M.

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

PLAINTIFF'S EXHIBIT NO. 13—PHOTOGRAPH, PENNELL'S CIGAR STORE WINDOW DISPLAY, ASHEVILLE, N. C.



PLAINTIFF'S EXHIBIT NO. 14—RECEIPT SIGNED "E. L. LARSON."



Form 9. 26

P. LORILLA[redacted]

119 WEST 40TH STREET
NEW YORK, N. Y.

Oct 18 1921

Jobber Reed Tobacco Co

Town Columbia State S. C.

Ship to (Name) Capital City Drug Co

Shipping Point 407 Main St.

P. O. Address

SHIP FROM JOBBER'S STOCK

Quantity	BRAND	SIZE	STYLE	PRICE
10	Beech Nut	10		7.-
1				3
				74
	Paid			
	Oct 19 1921			
	C. L.			

This order is subject to acceptance by the jobber to whom it is addressed

SIGNATURE OF Retail Purchaser _____

Order taken by Salesman E. L. LARSON

IF NOT ACCEPTABLE RETURN THIS ORDER TO

_____

_____

PLAINTIFF'S EXHIBIT NO. 15—PHOTOGRAPH, COLLECTION OF BEECH-NUT PACKING COMPANY PRODUCTS 1922.

PLAINTIFF'S EXHIBIT NO. 16—PORTION OF SHIPPING CARTON USED BY BEECH-NUT PACKING COMPANY.

PLAINTIFF'S EXHIBIT NO. 17—P. LORILLARD COMPANY BEECH-NUT CIGARETTES CARTON.

PLAINTIFF'S EXHIBIT NO. 18—PUBLICATION "BON JOUR" OF DEC. 4 AND 5, 1891.

V. KIRBY,
Contractor and Builder,
ARCHITECT OF SHAPER BLOCK,
Is a Canajoharie Boy, and wishes to stick to the place, and all he asks is, for us to stick by him

G. EDW. COOPER,
ARCHITECT,
126 Genesee St., UTICA, N. Y.

LEWIS FIEDLER,
FRESCO PAINTER,
CHURCHES A SPECIALTY
177 Livingston Ave., Albany N. Y.

Mrs. Charles Hagadorn,
TEACHER OF
Piano Forte and Organ,
RESIDENCE IN NELLIS ROW.

The Imperial Packing Co.,
Cures and Sells the
"BEECH NUT HAMS,
Also Bacon, and Smoked Beef,
CANAJOHARIE, N. Y.

UMBRELLAS
at
E. EDWARDS, Fort Plain, N. Y.

Nortbrup Glove Manufacturing Co.,
Belt only at Wholesale.
One of the oldest and most reliable
houses in Johnstown, N. Y.

ALWAYS USE
KNOX'S SPARKLING
GELATINE.
Finest on the market. Cannot fail in making Jellies and Ice Cream if you use it.
Manufactured at Johnstown, N. Y.

FROEHLICH & CO.,
JEWELERS
At their old place of business in the
MOHAWK BLOCK.
A fine stock of Watches, Clocks, Jewelry and Silver table ware. Always on hand Clocks on "Cuff"

J. C. VAN GAASBEEK. R. ARKELL.
VAN GAASBEEK & ARKELL,
IMPORTERS OF
Oriental Rugs and Carpets
1235 BROADWAY,
Corner 32d Street, New York.
WM. H. HALLIGAN. A. LINCOLN VAN DECAR.
HALLIGAN & VAN DECAR,
Hatters and Men's Furnishers,
65 CONGRESS STREET.
RAND'S OPERA HOUSE BLOCK.
TROY, N. Y.

"WIDE-AWAKE MERCHANTS"
OUT OF TOWN.
R. H. SHEARER & CO.,
FORT PLAIN, N. Y.
Large stock of Goods. Novelties for the Holi day season in Dress Goods.
Always stops to wait on Canajoharie ladies

To Insure Peaceful Slumbers
Have your property insured in the always reliable companies represented by
DANIEL SPRAKER, JR.
He also affords Tornado, Wind Storm and Life Insurance.
Office at Sprakers, or National Sprak er Bank Canajoharie.

FARM FOR SALE
IN THE TOWNSHIP OF MAYFIELDS, N. Y.
Just the place for a young married couple starting farming

Everything romantic and suggestive of the honeymoon. Nothing to do but listen to the tinkling of cow bells and the twitter of the robins. Everything that loves dose for them by the proprietor

With his own hands he has gathered up the stones, placed them on piles and painted them green. Nothing grows about that either. You see the farmers are so used to seeing stones scattered over a farm, that if they couldn't see any on the surface they'd think that they couldn't raise white beans there. And the cattle—nothing but yellow cows. If you should buy a white cow for a pet, and let her feed on this farm, the grass is so rich in butter that it would turn her hair yellow. And such butter balls of sweetness and delightful pungency and sufficiency—they are pale when placed beside the fragrant unctuous substance. There is only one drawback to butter making on this farm. The milk is so rich that in the process of milking the agitation causes the butter globules to form and separate from the milk, and it is for expensive and inconvenient to work the butter in the pail, but this will be remedied in time by patent sufferers, and the operation of making butter and forcing it into rolls ready for distribution will be done in the process of milking

Any other information concerning this picturesque farm will be cheerfully given by applying to

JOHN D. TAYLOR,
Central R. R. Depot

P. S. This farm would not be for sale if its owner was young and had an ambition to join the Farmers Alliance

WAGNER HOTEL.
HENRY JOY, PROP.
Centrally located. Beautifully fitted up. A model boathery in every respect. A most courteous landlord

"Where has traveled life's fall travel, Wherever his stages may have been, May sigh to think he still has found The warmest welcome at an inn

VERY STYLISH.
Tall ladies are very stylish sometimes so are tall lamps. "The Rochester silways." Short ladies are stylish too, if you like them. It is the same with short lamps. In fact everything is fashionable now a days that suits you. We have the finest stock you ever saw to select from. Lamps we mean. You will do yourself an everlasting favor to purchase one, and hug yourself for what you have done every time you light it. Art Pottery. Well the finest you ever saw. Will have it on exhibition in a few days.

KIRBY & DIEFENDORF

"Why does a miller wear a white hat?" is an old conundrum, but why a "Hatter" should sell a "white hat" is newer

Answer Because John is in the business, and he sells everything to correspond. Dress suits, business suits and hats like made to fit. If you want to attend the Toto Ball go to Hatter & Sons for your outfit. They can fit you with or without the tape measure. Gentlemanly tailor always in attendance.

FUN.
It was at a Minister's meeting
The presiding officer in announcing the following session said: The speaker of the occasion will be the Rev. Dr. ——, whose theme is 'The Devil,' and I respeak for the Rev. Bro. a large attendance, as I understand he is full of his subject."

Query.—What is the difference between a friend and a Methodist?

Ans A friend is a Quaker, but a Methodist is an earth quaker

Husband opens a can of tomatoes for his wife and growing disgusted with his ill success, mutters forth his feelings somewhat audibly

Wife—Dear, what are you opening that can with?

With a can-opener, of course. What d—— you spose

Oh, I thought from your language, you were opening it with prayer

A PSALM OF LIFE.
(A HIND WAS AFTER UNSPEECHLOW.)
Tell me not, in sorrowful numbers,
Life is but an empty dream!
For the soul is dead that doesn't,
And things are not what they seem.

Life is real! Life is earnest!
And the grave is not the goal;
If we advertise, still and wisely,
We will get there sweet and soul.

Not enjoyment, and not sorrow,
Is our destined end or way,
Advertise that each to-morrow
Finds us richer than to-day

In the world's broad field of battle,
In the bivouac of life,
Be not like dumb drivers cattle!
Be a leader in the strife

Trust no future however pleasant!
Let the buried past bury its dead!
Advertise in the living present!
In that way you'll forge ahead.

Lives of great men all remind us
We can make the paths our there,
If we advertise ourselves
Make a business bright advertise

Let us then be up and doing,
With a heart for any fate;
Advertising and still hoeing,
Let the other fellows wait

WILLEY F. OOOD.

HARD WARE.
Lewis S. Davis, successor to his father, carries a large line of hardware, farmers ostensils, parlor stoves and ranges. Will take special pains to accommodate. Prices satisfactory.

67,270,000 people visit Glen Island yearly.

C. STICHT,
BOOTS and SHOES
A Full Line of all sizes
"For Misses and Children."
Everybody Knows the Place.
Don't go any wet feet when boots and shoes are so cheap, at Christ's suttle.

J. C. RICHMOND. W. BELLINGER.
RICHMOND & BELLINGER,
Fire, Life and Accident Insurance
CANAJOHARIE, N. Y.

PREPARE FOR WINTER.
Robes, Blankets, Harness
and SLEIGH BELLS.
Everything to make your best girl happy
go to
KNAPP & HIBBISON
AND MAKE YOUR SELECTION

A. M. HODGE,
WHOLESALE AND RETAIL DEALER IN
DRUGS, CHEMICALS, PAINTS,
OILS and VARNISHES.
Also BOOKS & STATIONERY

Particular attention is paid to the department of Physicians Supplies, and any article not in stock, and any Book, school or miscellaneous not on hand procured at short notice.

STOP AND LOOK FOR
FRANK SHUBERT'S
Boot and Shoe Store.
It is the First Shoe Store on the right hand side going down the street. You will get a "good fit," and a No. 1 Shoe, with price to suit. No one can beat Frank in a walking match, he wears his own shoes.

EMMONS HOWARD,
For workmanship, material and painstaking in every instrument large or small, the Howard Organ cannot be excelled. Mr. Howard taking special supervision in the construction of every part. In the selection of stops for different sizes, a proper amount of foundation, tone and volume, he brings his long experience as an Organ builder to bear, and warrants his instruments unexcelled in every particular.
BUILDER of CHURCH ORGANS
The new Organ in the Reformed Church is one of Mr. Howard's, and all are invited to attend the recital and concert which will be held Tuesday evening, 15th ember 29th, 1891

WESTFIELD, MASS.

The MAIL and EXPRESS
The Leading Evening Paper
Will be delivered to subscribers in Canajoharie and vicinity by seven o'clock every morning for seven dollars a year
Try a Healthy Metropolitan Journal
Remit to 23 PARK ROW,
NEW YORK.

CHRISTMAS IS COMING!
FINEHOUT & SON
ARE HERE.
IN THEIR NEW STORE IN THE
MOHAWK BLOCK.
You can see their fine display from the windows, but go in and purchase.
Groceries, Glassware and Crockery, etc.
Goods Delivered with Dispatch. Large paces on purpose.

Once a customer Always a customer
AT
JULIUS SAULS
Men's Furnishing Goods.
Finest and Best in Eastern New York
Overcoats and Ulsters.
CLOTHING OF EVERY DESCRIPTION
Our Cutter is unrivalled. Perfect fit and satisfaction guaranteed. Call and be convinced. We can afford to give you a fine thing at a low price

258 & 260 RIVER ST. 51 & 53 NORTH
258 & 21 FOX 20TH ST. PEARL ST.,
TROY. ALBANY.
NEW YORK

QUACKENBUSH'S
GREAT PURCHASE OF
Cloaks and Furs.
Our Cloak sales are the largest we have ever had, and we have just bought the biggest variety of good Cloaks ever shown in Troy.
Seal Plush Sacques, the finest in the world, at $25, $29.50, $35, $40 to $50.
In stories of Full Fur trimmed Coats at $15, $16, $18.
50 different designs in Coats, full fur trimmed, at $16, $18, $20.
Excellent Fur Capes we now mark at $5, $6, $8, $10, $15.
We bought these Cloaks at the bottom prices from the best manufacturers in America.
Take advantage of this sale. We bought them cheap and we have marked them low, but our big sales have made up for the loss of a regular legitimate Troy Goods profit.
G. V. S. QUACKENBUSH & CO.,
TROY, N. Y.

Canajoharie Lawyers
Hovel & Spraker
H. Dunbar W. A. Williams
Hudson & Merrick

BONJOUR.

Canajoharie Lawyers
S. C. Fox
W. H. Van Benschoten
C. W. Wheeler J. C. Wheeler

"O LIFE! HOW PLEASANT IN THE MORNING

A fair Paper for the Fair, held at Wagner Opera Hall, Canajoharie, N. Y., December 4th and 5th, 1891.

BUSINESS DIRECTORY
CANAJOHARIE.

DRESS MAKERS—Miss Mary Wells' Miss Shaw.

BANKS—Canajoharie National Bank Sprak er National Bank.

TELEGRAPH—James Vanalstyne.

COMMISSION MERCHANT—Miss H. Dieterich.

PUBLISHERS—Cook & Fortune. L. F. Allen.

BREWER—Louis Borchardt.

CONTRACTOR AND BUILDER—Valentine Kirby.

HOTEL PROPRIETORS—Henry Joy, Daniel B. Johnson. David Gilchrist. Harry Long, Mohawk.

HIDES AND LEATHER—J. Hoffmeier. J. O'Connor.

GROCERS—John Fromhold & Son. Sweyer & Sprakert. Theodore Metzelaar. Wendell Wm. Mosher & Quackenbush. John E. Hallenbeck. F. E. Pugsley & Co. Kirby & Diefendorf.

BAKERY—Benjamin Getman. Frederick Sin. Mrs. Hawthorn.

FURNITURE—John Q. Adams. Joseph Henry.

TOBACCONIST—W. J. Ahering.

BLACKSMITH—D. L. Lansbert.

LAUNDRY—Addison Cromwell.

DRY GOODS—Bellinger & Dygert. Thomas & Dygert. Vaghenar M. Hodge.

MONUMENTS—A. W. Eide.

HARDWARE—Lewis S. Davis. Schaef & Mc Cluskey.

JEWELRY AND FLORISTS—Mohawk Valley Floral Co.

PHYSICIANS—Dr. F. E. Simons. Dr. D. H. Taylor. Dr. I. D. Quinn. Dr. Wendell Dr. J. Wagner.

MERCHANTS—A. P. Gage & Co. A. M. Hodge. C. Bender. Jr. J. Van Benschoten.

MERCHANT TAILORS—Wm. Hattery. Sauls & C. Bender. Barnett Bros. H. Heiser.

BLACKSMITHS—Weeks & Bancroft. L. Quackenbush & O'Connor.

COAL MERCHANTS—Yates & Bain. Craig. Bellinger & Co. James Bowe.

BOOTS AND SHOES—C. Sticht. Frank Shubert.

LUMBER—M. L. Smith. Abel Hess.

JEWELLER—Roney & Barlow. Martin Fonda Dale.

FISH MARKET—Daniel Salso.

N. S. & H. FREIGHT AGENT—T. Crough.

VARIETY STORE—Mr. Maylander.

CARRIAGE BUILDER—L. Bellinger. Crow Lord Mosher.

PAINTERS AND DECORATORS—Mc Carthy & Smith. Shaffer & Graves.

LIVERY—Simpson & Simpson. G. S. Van Ry.

BARBERS—C. Mosher. C. Seeley. H. Stringbell.

TAILORS—C. Fedric. Henry Pfister.

HAT DEALERS—Willis Bullock. R. & W. H. Edgar.

HARNESS—Knapp & Harrison. C. G. Schoe

MALTSTER—E. I. Yates.

MUSIC—F. Leppert. H. G. Perry.

MARKET—C. Schaffer. Philip Bettle. Klock bart & Bowyer.

INSURANCE AGENTS—H. Stafford. Richardson & Bellinger. Daniel Spraker.

DENTISTS—Sloan & Woolsey. J. L. Sumner.

PHOTOGRAPHERS—J. Gilman. S. Dygert.

MILLINERS—Miss J. Burnap. Mrs. Crouse Miss Gage.

MANUFACTURERS—Arkell & Smiths. Feltin Mfg. Co. Mohawk Valley Silk Fabric Co. Canajoharie Refrigerator Co.

VEGETABLE MARKET—Harrison Spraker

PALATINE BRIDGE.

MANUFACTURERS—J. C. Beach & Co. Alon zo Dalenbeck.

GROCER—Mr. Augustus Fuller.

N. Y. C. R. R. FREIGHT AGENT—L. Yosburgh.

A CHRISTMAS CAROL.

Extract within the vestibule and heart Sweet, tuneful voices called up in song. The scent of evergreens was in the air and from with eager into erupting lungs and merry interplade of speech revolved The fair and feast, for this was Christmas Eve, and this their song

Ring out wild bells, to the wild sky,
The flying cloud, the frosty light;
The year is dying in the night;
Ring out wild bells and let him die.

Ring out the old, ring in the new,
Ring happy bells across the snow:
The year is going, let him go;
Ring out the false, ring in the true.

The store is every decked the aisles,
The merry bells are ring above,
The Christ is coming to our hearts,
Let us prepare to meet Him there.

Ring out the darkness of our life,
Ring in the light that is to be.

The store is fair is far away,
We do not always hear their song
We store grow dim in the distance,
The path is rough, the way is long
Till Christ is found the crowds come up

So enters the choir for Heaven opens
Ring out the old, ring in the new,
Christ puts the queen to our hearts
And peace with light on earth to you.
We find our song and light to true

A. E. WOOLSEY—DIX.

DIXIE—1891.

"Yes, its the same old Canajoharie, but how changed

The hills is sweeping around the curve near the Fire mansion. An old gentleman intently gazes at the village opposite. Evidently he is not quantizing about it, and wants to know more. Let us approach him

"You seem to be interested in the village yonder

"I ought to be. I was born and brought up in Canajoharie. I left it in '58, and have never seen it since."

Our heart-strings are at once discordant. A few extra throbs of that organ attract to our poly fee a stab were inflicted twenty-six years ago from the bogclad hills and walnut groves of Canajoharie.

"If you will stop over a day or so we shall be glad to show you about the town. It will do you good to see the improvements that have taken place since you left it."

The old gentleman is willing. Forth with the bell rings, the wheels toots, and we are at the depot. Alighting from the train we are soon pursuing our onward and upward flight to the bridge.

"Now depot, but name old stairs," muttered the Ancient.

We are upon the bridge—across it.

"Great change, great change, we used to go across on those flats to a row boat every spring, and wade up to our waists after every hard shower. I remember I carried a girl across those flats on my back once, and just as I reached the bank I fell. The Lutherans used to own that property—a little white church with galleries all around and a wide door open to boat it. I remember a cake of ice one spring"—we interrupt him, and tell him of the new Lutheran Church—of its beauty and completion—of the Memorial Room, containing so many reminders of Senator Webster Wagner—of the new organ, and

"Well, I'm lost," says the Ancient "I don't know the canal! That, like the soil, remains, and like the soil, is as dirty as ever

After we cross the bridge, the Ancient is silent several minutes, occasionally giving utterance to a word or two of pleasure or surprise. We point out the new brick block, which rose from the ashes of that disastrous fire of April 20, 1877. Here, over the stores stood Henry Hallenbeck's little fish market—since supplanted by the Saylon Block, which was again succeeded by the present Stumpfel Block. Then came the Bart. Smith and Stafford Blocks.

"The Kirby House is gone too" says the Ancient.

We give a history of that property. We tell him of the Nellis House and its proprietors, and how as age crept on they sold it to other parties, and brought a home with daughters in the great city of the west. We tell of the changes made by the new proprietors, point out the magnificent plate-glass windows just put in, and show him the gilded letters "Mohawk" by which name the stately structure is now known. Across the street he views the substantial block now owned by A. M. Hodge, Christ Sticht and Mrs. Arrions. "Another land-mark gone" remarks the Ancient, as we looks into Hatter's beautiful windows. "Oh, yes, you are thinking of Mark Hong's meat market." "I remember Mark well. One day my little boy was sent there for a roast. He asked for some roast beef. Mark said he didn't have any but he had a good piece of raw beef, and he could take it home and let the folks roast it. Good judge, Mark was."

We notice the changes in other buildings along the street. Now stories added to the Mitchell and Hawley buildings, a fourth story just added by Lewis S. Davis to accommodate his increasing business—in fact the Ancient noticed improvements to every building we passed on Church street. At the railroad crossing we waited fifteen minutes for a freight train to demonstrate the absurdity of a few West Shore curves. Then we came to the sleeper block—another Phoenix, rising from the ashes—just raising for eagerly waits into the limitless ether. We tell him about it, of course

"So that's Charley Shaper's is it? He used to quarry stone and run a time kiln. I heard of buying him out once." We gently insinuate that his present appearance doesn't indicate that he possesses sufficient dust to buy out Mr Shaper now, whatever he might have done once upon a time.

You remember Gottlieb's store shop, by the bridge? You notice a change there, too, I presume."

"Yes, the old lot known as the "Easter triangle" was bought by a prosperous butcher who built that fine block, and put his name upon it—Bettle Block.

Now for the town-pump and the Eldridge House—the Ancient fairly shook with wonder as he witnessed the grand transformation.

"It's a dream," he muttered. He stood silent before the beautiful pile—the work of an artist as well as an architect—the pride of the village. It is an ideal hotel—a home for wanderers—a refuge from the noise and dust of travel—grateful, comforting. Upon its front bearing the gilded letters of an honored name, it stands a monument to the enterprise and public spirit of Webster Wagner. In Henry Joy, the present owner, the Hotel Wagner has an ideal landlord.

We must hasten on with the Ancient. We glance at the Hennemonth and O'Connor buildings, and over toward the Courier building with "no stairs to climb." He removes a tear as he views the handsome entrance to the Washington Hotel—quarters which stood for a century or two at the foot of the Academy Hill. Then we proceed to clamber up the Acropolis.

"Where is the Academy?"

"Dust and ashes" principally dust, however, and—come to think of it—no ashes at all. They tore down the substantial halls of learning, and—well, come around in a few years and we'll show you our Parthenon—grander by far, to us, than all the Athenian wonders from Pericles to Prince George. Our school has been our pride for many years and we intend to imitate it in one of the finest school-buildings of modern times.

So onward we go. Up Cliff street to Adam Reith's pleasant home, and beyond—both sides of a former wilderness lined with other pleasant homes—up Walnut street, noting the renewed Catholic Church, with stained-glass windows breaking the light into warm and mellow tints—on every side evidences of general thrift, prosperity and happiness. Crossing over to Orange street, the story is suspended. New houses, old ones refitted, new and three an exceptionally elegant home—all suggests to render the Ancient speechless. We descend to Mill street and the Ancient listens to the story of the Flour Sack with the extensive plant of Arkell & Smiths at hand to corroborate the narrative. We show him the works of the Mohawk Valley Silk Fabric Co. Then down Mill street to the new grist bridge—another eye-opener for the Ancient—and here we pause a moment. The old blacksmith shop on the left has been replaced by the tasteful cottage of W. F. Cook. The jumble of shops and tenements opposite have been removed, giving a noble view of Mrs. Joseph Dygert's graceful dome flanked by her special protege, the Episcopal Church and Rectory.

We walk slowly up the hill. The old Mohawk glistens in the sunlight of the realtime, milk-wards, and cedar bushes is gone. Yonder upon a terrace, in the new home of A. P. Heldermont—a marvel of architectural skill. Further up the hill appears another "shapely mass of stately stone"—the home of Wm. J. Arkell. "I see you are moved" says the Ancient. "He sent me a Judge once." "Yes, I don't doubt it he is a very."

"Well, well, here's another dream" said the Ancient. He was looking at the little park, with its velvety lawn, its banks of flowers, its miniature lake filled with rare aquatic plants, and shrubbery arranged to conceal the art which shaped it all.

"Think of the contrast. Then a common, and a very common common. With cows, pigs, and small boys in active league to—to—to—to everybody ex—we—now, a thing of beauty not to be described but to be enjoyed."

Again we turn our eyes eastward. Surely if palaces are ever to adorn our grand, the residence before us may be justly termed palatial! Like the park it is something to feast ones eyes upon. With its walk artistically blended in nature's own colors are rocks from the Adirondacks, from the St. Lawrence, and even from beyond the Lakes. The combinations of color in those rough brown stones give the edifice a singular undefinable artistic attractive, and make it to be one of the handsomest homes in the valley. It is fitting that the close-handed, ingenious and enterprising head of the leading industry of Canajoharie should dwell in such a home. No one will question that to him more than to any other man Canajoharie owes its present prosperity, and to their estimation of comparative values of services rendered to the village his neighbors would ascribe the first place to Hon. Jas. Arkell.

The Ancient is weary—so is his guide. Hurriedly we move on through Barclay street. We are in the old "cedar lot." now divided into many cottage lots upon which stand elegant homes. Would Mrs Moyer know the old farm now? Another opportunity to clamber up the Acropolis of Time! We approach the "Old Fort"—no longer left to neglect and decay but owned and occupied by the Mohawk Valley Historical Society, who have thoroughly repaired it and consigned to its quaint interior many curious and valuable relics of the Past.

Suddenly our old friend leaves us and we are left alone to muse upon the changes which have taken place in our village. Looking backward through the quarter century we see only advancement on every hand. During that time two new churches have been erected and the others have been modernized and beautified. The old Reformed Church, at this moment, is undergoing repairs which will transform it into a most attractive and pleasant place of worship. With elegant memorial windows as arched ceiling, a

PLAINTIFF'S EXHIBIT NO. 19—PHOTOGRAPH, SCRAP-BOOKS OF BEECH-NUT PACKING COMPANY PERIODICAL ADVERTISING, 1911-1915.

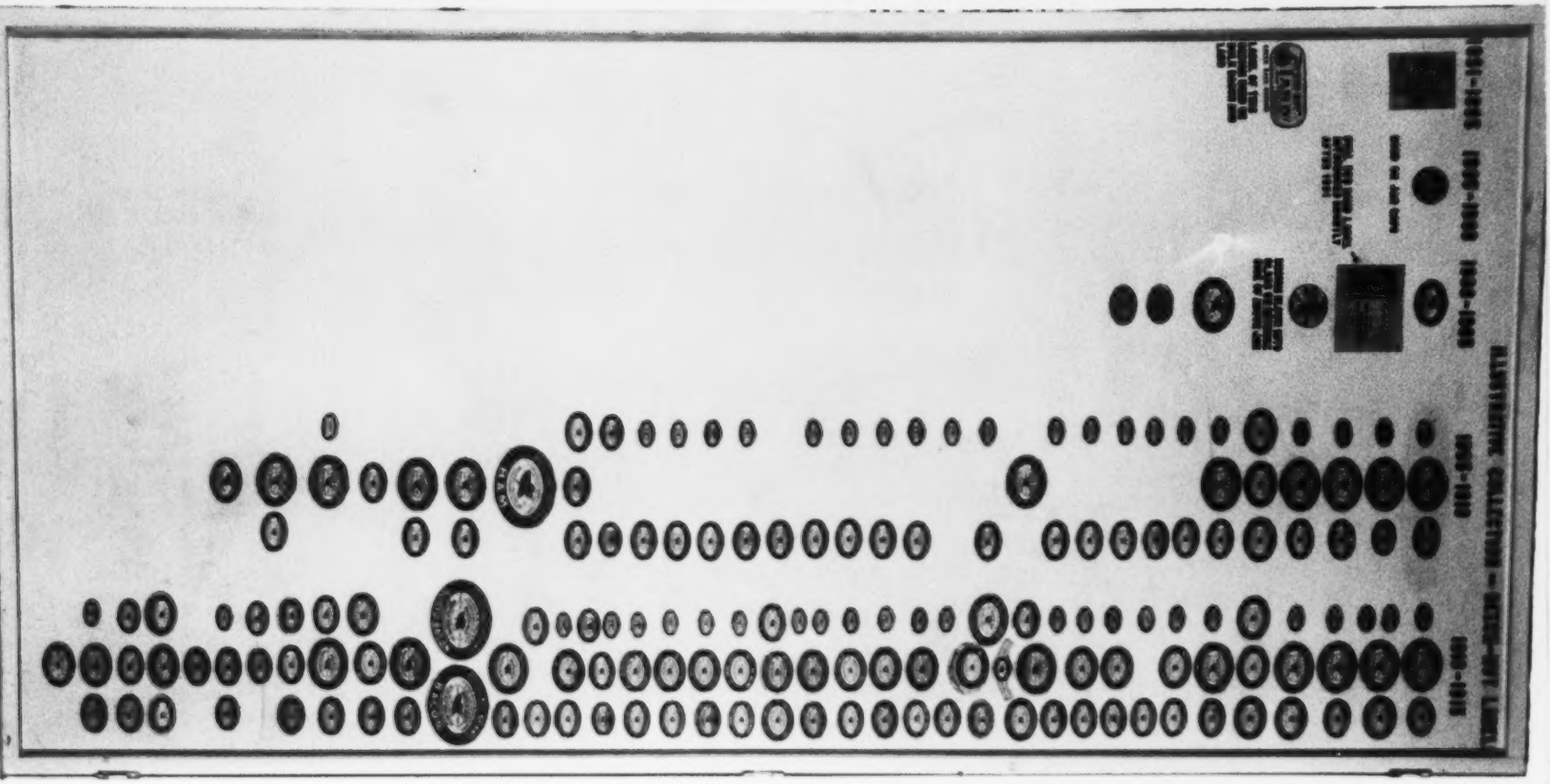
PLAINTIFF'S EXHIBIT NO. 27—BEECH-NUT CHEWING GUM DISPLAY BOX.

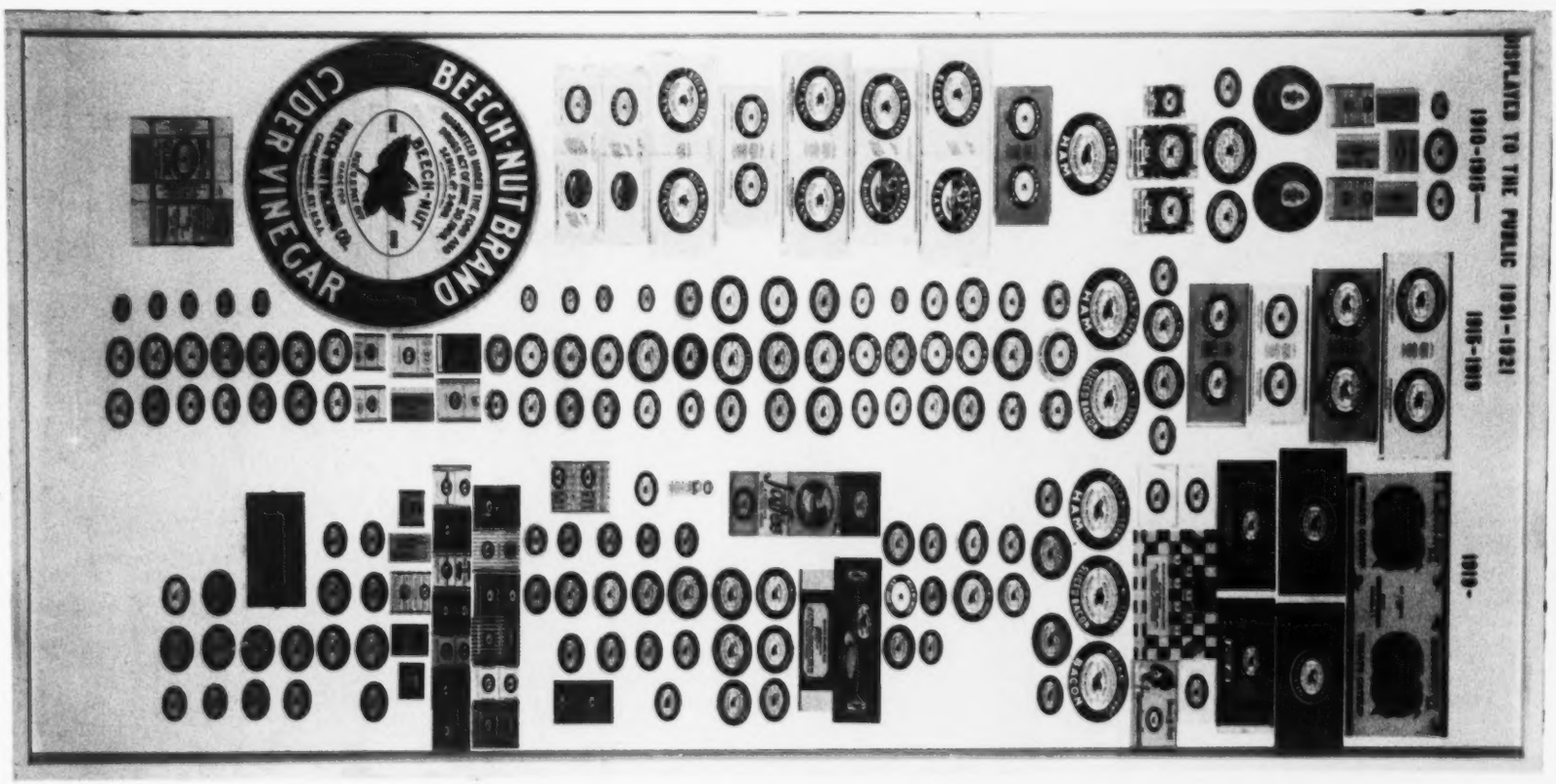
BOX INCLOSED IN OUTSIDE COVER.

BOX WITH FLAP DOWN—COVER REMOVED.

BOX WITH FLAP UP.

PLAINTIFF'S EXHIBIT NO. 28—BOARD: BEECH-NUT LABELS DISPLAYED BEFORE THE PUBLIC, 1891-1921.





PLAINTIFF'S EXHIBIT NO. 31—IMPERIAL PACKING COMPANY BOX OF 1891.

PLAINTIFF'S EXHIBIT NO. 32—COLLECTION OF LORILLARD POSTERS AND SIGNS.

PLAINTIFF'S EXHIBIT NO. 35—SUMMARY OF BEECH-NUT PACKING COMPANY PRODUCTS.

1902

BULK GOODS

Beech-Nut Hams, Bacon and Beef.

SLICED BACON

Beech-Nut Sliced Bacon, glass jars,
Beech-Nut " " , one pound boxes,
Mohawk " " , glass jars.

BEEF

Beech-Nut Sliced Beef, glass jars,
Mohawk " " " "
Holly " " " "
Erie Chipped " " "

CONSERVES

Beech-Nut Pure Grape Jam

1903

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, glass jars,
Mohawk " " " "

BEEF

Beech-Nut Sliced Beef, glass jars
Beech-Nut Chopped " " "
Holly Sliced " " "
Erie Chipped " " "

CONSERVES.

Beech-Nut Grape Jam
" " Gingered Pear
" " Cranberry Sauce

1906

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, glass jars
Mohawk " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie Chipped " " "

BEECH-NUT CONSERVES

Grape Jam, Concord
Grape Jam, Catawba
Cranberry Sauce
Orange Marmalade, sweet
Orange Marmalade, bitter
Orange Marmalade, lemoned
Grape Fruit Marmalade
Lime Fruit Marmalade
Black Currant Jelly
Quince Jelly
Strawberry Jam
Strawberry " home style
Red Raspberry Jam
Cherry Preserve
Peanut Butter
Rhubarb Marmalade
Lime Fruit Jelly
Blackberry Jam
Red Currant Jelly
Pineapple Preserve
Spiced Plum
Plum Jam
Peach Jam
Quince Jam
Ginger Pear
Grape Jelly
Crabapple Jelly
Dates
Fard Dates
Persian Dates

BACON & BEEF IN GLASS TABLE TUMBLERS

Beech-Nut Sliced Bacon
Beech-Nut Sliced Beef

CHEESE

Beech-Nut Camembert Cheese
Beech-Nut Cream-De-Lay Cheese

LARD FOR PIES

Beech-Nut Lard for Pies in stone crocks

BEANS

Beech-Nut Baked Beans, in tins

1907

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, glass jars
Mohawk " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie Chipped " " "

SAUSAGE

Beech-Nut Sliced Sausage, glass jars

BEANS

Beech-Nut Beans, Tomato Sauce, in tins
Beech-Nut " Plain " "

CHEESE

Beech-Nut Cream-De-Lay Cheese, Opal glass jars,
" " Roquefort, Imported, " " "
" " Gorgonzola, " " " "

BEECH-NUT CONSERVES

Blackberry Jam
Black Currant Jelly
Cherry Preserve
Crabapple Jelly
Cranberry Sauce
Fig Jam
Grape Fruit Marmalade
Grape Jam, Catawba
Grape Jam, Concord
Grape Jelly
Lime Fruit Jelly
Strawberry Jam
Lime Fruit Marmalade
Orange Marmalade, bitter
" " lemoned
" " sweet
Peach Jam
Pineapple Preserve
Plum Jam
Quince Jelly
Red Currant Jelly
Red Raspberry Jam
Rhubarb Marmalade
Strawberry Jam (Home Style)
Spiced Plum
Dates
Figs
Fard Dates
Persian Dates
Ginger Pear
Peanut Butter

1908

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, glass jars
Mohawk " " " "
Erie " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie " " " "

SLICED SAUSAGE

Beech-Nut Sliced Sausage, glass jars
Lebanon Sliced Sausage

BEECH-NUT CANDY IN GLASS

Peppermint Cuts,	Wintergreen Cuts
Hoarhound "	Lime "
Beech-Nut Creams, Mint	Cinnamon "
flavor and Vanilla flavor	Lemon "
Beech-Nut Molasses Pep-	Clove "
permint Cuts	Anise "

CHEESE

Beech-Nut Roquefort, Imported, opal glass jars
" " Gorgonzola " " " "
" " Cream-De-Lay " " " "
" " Camembert " " " "

1908 (Continued)

BEECH-NUT CONSERVES

Blackberry Jam
Black Currant Jelly
Cherry Preserve
Crab Apple Jelly
Apple Jelly
Cranberry Sauce
Fig Jam
Peach Jam
Red Currant Jelly
Red Raspberry Jam
Grape Fruit Marmalade
Grape Jam, Concord
Grape Jelly
Lime Fruit Jelly
Lime Fruit Marmalade
Orange Marmalade, bitter
Orange Marmalade, sweet
Orange Marmalade, lemoned
Rhubarb Marmalade
Peanut Butter
Pineapple Preserve
Plum Jam
Quince Jelly
Strawberry Jam
Strawberry " (home style)
Spiced Plum
Figs
Dates
Fard Dates
Persian Dates

BEANS

Beech-Nut Beans, Tomato Sauce, in tins

TOMATO CATSUP

Beech-Nut Tomato Catsup in bottles

CIDER VINEGAR

Beech-Nut Cider Vinegar, barrels about 47 gallons

1909

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, glass jars
Mohawk " " " "
Erie " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie " " " "

SLICED SAUSAGE

Beech-Nut Sliced Sausage, glass jars
Lebanon Sliced Sausage, " "

BEECH-NUT CONSERVES

Strawberry Jam
Strawberry, home style
Blackberry Jam
Red Raspberry Jam
Peach Jam
Cranberry Sauce
Concord Grape
Plum Jam
Fig Jam
Red Currant Jelly
Black Currant "
Quince Jelly
Grape Jelly
Crabapple Jelly
Lime Fruit Jelly
Apple Jelly
Cherry Preserve
Pineapple
Peanut Butter
Lime Fruit Marmalade
Orange sweet "
" bitter "
Grape Fruit "
Rhubarb "
Figs
Dates
Fard Dates
Persian Dates
Spiced Plum

BEANS

Beech-Nut Beans, Tomato Sauce, in tins
Beech-Nut Beans, Plain " "

1909 (Continued)

CATSUP

Beech-Nut Tomato, in bottles

VINEGAR

Beech-Nut Cider Vinegar in bottles
Beech-Nut Cider Vinegar in barrels

BEECH-NUT CANDY IN GLASS

Peppermint	Cuts	Cinnamon	Cuts
Wintergreen	"	Assorted	"
Lime	"	Hoarhound	"
Lemon	"	Clove	"
		Anise	"

SEA FOOD

Beech-Nut Boned Herring in glass jars
Beech-Nut Fancy Codfish in glass jars

CHEESE

Beech-Nut Camembert Cheese
Beech-Nut Roquefort in opal glass
Beech-Nut Roquefort Type in opal glass

1910

Bulk Goods

Beech-Nut Hams and Bacon

Sliced Bacon

Beech-Nut Sliced Bacon, in glass jars,
Erie " " " "

Sliced Beef

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie " " " "

Sausage

Beech-Nut Sliced Sausage, glass jars,

Beech-Nut Conserves

Jams	*Jellies*	*Preserves*
Strawberry	Red Currant	Cherry
Strawberry, home style	Black Currant	Pineapple
Blackberry	Quince	
Red Raspberry	Grape	
Peach	Crabapple	
Cranberry Sauce	Lime Fruit	
Concord Grape	Apple	
Plum	Peanut Butter	
Fig		
Spiced Plum		

Marmalades	*Figs and Dates*
Lime Fruit	Beech-Nut Figs
Orange, sweet	" " Dates
Orange, bitter	Fard Dates
Grape Fruit	Persian Dates
Rhubarb	

1910 (Continued)

BEANS

Beech-Nut Beans, Tomato Sauce
" " " , Plain

TOMATO CATSUP

Beech-Nut Catsup in bottles

CIDER VINEGAR

Beech-Nut Cider Vinegar in bottles and in barrels

SEA FOOD

Beech-Nut Smoked Boned Herring—Beech-Nut Codfish in shreds

OLIVE OIL

Beech-Nut Olive Oil

GRANULATED GELATINE

Beech-Nut Granulated Gelatine

CHEESE

Beech-Nut Camembert
Beech-Nut Roquefort in opal glass
" " " Type in opal glass
Beech-Nut Gorgonzola " " "
Beech-Nut Piminto " " "

SLICED BACON

Beech-Nut Sliced Bacon, paste board boxes

1911

Bulk Goods

Beech-Nut Hams and Bacon

Sliced Bacon

Beech-Nut Sliced Bacon in paste board boxes
Beech-Nut Sliced Bacon in glass jars
Erie Sliced Bacon in glass jars

Sliced Beef

Beech-Nut Sliced Beef, glass jars
Mohawk " " " "
Holly " " " "
Erie " " " "

Sea Food

Beech-Nut Smoked Boned Herring
Beech-Nut Codfish in Shreds

Olive Oil

Beech-Nut Olive Oil

Beech-Nut Conserves

Jams	*Jellies*	*Preserves*
Strawberry	Red Currant	Cherry
Blackberry	Black Currant	Pineapple
Red Raspberry	Quince	
Peach	Grape	
Cranberry Sauce	Crab Apple	
Concord Grape	Apple	
Plum		
Fig		
Spiced Plum		

Marmalades	*Figs and Dates*
Lime Fruit	Beech-Nut Figs
Orange, sweet	" " Dates
Orange, bitter	Fard
Grape Fruit	Persian
Rhubarb	

1911 (Continued)

PEANUT BUTTER

Beech-Nut Peanut Butter in glass jars

BEANS

Beech-Nut Beans, Tomato Sauce
Beech-Nut Beans, Plain

TOMATO SAUCE

Beech-Nut Tomato Sauce in bottles

BEECH-NUT GRANULATED GELATINE

CIDER VINEGAR

Beech-Nut Cider Vinegar in Bottles and Barrels

BEECH-NUT CHEWING GUM

CHEESE

Beech-Nut Camembert
Beech-Nut Roquefort, in opal glass
Beech-Nut Roquefort Type " "
Beech-Nut Gorgonzola " "

1912

BULK GOODS

Beech-Nut Hams and Bacon

BACON IN BOXES

Beech-Nut Sliced Bacon in paste board boxes

BACON IN GLASS JARS

Beech-Nut Sliced Bacon Erie Sliced Bacon

BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

PEANUT BUTTER

Beech-Nut Peanut Butter

TOMATO CATSUP

Beech-Nut Tomato Catsup, in bottles

BEECH-NUT BEANS

CIDER VINEGAR

Beech-Nut Cider Vinegar in bottles and in barrels

BEECH-NUT CHEWING GUM

BEECH-NUT OLIVE OIL

BEECH-NUT CONDIMENT SAUCE

BEECH-NUT GRANULATED GELATINE

SEA FOOD

Beech-Nut Selected Smoked Herring
Beech-Nut Codfish in Shreds

1912 (Continued)

BEECH-NUT CONSERVES

Jam	*Jelly*	*Marmalade*
Strawberry	Red Currant	Orange Marmalade, sweet
Blackberry	Black Currant	Grape Fruit Marmalade
Red Raspberry	Quince	Rhubarb Marmalade
Peach	Grape	Orange Marmalade, bitter
Cranberry Sauce	Crabapple	Lime Fruit Marmalade
Concord Grape	Apple Spitzenberg	
Plum		
Fig		
Spiced Plum	Pineapple Preserve	

FRUITS IN SYRUP

Beech-Nut Brand Figs

CHEESE

Beech-Nut Camembert
Beech-Nut Roquefort in opal glass
Beech-Nut Pimiento
Beech-Nut Gorgonzola

1913

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in Boxes
Beech-Nut Sliced Bacon in glass jars
Erie " " " " "

BEEF

Beech-Nut Sliced Beef, glass jars
Holly Brand " " " "
Erie " " " " "

BEECH-NUT TOMATO CATSUP

BEECH-NUT BEANS

BEECH-NUT OLIVE OIL

BEECH-NUT PREPARED MUSTARD

BEECH-NUT PEANUT BUTTER

BEECH-NUT CIDER VINEGAR

BEECH-NUT GRANULATED GELATINE

BEECH-NUT CHEWING GUM

BEECH-NUT CONSERVES

Strawberry
Blackberry Jam
Red Raspberry
Peach
Cranberry Sauce
Concord Grape
Plum
Fig
Spiced Plum
Red Currant Jelly
Black Currant Jelly
Quince Jelly
Guava Jelly
Grape Jelly
Crabapple
Apple Jelly (Spitzenberg)
Orange Marmalade
Grape Fruit Marmalade
Rhubarb Marmalade
Pineapple Preserve (Shredded)

FRUITS IN SYRUP

Beech-Nut Brand Figs

1914

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in paste board boxes
Beech-Nut Sliced Bacon, glass jars
Erie " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT TOMATO CATSUP

BEECH-NUT BEANS

BEECH-NUT OLIVE OIL

BEECH-NUT PREPARED MUSTARD

BEECH-NUT CIDER VINEGAR

BEECH-NUT GRANULATED GELATINE

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS

BEECH-NUT CONSERVES

Jam

Strawberry Jam
Blackberry Jam
Red Raspberry Jam
Peach Jam
Cranberry Sauce
Concord Grape Jam
Plum Jam
Fig Jam
Spiced Plum Jam

Jelly

Red Currant Jelly
Black Currant Jelly
Quince Jelly
Guava Jelly
Grape Jelly
Crabapple Jelly
Apple Jelly (Spitzenberg)

Pineapple Preserve (Shredded)

Marmalade

Orange Maramalade, sweet
Grape Fruit
Rhubarb

FRUITS IN SYRUP

Beech-Nut Brand Figs

1915

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in paste board boxes
Beech-Nut Sliced Bacon in glass jars
Erie " " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CIDER VINEGAR

BEECH-NUT BEANS

BEECH-NUT OLIVE OIL

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS

BEECH-NUT CONSERVES

Jam	*Jelly*
Strawberry	Red Currant
Blackberry	Black Currant
Red Raspberry	Quince
Cranberry Sauce	Guava
Concord Grape	Grape
Damson Plum	Crabapple
Peach	Apple (Spitzenberg)
Black Currant	
Spiced Plum	

Marmalade

Orange
Grape Fruit
Pineapple Preserve (shredded)

FRUITS IN SYRUP

Beech-Nut Brand Figs

1916

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in paste board boxes
Beech-Nut Sliced Bacon in glass jars
Erie " " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT BEANS

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT CIDER VINEGAR

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS, WINTERGREENS, CLOVES

BEECH-NUT CONSERVES

Jam

Strawberry
Blackberry
Red Raspberry
Cranberry Sauce
Concord Grape
Damson Plum
Peach
Black Currant

Jelly

Black Currant
Red Currant
Quince
Guava
Grape
Crabapple
Apple Jelly (Spitzenberg)

Preserve

Pineapple (Shredded)
Cherry

Marmalade

Orange Marmalade
Grape Fruit "

FRUITS IN SYRUP

Beech-Nut Brand Figs

1917

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in boxes
Beech-Nut " " in glass jars
Erie " " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT BEANS

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CIDER VINEGAR

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS, WINTERGREENS AND CLOVES

BEECH-NUT CONSERVES

Jam	*Jelly*
Strawberry	Red Currant
Blackberry	Quince
Red Raspberry	Grape
Cranberry Sauce	Crabapple
Concord Grape	Apple (Spitzenberg)
Peach	Guava
Black Currant	

Preserve	*Marmalade*
Pineapple (Shredded)	Grape Fruit
Cherry	Orange

1918

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, in boxes
Beech-Nut Sliced Bacon in glass jars
Erie " " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT TOMATO SAUCE

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CIDER VINEGAR

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS, WINTERGREENS AND CLOVES

BEECH-NUT CONSERVES

Jam	*Jelly*	*Marmalade*
Strawberry	Grape	Orange
Blackberry	Crabapple	Grape Fruit
Red Raspberry	Apple (Spitzenberg)	
Cranberry Sauce	Catawba Grape	
Concord Grape		
Damson Plum		
Pecan		
Black Currant		
Quince Jelly		

Preserve

Pineapple Preserve (Shredded)
Cherry Preserve

1919

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in boxes
Beech-Nut Sliced Bacon, glass jars
Erie " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT BEANS, Tomato Sauce

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CIDER VINEGAR

BEECH-NUT GINGER ALE

BEECH-NUT CONSERVES

Jams	*Jellies*	*Marmalade*
Blackberry	Apple (Spitzenberg)	Grape Fruit
Damson Plum	Black Currant	Orange Marmalade
Peach	Catawba Grape	
Red Raspberry	Crab Apple	
Strawberry	Grape	
	Quince	
	Red Currant	

Preserves	*Sauce*
Cherry	Cranberry
Pineapple	

1919 (Continued)

BEECH-NUT JELLIED FRUITS
(in Lithographed Tins)

Apricots	Blackberry	Loganberry	Peach
Raspberry	Strawberry	Plums	Pineapple

BEECH-NUT JELLIED FRUITS
in tin, varnished label

Apricot Jam Prunes in Syrup

BEECH-NUT CHEWING GUM

BEECH-NUT CANDIES

Mints, Wintergreens, Cloves, Licorice, Sweet Birches, Hard Candy Cough Drops, Lemon Drops, Lime Drops

1920

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon in Boxes
Beech-Nut " " in glass jars

SLICED BEEF

Beech-Nut Sliced Beef
Holly Sliced Beef
Erie Sliced Beef

BEECH-NUT PEANUT BUTTER

BEECH-NUT BEANS, Tomato Sauce

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CIDER VINEGAR

BEECH-NUT BEVERAGES

Ginger Ale Birch Sarsaparilla

BEECH-NUT CONSERVES

Jams	*Jellies*	*Marmalade*
Blackberry	Apple (Spitzenberg)	Grape Fruit
Damson Plum	Black Currant	Orange
Peach	Catawba Grape	
Red Raspberry	Crab Apple	
Strawberry	Grape	
	Quince	
	Red Currant	

Sauce	*Preserves*
Cranberry	Cherry
	Pineapple (Shredded)

1920 (Continued)

BEECH-NUT CHEWING GUM

BEECH-NUT CANDIES

(Compressed Tablets)

Beech-Nut Mint, Beech-Nut Licorice
" " Clove " " Sweet Birch
" " Wintergreen " " Cinnamon

BEECH-NUT HARD CANDIES

Beech-Nut Anise Beech-Nut Lime
" " Lemon " " Orange
Beech-Nut Peanut Bars
Beech-Nut Caramels

BEECH-NUT JELLIED FRUITS

(Lithographed Tins)

Apricots Blackberry Loganberry Peach Pineapple
Plums Raspberry Strawberry

BEECH-NUT CALIFORNIA CONSERVES

(Packed in Tin with Varnished Label)

Apricot Jam Prunes in Syrup

1921

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, in boxes
" " " " in glass jars
Erie " " in " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT MACARONI AND SPAGHETTI

BEECH-NUT BEANS (Tomato Sauce)

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT JAFFEE

BEECH-NUT CONSERVES

Jams	*Jellies*	*Marmalades*
Blackberry	Apple (Spitzenberg)	Grape Fruit
Damson Plum	Black Currant	Orange
Loganberry	Crab Apple	
Peach	Grape	
Red Raspberry	Quince	
Strawberry	Red Currant	

Preserves	*Sauce*
Cherry	Cranberry
Pineapple (Shredded)	

1921 (Continued)

BEECH-NUT CALIFORNIA CONSERVES

Apricot Jam (Tin, varnished label)
Erie Brand Prunes in Syrup (glass)

BEECH-NUT JELLIED FRUITS
(Lithographed Tins)

Apricot Blackberry Cherry Loganberry Peach
Pineapple Plum Raspberry Strawberry

BEECH-NUT CHEWING GUM

BEECH-NUT COMPRESSED TABLETS

Mints Wintergreens Cloves Licorice Sweet Birches
Cinnamons Menthols

BEECH-NUT HARD CANDIES

Anise Horehound Lemon Lime
Orange Cough Drops

BEECH-NUT PEANUT BARS

BEECH-NUT CARAMELS

BEECH-NUT BEVERAGES

Ginger Ale Birch Sarsaparilla

1922

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, in boxes
Beech-Nut " " in glass jars
Erie " " " "

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT MACARONI PRODUCTS

BEECH-NUT PREPARED SPAGHETTI
(Packed in Tin)

BEECH-NUT PORK & BEANS
(Tomato Sauce)

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT CONSERVES

Jams	*Jellies*	*Marmalades*
Blackberry	Apple (Spitzenberg)	Orange
Damson Plum	Black Currant	Grape Fruit
Loganberry	Crab Apple	
Peach	Grape	
Red Raspberry	Quince	
Strawberry	Red Currant	

Preserves	*Sauce*
Cherry	Cranberry
Pineapple (Shredded)	

1922 (Continued)

BEECH-NUT CALIFORNIA CONSERVES

(Packed in Glass)

Erie Brand Prunes in Syrup

(Packed in Tin, varnished label)

Apricot Jam

BEECH-NUT JELLIED FRUITS

(Lithographed Tins)

Apricot Blackberry Cherry Loganberry Peach
Pineapple Plum Raspberry Strawberry

BEECH-NUT CHEWING GUM

BEECH-NUT COMPRESSED TABLETS

Mints Wintergreens Cloves Sweet Birches Licorice
Cinnamons Menthols Spearmints

BEECH-NUT HARD CANDIES

Anise Horehound Lemon Lime
Orange Cough Drops

BEECH-NUT PEANUT BARS

BEECH-NUT CARAMELS

BEECH-NUT BEVERAGES

Ginger Ale Birch Sarsaparilla

BEECH-NUT JAFFEE

1923

BULK GOODS

Beech-Nut Hams and Bacon

SLICED BACON

Beech-Nut Sliced Bacon, in boxes
" " " " in glass jars

SLICED BEEF

Beech-Nut Sliced Beef, glass jars
Holly " " " "
Erie " " " "

BEECH-NUT PEANUT BUTTER

BEECH-NUT MACARONI PRODUCTS

BEECH-NUT PREPARED SPAGHETTI
(Packed in Tin)

BEECH-NUT PORK AND BEANS
(Tomato Sauce)

BEECH-NUT TOMATO CATSUP

BEECH-NUT CHILI SAUCE

BEECH-NUT PREPARED MUSTARD

BEECH-NUT CONSERVES

Jams	*Jellies*	*Marmalades*
Blackberry	Apple (Spitzenberg)	Orange
Damson Plum	Black Currant	Grape Fruit
Peach	Crab Apple	
Loganberry	Grape	
Red Raspberry	Quince	
Strawberry	Red Currant	

Preserves	*Sauce*
Cherry	Cranberry
Pineapple (Shredded)	

1923 (Continued)

BEECH-NUT CALIFORNIA CONSERVES
Packed at San Jose, Cal.
in Glass Jars

Apricot Jam
Loganberry Jelly
Loganberry Preserves
Strawberry Preserves
Blackberry Jelly

(Packed in Tin with Varnished Label)

Apricot Jam

BEECH-NUT JELLIED FRUITS
(Lithographed Tins)

Apricot Blackberry Cherry Loganberry Peach
Pineapple Plum Raspberry

BEECH-NUT CHEWING GUM

BEECH-NUT MINTS

Peppermint Wintergreen Clove Cinnamon Spearmint

BEECH-NUT FRUIT DROPS

Anise Lemon Lime Orange

BEECH-NUT CARAMELS

BEECH-NUT BEVERAGES

Ginger Ale Birch Root Sarsaparilla

PLAINTIFF'S EXHIBIT NO. 36—ADVERTISEMENT OF BEECH-NUT CIGARETTES, NEW YORK EVENING SUN.

PLAINTIFF'S EXHIBIT NO. 38—BERRY PHOTOGRAPH OF AUSTER WINDOW DISPLAY, BALTIMORE.

Plaintiff's Exhibit No. 38

PLAINTIFF'S EXHIBIT NO. 40—"THE NATIONAL FINANCIAL NEWS" OF MAY 28, 1923.

Title Page Heading:

"THE NATIONAL FINANCIAL NEWS."

A Weekly Newspaper of American Finance.

Issued Every Monday Published by Plummer Publications, Inc. 5c per copy
Vol. I. No. 4. May 28, 1923. 120 Broadway, New York, N. Y. $2.00 yearly

Page 2, third column:

BEECH-NUT PACKING CO.
EARNING NEARLY $9 SHARE.

COMPANY IN STRONG FINANCIAL CONDITION—
LARGE WORKING CAPITAL.

Beech-Nut Packing Co. is at present earning at the annual rate of nearly $9 a share on its common stock, based on net earnings for the first three months of 1923, which amounted to, before preferred dividends, $595,737, against $392,291 reported for the corresponding period in 1922. Net earnings in 1922 amounted to $1,937,480, which, after preferred dividends, was equivalent to $7.42 a share on the common stock. These earnings are in sharp contrast with the present $2.40 annual dividends being paid on the common shares.

PRODUCTS WELL KNOWN.

The Beech-Nut Packing Company does a general meat and fruit business and its products are widely diversified. The business includes the curing of meat products, preservation of fruits, manufacture of ketchup, peanut

butter, macaroni, jams, jellies, sauces, chewing gum and confections; bottling of vinegar and ginger ale, and the marketing of these products; and the company has more recently added the manufacture of cigarettes and smoking tobacco and candy. Practically all of these products are distributed under the trade-name, "Beech-Nut," and are widely advertised and reputably known all over the world. The company was incorporated in 1899, and owns the stock of subsidiary companies, as follows: Fairmont Box Co., Oscar & Co., Beech-Nut Co. of Calif., Montgomery Electric Light & Power Co., Canajoharie Supply Co., and Beech-Nut Foil Co., Inc. Beech-Nut Packing Company operates two plants at Canajoharie, N. Y., one at Rochester, N. Y., and another at Brooklyn, N. Y. The Canajoharie plants consist of 23 buildings having a total floor space of 328,766 square feet; the Rochester plant is made up of 14 buildings with 123,233 square feet of floor space; and the Brooklyn plant consists of 70,000 square feet of floor space in the Bush Terminal Building, 47,000 square feet of which is utilized in the making of Beech-Nut chewing gum and the balance is sublet to the Beech-Nut Foil Co., Inc., for the manufacture of tin foil.

CAPITALIZATION—DIVIDENDS.

The company has no funded or bonded indebtedness. Ahead of the common stock which is of $20 per share par value and outstanding at 250,000 shares, there are two preferred stock issues, Class "A" being 7 per cent cumulative $100 par, and outstanding at $4,500, and convertible, on a share-for-share basis, into Class "B" preferred, which is also 7 per cent cumulative, $100 par, and is outstanding at $1,119,500. The preferred dividends

have been paid at the regular prescribed rate since organization. Common dividends are now being paid at the rate of $2.40 per share annually.

STRONG FINANCIAL POSITION.

The company enjoys a strong financial position. Its balance sheet as of December 31, 1922, shows total current assets of $5,420,482, compared with $4,785,062 at the end of the 1921 year, and against total current liabilities of only $781,892, leaving a net working capital of $4,638,500. Net working capital at the end of the previous year amounted to $4,105,085. The company has about $800,000 in cash.

PLAINTIFF'S EXHIBIT NO. 41.—CERTIFIED COPY, DECISION OF EXAMINER OF INTERFERENCES IN PATENT OFFICE TRADE-MARK OPPOSITION NO. 2805.

Final Hearing
May 4, 1921

IN THE UNITED STATES PATENT OFFICE.

Opposition No. 2805.

P. Lorillard Company v. Beech-Nut Packing Company.

Application No. 119,930, filed June 25, 1919, published Sept. 9, 1919.

CIGARETTES.

Messrs. MEYERS, CUSHMAN & REA, and MEYERS, CAVANAGH & HYDE, for P. Lorillard Company.

Mr. JAMES R. OFFIELD for Beech-Nut Packing Company.

This is an opposition filed under the provisions of section 6 of the Trade-Mark Act of February 20, 1905, and involves the right of the applicant to obtain the registration for which it has made application.

In the drawing forming part of the application involved herein is disclosed the word "Beech-Nut" and is for use on cigarettes.

The grounds of the opposition are set forth in eleven paragraphs but they all relate to use in trade by the opposer of a substantially similar mark upon tobacco. Both parties have filed testimony and briefs. These facts are very fairly stated in the briefs of both parties.

The conflict exists as in the interpretation of these facts.

The record shows that in about 1891 the predecessor of the applicant, namely, the Imperial Packing Company, was engaged in general meat-packing business. In 1899 the business of the Imperial Packing Company was taken over by the applicant which was then incorporated under the name of the Beech-Nut Packing Company. The latter concern seems to have been very active in extending its business in various lines, from 1899 to the present time. The goods sold by this company are quite numerous and include a varied line of groceries, meat products, candy and chewing gum. On each and all of these products the word "BEECH-NUT" has been employed, and it is the symbol of a very valuable good will associated with the business of the applicant. This business is said to amount to about a million dollars monthly.

The business of the opposer is that of manufacturing and selling tobacco. It is the owner of some of the oldest and most valuable brands now on the market and has been continuously engaged in the tobacco business for more than a century. It clearly appears that in February, 1915, it placed on the market a scrap tobacco having a label thereon like its Exhibit No. 16. The dominant feature of the mark shown thereon is the word "BEECH-NUT." It further appears that this tobacco has since been extensively and continuously sold by the opposer in very large quantities. At the present time it amounts to about a million dollars monthly, which approximates in amount the entire business of the applicant on all its products.

It further appears that the opposer in 1913 acquired from the Luhrmann & Wilbern Tobacco Company all the business of the latter company together with certain brands which it in turn had acquired from the Harry Weissinger Tobacco Company through the Continental

Tobacco Company. Among the brands which have been in use by predecessors of the opposer is that shown by opposer's Exhibit No. 17. This discloses as a prominent feature thereof the word "BEECHNUT," associated with the representation of a squirrel. The record clearly shows (see opposer's Exhibit No. 1) that considerable quantities of this tobacco were sold by Luthmann & Wilbern Tobacco Company during the years 1904, 1905, 1906, and 1907; that in 1908 the sales thereof commenced to decrease rapidly, so that in 1910 but 25 lbs. were sold and during the years 1911 and 1914 none whatever was sold by either the opposer or its predecessors in business.

The opposer seeks to carry its use in trade of the word "BEECH-NUT" back to 1896 or 1897, the date which it is claimed its predecessors in business, the Harry Weissinger Tobacco Company, adopted the mark disclosed in its Exhibit No. 17. The applicant contends that the mark disclosed in opposer's Exhibit No. 17 had become abandoned in 1915, the date when the opposer commenced to use its Exhibit No. 16. The opposer contends that the inference of abandonment is not justified and is rebutted by the following circumstances; viz., the existence during the period in question of tobacco suitable for use, the formula, wrappers and packages and willingness to fill any order if it had been received. The examiner is unable to attach thereto the significance that opposer does. For the keeping of wrappers might be either accidental or intentional. If intentional it would be accounted for as an act of caution, considering the evanescent character of tobacco brands. The tobacco could and presumably was used in the manufacture of other brands and formulae are kept even of brands which become abandoned. In connection with the willingness to fill orders, the inherent probability of obtaining such an order must be considered.

What seems to the examiner of more significance is the character of the label found on opposer's Exhibit No. 16 when considered in connection with opposer's Exhibit No. 17. Considering the great care which is exercised by traders generally to keep intact the dress and style of the label for the purpose of preserving any good will that may be symbolized thereby, the difference between the label found on Exhibits 16 and 17 seems highly significant. The record fails to show any of the circumstances which resulted in the adoption of the design found on opposer's Exhibit No. 16, although Boykin, one of the managers for the opposing company, was cross-examined somewhat at length relative thereto (see pages 60 to 72, inclusive). If the originator of the label shown on opposer's Exhibit No. 16 was aware at the time of its adoption in 1915 of the label found on opposer's Exhibit No. 17, Exhibit No. 16 is mute testimony that its originator deemed the good will that was at one time symbolized by opposer's Exhibit No. 17 to have in 1915 little or no value. The further circumstance that the opposer carefully preserved the dress of other brands which it had acquired from its predecessors tends to emphasize this significance of Exhibit No. 16 (see Beech-Nut Cross-exhibits 1, 1*a*, 2, 2*a*, 2*b*, 2*c*, 2*d*, 3 and 4 in connection with the deposition of Bowman, a witness for the opposer).

It seems to the examiner that in February, 1915, the trade-mark right evidenced by opposer's Exhibit No. 17 was not merely sleeping but actually dead and abandoned. The circumstances of this case resemble those found in the case of Levering Coffee Company v. Merchants Coffee Company, 181 O. G., 1075; 1912 C. D., 547; 39 App. D. C., 151. In view of conclusion just referred to whatever rights the opposer may have to use the

work "BEECHNUT," it is believed, must be predicated on its use which was commenced in February, 1915. The character thereof is evidenced by opposer's Exhibit No. 16.

The opposer contends that in 1915 it had a right to use the mark disclosed in its Exhibit No. 16 because tobacco possess different descriptive properties from any goods which were then manufactured and sold by the applicant. The record shows that in 1915 and just prior thereto the applicant was selling meat products, groceries, candy and chewing gum.

There is no reasonable doubt in the mind of the examiner that, generally speaking, a mark can be used on tobacco which is identical with the mark used by another on meat products, groceries, candy, or chewing gum without any confusion of origin occurring (Johnson Educator Food Co. v. Sylvanus Smith & Co., Inc., 175 O. G., 268; 37 App. D. C., 107; The Quaker Oats Co. v. Mother's Macaroni Company, 198 O. G., 899; 41 App. D. C., 254; Paul F. Beich Company v. Kellogg Toasted Corn Flakes Company, 271 O. G., 361; 49 App. D. C., 186; Rueckheim Bros. & Eckstein v. Texas Gum Co., Inc., Vol. 119, p. 28). Therefore it is believed that tobacco does not possess the "same descriptive properties" as either meat products, groceries, candy, or chewing gum.

The applicant in effect contends that the goods just mentioned do possess the same descriptive properties, since in the case at bar it appears from the testimony that in some instances at least confusion of origin has actually occurred (see "Correspondence" exhibit of applicant; also see the testimony of Wood, Q. 12; Sharpe, Qs. 14-15, and X-Qs. 30 to 37, inclusive; Weevel, Qs. 5 to 13, inclusive, and Yunkers, Qs. 14 to 23, inclusive). The examiner recognizes that if goods do possess the

same descriptive properties that confusion of origin will necessarily follow. The converse of this proposition, namely, if confusion of origin exists then that the goods possess the same descriptive properties, does *not*, however, necessarily follow. For confusion in origin may and sometimes does occur as a consequence of the significance to the public which a particular symbol has acquired. Thus, for instance, the examiner has no doubt that confusion of origin could occur by reason of the use in trade of the symbols "Ford" or "Coca Cola" on goods which possess descriptive properties which are clearly different from either automobiles or beverages. Such confusion of origin could not occur if another symbol having no such significance were substituted for these symbols. Thus, for instance, if the word "Ajax" were substituted for the symbols just mentioned, such confusion of origin would not occur. This shows that if the marks are identical, confusion of origin does not necessarily result merely from the descriptive properties of the goods on which the marks are used.

In the case at bar the record shows that the symbol used by the applicant has behind it a very extensive advertising campaign which is national in extent, coupled with the circumstances that the goods of the applicant are of excellent quality. This accounts for the significance of the symbol as used by the applicant and sufficiently explains the result shown by the testimony relied upon by the applicant to show actual confusion.

It seems to be contended in effect by the applicant (see bottom of page 22 of brief) that these meritorious efforts of the applicant are relevant and material to the determination of the question whether the goods do or do not possess the "same descriptive properties." With this contention the examiner is unable to agree. For the

determination of the question whether two specific goods do or do not possess the same descriptive properties seems to the examiner to be inherently of such a nature as to turn *solely* on the properties of the goods that are known to the trade. In this respect it is believed to resemble a determination made in a proceeding *in rem* rather than *in personam*.

At common law, the determination of the question whether certain goods do or do not possess the same descriptive properties involves not merely the rights of the particular parties to a proceeding but also the substantive rights of other traders. Certainty of definition of these rights is highly desirable if trade is to be encouraged. This certainty is no less desirable than it is in connection with the question of negotiability of a bill or note and for the same fundamental reasons.

The special significance that has been impressed upon the symbol by the efforts of the applicant is material and relevant to the question of confusion of origin and is considered by the courts in a certain type of unfair competition case. Since such special significance varies with the trader using the symbol, it is a transient factor. It is therefore inevitable that if this factor is considered as a basis for determination of the question of whether the goods do or do not possess the same descriptive properties, such determinations will necessarily be conflicting. In this type of unfair competition case, it is stated by a recent writer that "to reconcile the decision of the courts is hopeless" (Good Will Trade-Marks and Unfair Competition, Rogers, Chapter XXVI, page 255).

In the case at bar any diversion of good will resulting from this special significance of the symbol used by the applicant can be readily prevented through the control of a court by the manner of the use in trade of the mark

disclosed in opposer's Exhibit No. 16. An example of such control is disclosed in the case of Elgin National Watch Company v. Illinois Watch Case Company, 179 U. S., page 665. For the reasons stated herein the examiner believes that this question of significance should not be considered as relevant or material to the question of whether the goods of the opposer do or do not possess the same descriptive properties.

Since it is believed that the goods in question do not possess the same descriptive properties, it seems clear to the examiner that the opposer in 1915 had the *right to use* the mark disclosed in its Exhibit 16 on tobacco subject only to the well established principles relating to unfair trade (Johnson Educator Food Co. v. Sylvanus Smith & Co., Inc., *supra;* The Quaker Oats Co. v. Mother's Macaroni Co., *supra;* The Rookwood Pottery Company v. The A. Wilhelm Company, 212 O. G., 1691; 43 App. D. C., 1; The Denver Gas & Electric Light Company v. The Alexander Lumber Company, 283 O. G., 182; App. D. C.; The Hump Hairpin Company v. The DeLong Hook & Eye Company, 190 O. G., 1032; 39 App. D. C., 484; G & J Tire Company v. G. J. G. Motor Car Company, 190 O. G., 550; 39 App. D. C., 508).

The conclusion just reached relative to the right of the opposer to use the mark disclosed in its Exhibit 16 on tobacco is believed to be not adversely affected by the circumstance that prior to 1915 the word "Beech Nut" was a prominent feature of the corporate name of the applicant. For, at common law the use of a corporate name is not a basis for legal damage unless it results in diversion of good will and such diversion, if any, can be readily prevented by control of the manner of use of a symbol without however stopping its use. Whether this circumstance would or would not prevent

the opposer from obtaining registration is a question which is not determined since the opposer is not seeking registration and it is therefore deemed not to be in issue.

The applicant does not claim to have commenced using the word "Beech Nut" on any tobacco products prior to 1915, the date when the opposer commenced to use this word on tobacco products. Such use by the opposer is therefore deemed to be a bar to the application involved herein.

Accordingly the opposition is sustained, and it is adjudged that Beech-Nut Packing Company, the applicant, is not entitled to the registration for which it has made application.

Limit of appeal: October 28, 1921.

J. CARNES,
Examiner of Interferences.

October 8, 1921.

PLAINTIFF'S EXHIBIT NO. 42.—CERTIFIED COPY, DECISION OF ASSISTANT COMMISSIONER OF PATENTS IN PATENT OFFICE TRADE-MARK OPPOSITION NO. 2805

Hearing:
Jan. 10, 1922.

IN THE UNITED STATES PATENT OFFICE.

P. Lorillard Company v. Beech-Nut Packing Company.

Opposition No. 2805.

Appeal.

TRADE-MARK FOR CIGARETTES.

Application of the Beech-Nut Packing Company, filed June 25, 1919,

Serial No. 119,930, published Sept. 9, 1919.

Messrs. MEYERS, CUSHMAN & REA and Messrs. MEYERS, CAVANAGH & HYDE for P. Lorillard Company.

Mr. JAMES R. OFFIELD for Beech-Nut Packing Company.

This is an appeal from the decision of the examiner of interferences sustaining an opposition filed against the application for registration of "Beech Nut" for cigarettes filed by the Beech Nut Packing Company on June 25, 1919.

Under Section 7 of the trade-mark statute we are required to determine the question of the right of registra-

tion to the trade-mark. We are thus met in the beginning of the case with the question of whether applicant has such ownership in the mark as entitles it to registration. It is admitted that applicant has never manufactured cigarettes or other tobacco products. It is admitted that the only cigarettes or tobacco products in which applicant has dealt are 2,060 cigarettes which it purchased from the American Tobacco Company on an invoice dated July 12, 1919. These cigarettes were shipped by the American Tobacco Company in three lots, one to an officer of the company in New York City, another to a member of the firm of applicant's attorneys, of record here, at Chicago, and the third to the New Jersey Tobacco Company, Jersey City, N. J. The goods shipped to the New Jersey Tobacco Company had not been ordered, were not accepted, but were returned. There is no evidence that any of the Beech Nut cigarettes were ordered by the parties to whom they were shipped, nor is there any evidence that they were bought or paid for. It is admitted that aside from this single transaction applicant has never been in the tobacco or cigarette business. I am unable to see that this state of affairs is distinguishable from that condemned as not being sufficient to support a trade-mark registration in Phillips v. Hudnut, 1920, C. D., 164; 263 Fed. Rep., 643; 273 O. G., 629; 49 App. D. C., 247.

Applicant cites B. Fischer & Company v. Knickerbocker Mills Company, 1915, C. D., 71; 211 O. G., 955; 42 App. D. C., 570, but in that case apparently there had been a prior going business in the goods in issue. In Breitenbach *et al.* v. Rosenberg, 167 O. G., 763; 1911, C. D., 365; 37 App. D. C., 102, the business was a continuous business, although small in volume, but in the present

instance applicant has no business at all in cigarettes.

Applicant claims that having made this sale of cigarettes it discontinued the business for the time being, awaiting the outcome of the present application for trade-mark registration which it was prepared to make. The present application was filed June 25, 1919, almost two weeks after applicant had discontinued its activities. No question of abandonment of the mark is involved here as applicant has never owned the mark for cigarettes.

Applicant has established that it was using "Beech Nut" as a trade-mark for a large number of miscellaneous articles, saying:

> "The Beech Nut Company in using its own label on cigarettes was operating within an exclusive right it has always had; this being so, neither the extent nor the method of exploitation of cigarettes is of any legitimate interest to opposer."

Applicant seems to argue that inasmuch as it was employing a trade-mark on one class of goods it was free at any time to employ that mark on another class of goods, and that in order to obtain registration in the second class of goods it was not necessary to carry on a business as to the second class of goods. This argument is not supported by any cases that I can find and does not seem sound. A trade-mark right grows only from use in a business and the use of the mark in one business does not afford sufficient foundation for a registration of the mark for another business. Moreover, applicant did not apply to its cigarettes a label like that used on all its other goods.

In the argument and in the briefs many other interesting questions are urged, but since applicant has no business on which to base its registration, the Patent Office has no jurisdiction of its case and anything we may say

BEECH-NUT EXHIBIT—CERTIFIED COPY OF CERTIFICATE OF INCORPORATION OF BEECH-NUT PACKING COMPANY.

(Cancelled Revenue Stamp
10 cents.)

We, the undersigned, all being persons of full age and at least two-thirds being citizens of the United States and at least one of us a resident of the State of New York, desiring to form a stock corporation pursuant to the provisions of the Business Corporations' Law of the State of New York, do hereby make, sign, acknowledge and file this certificate for that purpose, as follows:

FIRST:—The name of the proposed corporation is "Beech Nut Packing Company."

SECOND:—The purposes for which it is to be formed are to puchase or otherwise acquire, sell, trade in, cure, pack, smoke, treat and prepare for the market, all kinds of animal and food products and goods, wares and merchandise of every class and description; to conduct the business of slaughtering animals or a general abattoir and cold storage business; to conduct a general trading and manufacturing business; to apply for, register, purchase or otherwise acquire, and to hold, own, use and operate, and to sell, assign, grant licenses in respect of and otherwise dispose of and deal with and turn to account, any and all inventions, improvements, formulae, processes, trade names and trade marks, copyrights, letters patent of the United States, and of any and all foreign countries, and patent rights of all kinds relating to the business above mentioned; to enter into, make, perform and carry out contracts of every kind and for any lawful purpose with any person, firm, association or corporation relating to the business aforesaid; and in gen-

eral to do any and all acts necessary and convenient for the most ample exercise of all the purposes and objects above expressed or connected therewith.

THIRD:—The amount of the capital stock is One hundred and fifty thousand (150,000) Dollars.

FOURTH:—The number of shares of which the capital stock shall consist is Fifteen hundred (1,500) of the par value of One hundred (100) Dollars per share, and the amount of capital with which the Company shall begin business is Five hundred (500) Dollars.

FIFTH:—Its principal business office is to be located in the town of Canajoharie, in the County of Montgomery, in the State of New York.

SIXTH—Its duration is to be One hundred (100) years.

SEVENTH:—The number of its directors is to be three.

EIGHTH:—The names and post-office addresses of the directors for the first year are as follows:

Name.	Post-office Address.
Edward B. Burnap,	Canajoharie, N. Y.
Frederick J. Winston,	32 Nassau St., New York.
William J. Arkell,	Canajoharie, N. Y.

NINTH:—The names and post-office addresses of the subscribers and a statement of the number of shares of stock which each agrees to take in the corporation, are as follows:

Name.	Post-office address.	Number of Shares.
Edward B. Burnap,	Canajoharie, N. Y.	1
Frederick J. Winston,	32 Nassau St., New York.	1
William J. Arkell,	Canajoharie, N. Y.	3
	Total	5

IN WITNESS WHEREOF, we have made, signed, acknowledged and filed this Certificate in duplicate dated this 27th day of December, One thousand eight hundred and ninety-nine.

E. B. BURNAP
FREDERICK J. WINSTON
WILLIAM J. ARKELL

State of New York, County of New York, ss.

On this 27th day of December, 1899, before me personally came, FREDERICK J. WINSTON, and WILLIAM J. ARKELL, to me personally known to be two of the persons described in and who made and signed the foregoing Certificate, and they severally duly acknowledged to me that they made, signed and executed the same for the uses and purposes therein set forth.

(Seal) BERTHA L. CLARKE
No. 160 Notary Public
N. Y. Co.

State of New York, County of Montgomery, ss.

On this 28th day of December, 1899, before me personally came, EDWARD B. BURNAP, to me personally known to be one of the persons described in and who made and signed the foregoing certificate, and he duly acknowledged to me that he made, signed and executed the same for the uses and purposes therein set forth.

(Seal) W. M. MURRAY
Notary Public

(Endorsed)

CERTIFICATE OF INCORPORATION OF BEECH NUT PACKING COMPANY

Dated, December 27th, 1899.

Tax for privilege of organization of this Corporation.

$187 $\frac{50}{100}$

Under Chapter 908, Laws of 1896.

Paid to State Treasurer before Filing.

STATE OF NEW YORK
Office of SECRETARY OF STATE
Filed and Recorded DEC. 29, 1899
J B H MONGIN
Deputy Secretary of State

State of New York, Office of the Secretary of State, ss.

I have compared the preceding with the original Certificate of Incorporation of "Beech Nut Packing Company" filed and recorded in this office on the 29th day of December, 1899, and do HEREBY CERTIFY the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this thirteenth day of April, one thousand nine hundred and twenty.

E. W. TAFT,
Second Deputy Secretary of State.

(Seal)

BEECH-NUT EXHIBIT—STATIONERY OF 1892, IMPERIAL PACKING COMPANY.

BEECH-NUT EXHIBIT—CORRESPONDENCE.

P. A. BARNETT

SAXTON, PA. Dec. 16, 1915.

THE BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Dear Sirs:

I have ordered a case of Beech-Nut Scrap some time ago and have not received it up to this writing. If you have not shipped it yet please do so at *once.*

Yours very truly,
P. A. BARNETT.

FEB. K 2/1/16

J. B. MALTBY, INC.,
Corning, N. Y.

Dear Sir:

We return your order for 100 cases Beech-Nut Scrap, evidently sent to us in error.

We believe that Lorillard Co., Middletown, O. are the manufacturers of these goods.

Yours very truly,
BEECH-NUT PACKING CO.

FEB. K 2/3/16

THE NEW RIVER CO.,
Macdonald, W. Va.

Dear Sirs:

We have your order No. 12770 calling for two gross of Beech-Nut Scrap Tobacco. We are not manufacturers of these goods, which we believe are made by Lorillard Co., Middletown, O.

Yours very truly,
BEECH-NUT PACKING CO.

FEB K 3/18/16

BENTLEY, SETTLE & Co.,
Syracuse, N. Y.

Dear Sirs:

We have your favor of the 17th inst. requesting us to ship direct to F. M. Blake & Sons, Fulton, N. Y., for your account 5 gross Beech-Nut Scrap.

We presume this refers to Beech-Nut scrap tobacco, which while it bears a label somewhat resembling that of the Beech-Nut Packing Co.'s is made by Lorillard Co. of Middletown, O.

We thank you for the order which, unfortunately, we are unable to fill.

Yours very truly,
BEECH-NUT PACKING CO.

SYRACUSE, N. Y. Feb. 16, 1917

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Please ship direct to Graves & Moore, Wolcott, N. Y., for our account and prepay freight:

5 gross Beech-Nut Scrap.

Yours very truly,
BENTLEY, SETTLE & Co.

WEW—G March 22, 1917

L. GOLDSMIT, BRO. & Co.,
Pittsburgh, Pa.

Gentlemen:

We return your order of March 20th directed to us as you have ordered 200 boxes of Beech-Nut Scrap.

As we do not merchandise this product, believe that the order was sent to us through error. If you intended to order Beech-Nut Gum, please advise.

Yours very truly,
BEECH-NUT PACKING CO.

WEW—G May 7, 1917

KURTZ & MAYERS,
Reading, Pa.

Gentlemen:

We return your order of May 4th which calls for 10 gross of Beech-Nut Tobacco, as we do not merchandize this product and know that you have confused this commodity with our goods.

Yours very truly,
BEECH-NUT PACKING CO.
Traffic Dept.

SPENCER HOGIN GROCERY & FRUIT CO.
MARION, IND.

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Please ship in addition to standing order 50 containers Beech-Nut Scrap.

Yours truly,
SPENCER-HOGIN GROCERY & FRUIT CO.

WEW/G June 14, 1917

BARKER & WHEELER CO.,
Peoria, Ill.

Gentlemen:

We return your order of June 11th which calls for one carton of Beech-Nut Chewing tobacco.

We do not manufacture or merchandise this product.

Yours very truly,
BEECH-NUT PACKING CO.

WEW—A June 30, 1917

BENTLEY, SETTLE & CO.,
Syracuse, N. Y.

Gentlemen:

We return your order of June 29th which calls for 5 gross of Beech-Nut Scrap. We believe you sent this order to us through error as we do not manufacture this product.

Yours very truly,
BEECH-NUT PACKING CO.

WEW—A July 19, 1917

WM. DEICHES & CO.,
115 S. Eutaw St.,
Baltimore, Md.

Dear Sirs:

We have your letter of the 17th stating that on June 27th you submitted an order to us for 15 cases Beech-Nut Scrap 5¢ size to be shipped to the Neudecker Tobacco Co. of your city. We have no record of receiving this order here and same would have been returned to you in view

of the fact that we do not merchandise this product. We know that you have this firm confused with the producers of Beech-Nut Scrap Tobacco.

Yours very truly,
BEECH-NUT PACKING CO.

WEW/C July 26, 1917

KURTZ & MAYERS,
Reading, Pa.

Gentlemen:

We return your letter of the 24th which calls for 5 gross of Beechnut Scrap Tobacco to be shipped to your store at Sunbury, Pa.

We are not the manufacturers of this product and believe you have sent the order to us through error.

Yours very truly,
BEECH-NUT PACKING CO.

WEW/G Feb. 14, 1918

LAUDERBACH-ZERBY CO.,
Philipsburg, Pa.

Gentlemen:

We return your order #10725 which you have sent us in error as you have ordered a quantity of Beech-Nut Scrap Tobacco, which is not produced by us.

Yours very truly,
BEECH-NUT PACKING CO.

BANGOR, ME., July 25, 1918

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Kindly ship the one gross Beech-Nut Scrap Chewing Tobacco to the University Store Company, Orono, Maine, as per our order July 9th, and which was corrected in your letter to us of July 12th, and oblige,

Yours respectfully,
ARTHUR CHAPIN CO.

BINGHAMPTON, N. Y., Oct. 3, 1918

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

Please ship for our account to
O. F. Potter, Ulster, Penn.
10 cases Beechnut Scrap, 1¼ gro. each.

Yours truly,
NEWELL & TRUESDELL.

WEW—G Nov. 15, 1918

LOGAN GROCERY CO.,
Logan, W. Va.

Gentlemen:

We return your order of Nov. 12th for 4 cases of Beech-Nut Tobacco and 1 case of Honest Tobacco.

We do not merchandise these products.

Yours very truly,
BEECH-NUT PACKING CO.

WEW—G Dec. 16, 1918

PETERSON-WETER CO.,
Buffalo, N. Y.

Gentlemen:

We have your letter of the 13th requesting us to ship J. D. Murray, Corry, Pa., four one quarter gross packages of Beechnut scraps.

We do not manufacture this product.

Yours very truly,
BEECH-NUT PACKING CO.

ITHACA, N. Y. April 6, 1920

BEECH-NUT PACKING CO.,
Canajoharie, N. Y.

Gentlemen:

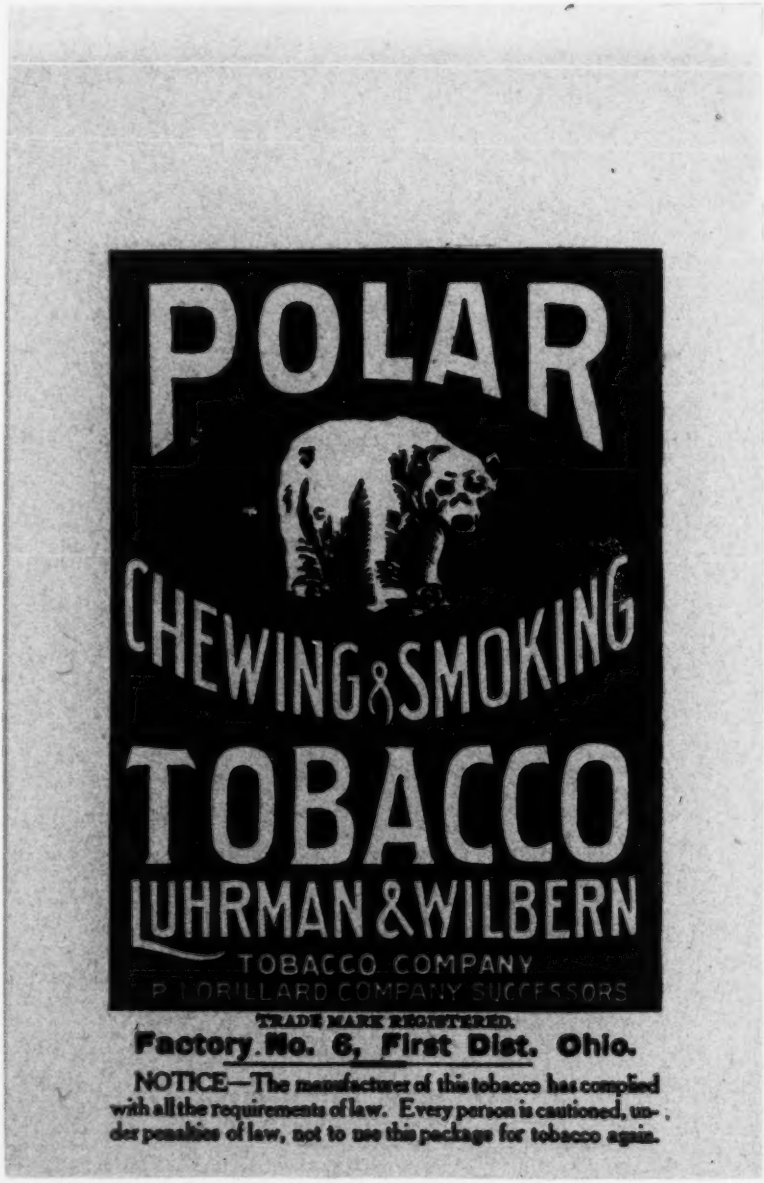
Please enter our order to be shipped as soon as possible,

50 cases Beech-Nut Scrap 1¼ gross each
50 " " " ½ " "

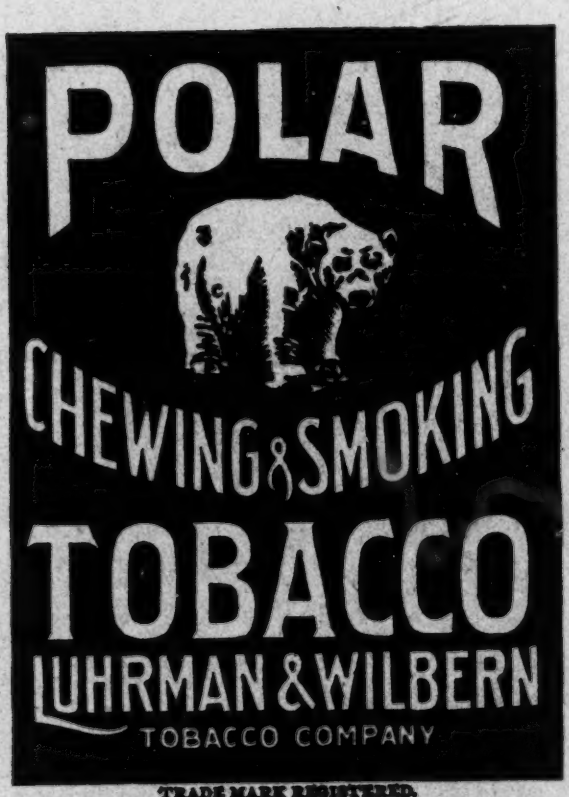
Yours very truly,
D. B. STEWART & CO.

28438

BEECH-NUT CROSS EXHIBIT NO. 1—P. LORILLARD COMPANY "POLAR BEAR" SCRAP TOBACCO BAG.



BEECH-NUT CROSS EXHIBIT NO. 1-A—LUHRMAN & WILBERN "POLAR BEAR" SCRAP TOBACCO BAG.

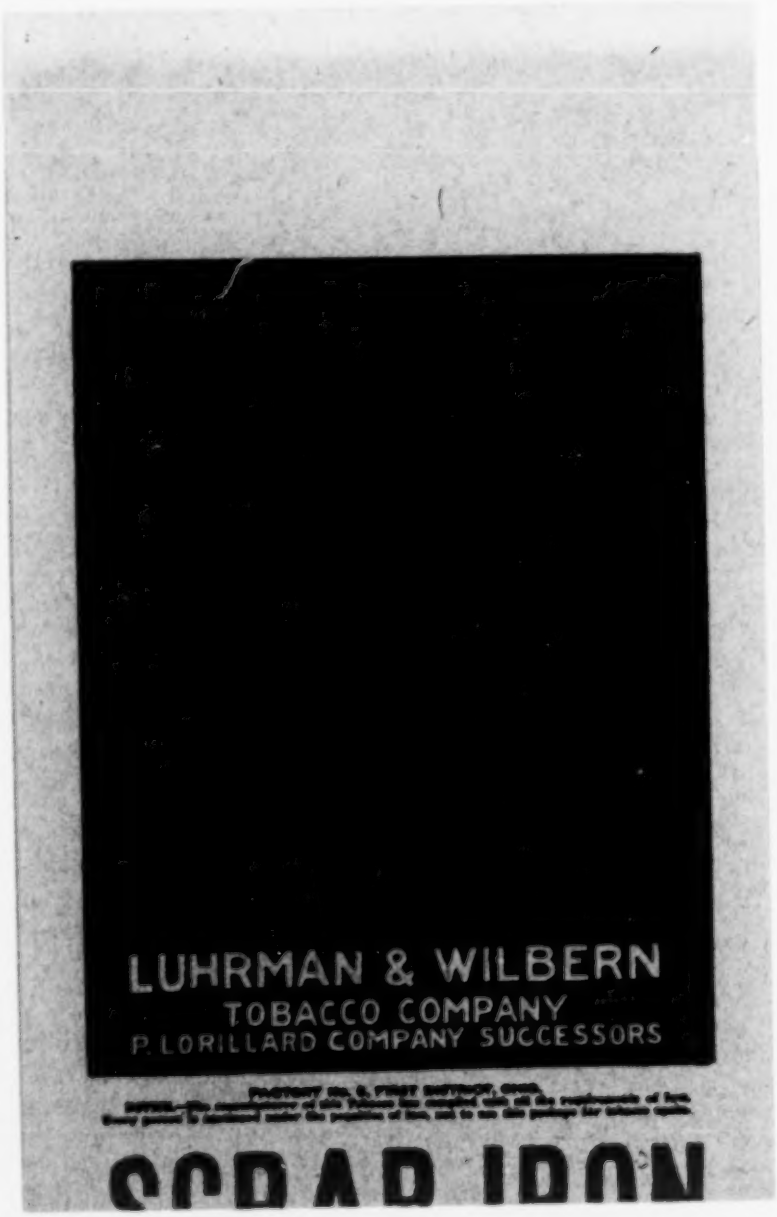


TRADE MARK REGISTERED.

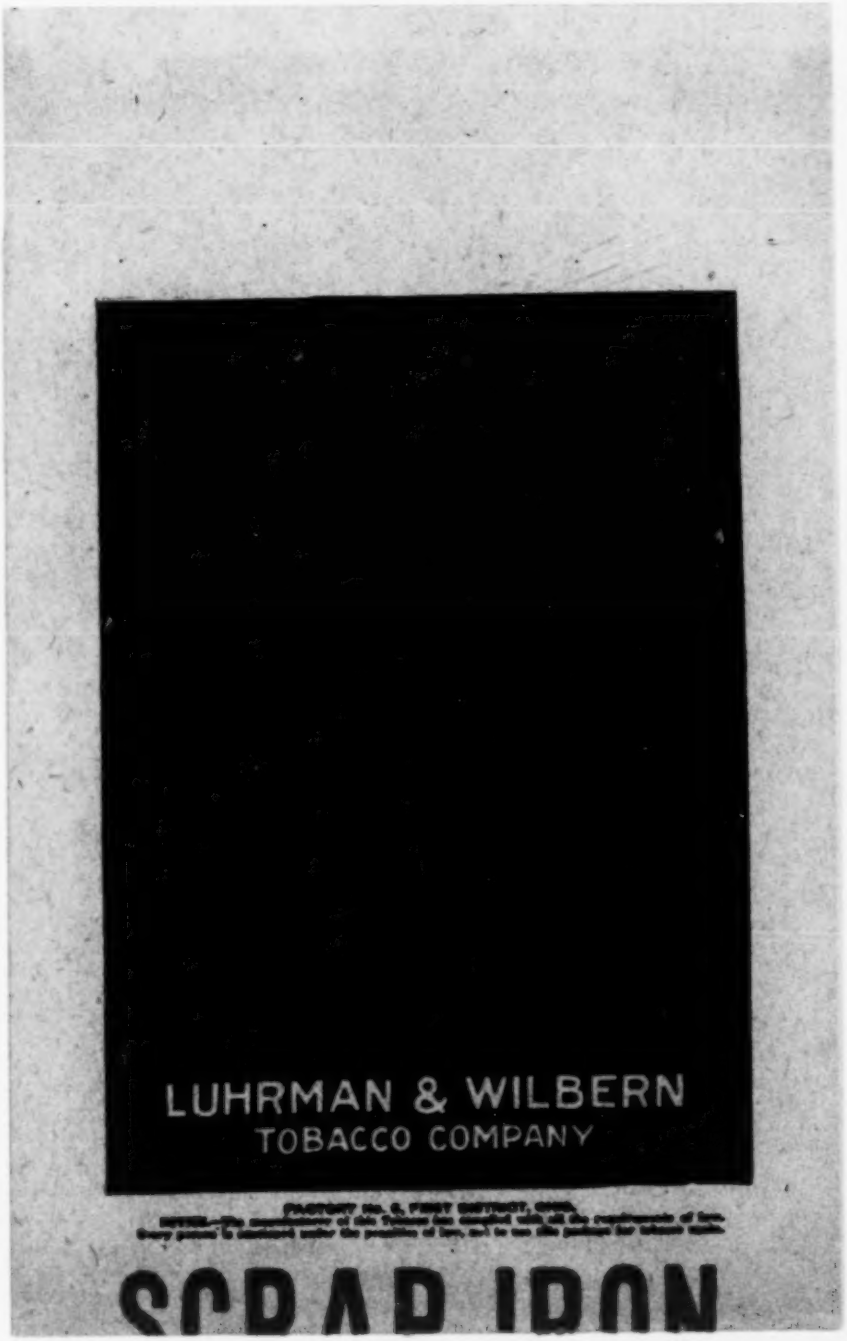
Factory No. 6, First Dist. Ohio.

NOTICE.—The manufacturer of this tobacco has complied with all the requirements of law. Every person is cautioned, under the penalties of law, not to use this package for tobacco again.

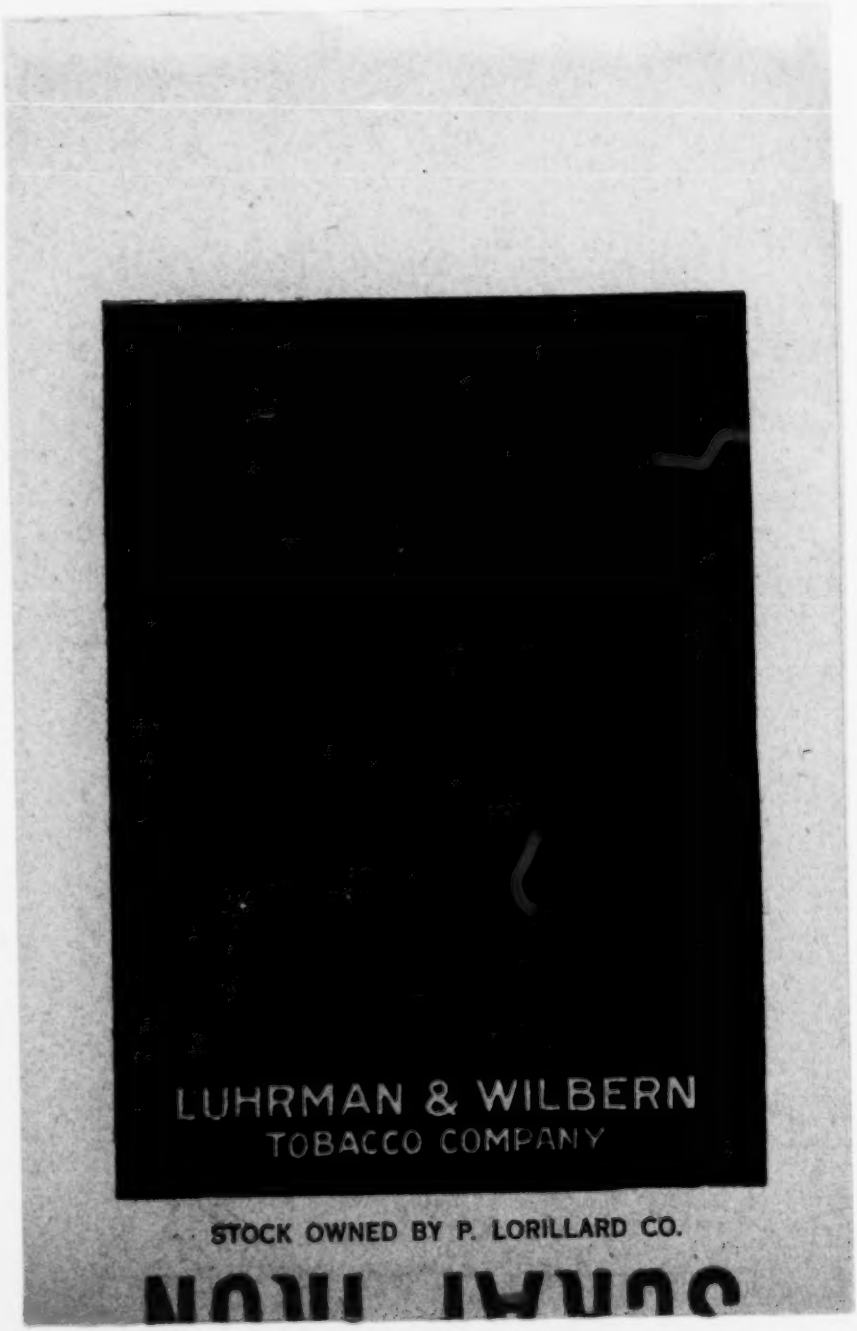
BEECH-NUT CROSS EXHIBIT NO. 2—P. LORILLARD COMPANY "SCRAP IRON" SCRAP TOBACCO BAG.



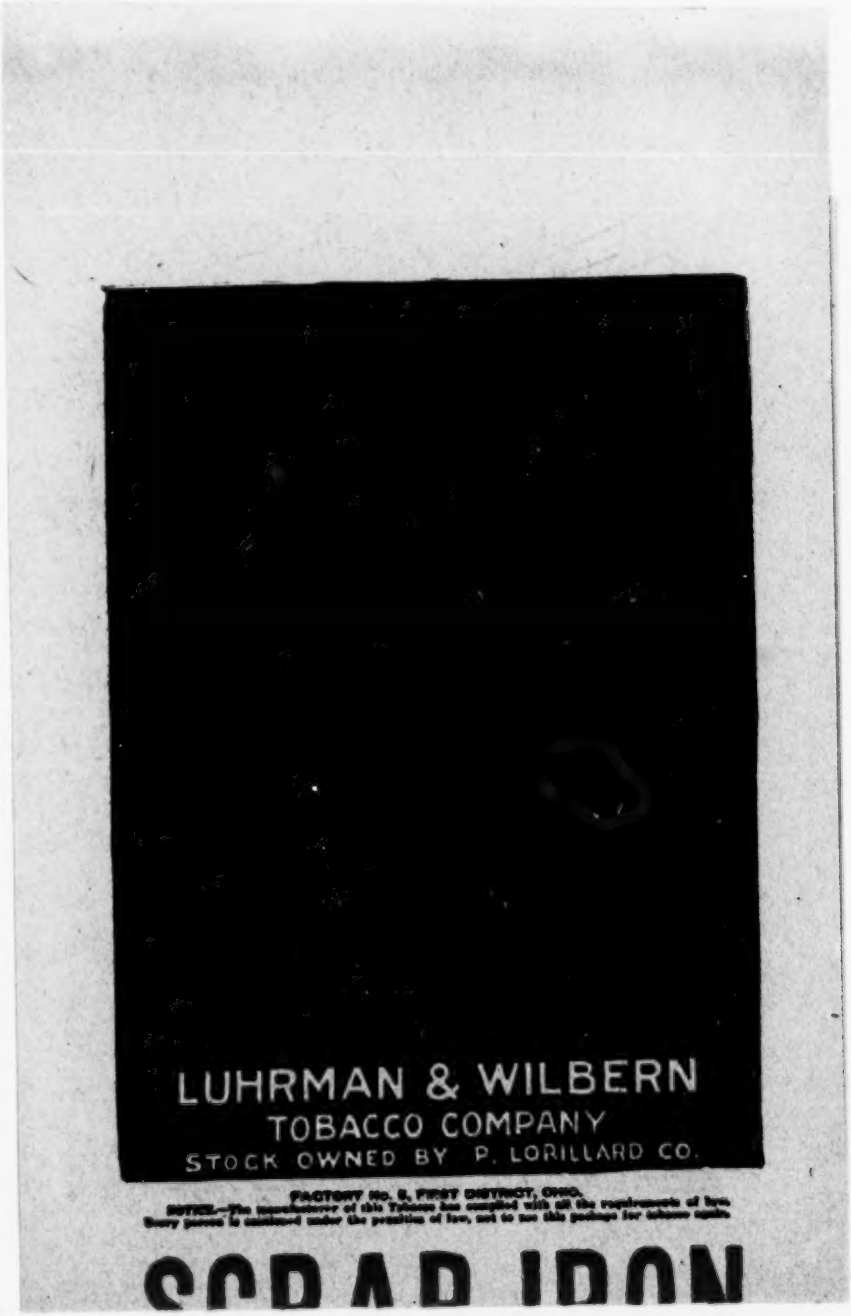
BEECH-NUT CROSS EXHIBIT NO. 2-A—LUHRMAN & WILBERN "SCRAP IRON" SCRAP TOBACCO BAG.



BEECH-NUT CROSS EXHIBIT NO. 2-C—P. LORILLARD COMPANY "SCRAP IRON" SCRAP TOBACCO BAG BEARING WORDS "STOCK OWNED BY P. LORILLARD CO." IN RUBBER STAMP.

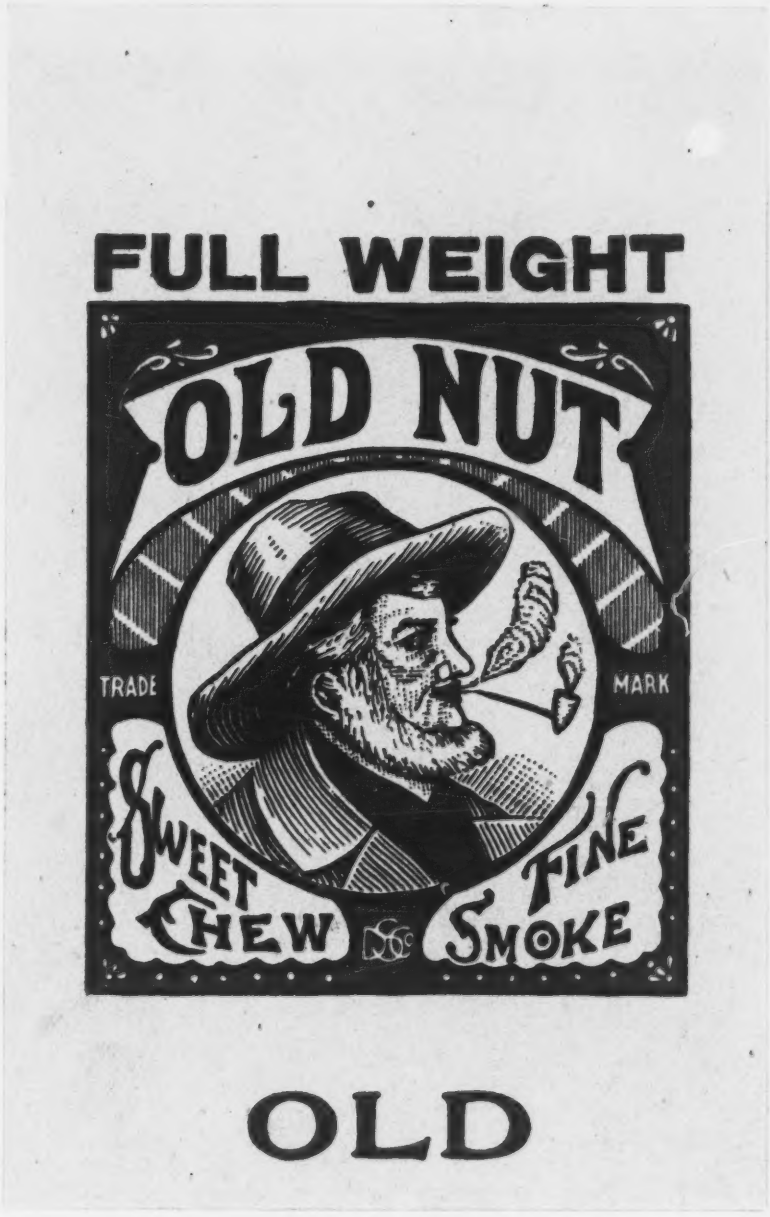


BEECH-NUT CROSS EXHIBIT NO. 2-D—P. LORILLARD COMPANY "SCRAP IRON" SCRAP TOBACCO BAG BEARING WORDS "STOCK OWNED BY P. LORILLARD CO." PRINTED.



28860

BEECH-NUT CROSS EXHIBIT NO. 3.—P. LORILLARD COMPANY "OLD NUT" SCRAP TOBACCO BAG.



28692

BEECH-NUT CROSS EXHIBIT NO. 4.—P. LORILLARD COMPANY "BAG PIPE" SCRAP TOBACCO BAG.

2864

BEECH-NUT CROSS EXHIBIT—LORILLARD BEECH-NUT CIGARETTES WRAPPER.

NOTE: This Exhibit wrapper is identical with Exhibit 3 in Bill of Complaint,—which see (Transcript, Vol. I, page 19); and also identical with the wrapper of P. Lorillard Co. Exhibit No. 6 (*post*, page 265).

BEECH-NUT CROSS EXHIBIT—TRADE-MARK REGISTRATION NO. 89,613.

UNITED STATES PATENT OFFICE.

BEECH-NUT PACKING COMPANY, OF CANAJOHARIE, NEW YORK.

TRADE-MARK FOR CERTAIN FOODS.

89,613. Registered Dec. 31, 1912.

Application filed March 22, 1909. Serial No. 41,324.

STATEMENT.

To all whom it may concern:

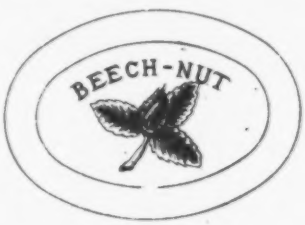
Be it known that BEECH-NUT PACKING COMPANY, a corporation duly organized under the laws of the State of New York, and located and doing business at Canajoharie, county of Montgomery, in said State, has adopted for its use the trade-mark shown in the accompanying drawing, the annular band being red, for cured ham, bacon, beef, codfish, and herring, sausage, Camembert cheese, pimento-cheese, Roquefort-type cheese, peanut-butter, canned beans, canned bacon and beans, canned beans with tomato sauce, canned bacon and beans with tomato sauce, canned beans and selected pork, malt vinegar, cider vinegar, olive-oil, gelatin, tomato catsup, prepared mustard, strawberries, raspberries, and cherries preserved in syrup, grape, quince, fig, peach, blackberry, raspberry, strawberry, cherry, and plum jams, blackberry, pineapple, huckleberry, cherry and ginger pear preserves, cranberry sauce, olives, orange, grape-fruit, rhubarb, and lime-fruit marmalades, spiced plums, preserved Persian and Fard dates and figs, quince, apple, black-currant, grape, crabapple, and red-currant jellies, peppermint, lime, wintergreen, clove, cinnamon, lemon, hoarhound, and anise cut candies, wintergreen, mint, and vanilla cream candies, and chewing-gum, all in Class 46, Foods and ingredients of foods.

The trade-mark has been continuously used in the business of said corporation, and in the business of its predecessor, the Imperial Packing Company, since the latter part of the year 1899.

The said corporation is the owner of the following trade-mark registrations in the United States Patent Office:—Imperial Packing Company, No. 19,838, July 7, 1891; Imperial Packing Company, No. 24,978, July 3, 1894; Beech-Nut Packing Company, No. 35,731, Jan. 8, 1901; Beech-Nut Packing Company, No. 36,444, May 21, 1901.

The trade-mark is applied or affixed to the goods or to the packages containing the same by placing thereon a printed label on which the trade-mark is shown, and by branding the goods, or the boxes or cases in which the said goods or packages are shipped, with an impression showing the said trade-mark.

BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL,
President.



DECLARATION.

State of New York county of New York ss.

BARTLETT ARKELL, being duly sworn, deposes and says that he is the president of the corporation applicant named in the foregoing statement; that he believes the foregoing statement is true; that he believes said corporation is the owner of the trade-mark sought to be registered; that no other person, firm, corporation, or association, to the best of his knowledge and belief, has the

right to use said trade-mark in the United States, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that said trade-mark is used by said corporation in commerce among the several States of the United States, and between the United States and foreign nations, and particularly with Great Britain and France; that the drawing presented truly represents the trade-mark sought to be registered; and that the specimens show the trade-mark as actually used upon the goods.

BARTLETT ARKELL.

Subscribed and sworn to before me, a notary public, this 25th day of September, 1912.

[L. S.] S. V. MORRIS,
Notary Public, 121, New York County.
Register's No. 3236.

Part III.

DEFENDANT'S EXHIBITS.

DEFENDANT'S CROSS EXHIBIT NO. 1—PACKAGE OF BEECH-NUT SCRAP TOBACCO.

2871

DEFENDANT'S CROSS EXHIBIT NO. 2—PACKAGE OF BEECH-NUT CHEWING GUM.

[NOTE: Replica of the wrapper on the Exhibit package:]

DEFENDANT'S CROSS EXHIBIT NO. 5—ADVERTISEMENT OF BEECH-NUT CIGARETTES, BOSTON HERALD OF AUGUST 18, 1921.

DEFENDANT'S CROSS EXHIBIT NO. 6—PACKAGE OF BEECH-NUT PEPPERMINTS.

[NOTE: Replica of the wrapper on the Exhibit package:]

DEFENDANT'S CROSS EXHIBIT NO. 8—BEECH-NUT BACON LABEL.

DEFENDANT'S EXHIBIT NO. 10—P. LORILLARD COMPANY ORDER BLANKS, A, B AND C.

Form S. 26

P. LORILLARD CO., INC.
119 WEST 40TH STREET
NEW YORK, N. Y

.....192.....

Jobber .....

Town ..... *State* .....

Ship to (Name) .....

Shipping Point .....

P. O. Address .....

☛SHIP FROM JOBBER'S STOCK☚

Quantity	BRAND	SIZE	STYLE	PRICE

This order is subject to acceptance by the jobber to whom it is addressed

SIGNATURE OF
Retail
Purchaser .....

Order taken by Salesman.....

IF NOT ACCEPTABLE RETURN THIS ORDER TO

.....

.....

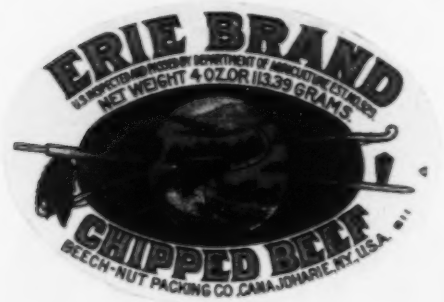
A. Above on white paper.
B. Above on yellow paper.
C. Blank white tissue sheet.

22881
172

DANT'S EXHIBIT NO. 11—PHOTOGRAPH, WEST HAVEN DRUG STORE DISPLAY.

288
1783-a
4

DEFENDANT'S CROSS EXHIBIT NO. 16—ERIE BRAND LABEL.



2883

DEFENDANT'S CROSS EXHIBIT NO. 17—HOLLY BRAND LABEL.

DEFENDANT'S EXHIBIT NO. 18 — PAMPHLET ENTITLED "CORRESPONDENCE — BEECH-NUT PACKING COMPANY AND P. LORILLARD COMPANY—IN RE 'BEECH-NUT' TRADE-MARK".

INDEX TO LETTERS.

	PAGE
Beech-Nut Packing Co. to Lorillard Co. 6/11/15	1
Beech-Nut Packing Co. to P. Lorillard Co. 6/18/15	3
P. Lorillard Co. to Beech-Nut Packing Co. 6/23/15	4
Beech-Nut Packing Co. to P. Lorillard Co. 7/2/15	5
P. Lorillard Co. to Beech-Nut Packing Co. 7/8/15	6
Beech-Nut Packing Co. to P. Lorillard Co. 7/26/15	8
Beech-Nut Packing Co. to Thomas S. Fuller 9/2/15	9
Thomas S. Fuller to Beech-Nut Packing Co. 9/15/15	10
Beech-Nut Packing Co. to Thomas S. Fuller 9/20/15	14
P. Lorillard Co. to Beech-Nut Packing Co. 6/28/19	15
Beech-Nut Packing Co. to P. Lorillard Co. 7/7/19	17-18
P. Lorillard Co. to Beech-Nut Packing Co. 7/9/19	19
P. Lorillard Co. to Beech-Nut Packing Co 7/15/19	20
Beech-Nut Packing Co. to P. Lorillard Co. 7/17/19	21
Offield & Poole to Beech-Nut Packing Co. 7/22/19	22
Beech-Nut Packing Co. to P. Lorillard Co. 7/25/19	23
P. Lorillard Co. to Beech-Nut Packing Co. 7/28/19	24
Beech-Nut Packing Co. to P. Lorillard Co. 8/7/19	25
Beech-Nut Packing Co. to P. Lorillard Co. 8/9/19	26
Beech-Nut Packing Co. to James R. Offield 8/8/19	27
P. Lorillard Co. to Beech-Nut Packing Co. 8/27/19	28
Beech-Nut Packing Co. to P. Lorillard Co. 8/28/19	29
P. Lorillard Co. to Beech-Nut Packing Co. 9/17/19	30
Beech-Nut Packing Co. to P. Lorillard Co. 9/19/19	31
Beech-Nut Packing Co. to P. Lorillard Co. 9/22/19	32
Beech-Nut Packing Co. to P. Lorillard Co. 10/8/19	33
P. Lorillard Co. to Beech-Nut Packing Co. 10/15/19	35

28887

BEECH-NUT PACKING COMPANY

CANAJOHARIE, N. Y.

6/11/15

LORILLARD CO.,
Middletown, O.

Dear Sirs:

We adopted many years ago as our trade name the word "Beech-Nut" arbitrarily selected by us as the mark or name for our manufacturing output of food material. We also associated with such trade name "BEECH-NUT" and as a part of the trade mark, an oblong or oval frame or border of a red color surrounding and enclosing a white oblong space with a picture or representation of a Beech-Nut centered therein.

We have built up during the last quarter of a century a vast trade in our products and always with our trade name or trade mark associated therewith. We have expended a very large sum of money in so doing and the word or name "BEECH-NUT" and our trade mark has become of vast value to us not only for these reasons but for the reason of a high quality and perfection of the various products manufactured by us to which this name and mark has been applied.

So completely has this name and mark been attached to and associated with our goods during all of these years that the purchasing public has come to recognize this name and mark as our property as to origin and to purchase the manufacture and output to which this name and mark is applied without any further identification as to the origin of the word or name itself, believ-

ing that wherever they see our name and mark applied that we are the manufacturers of the product and purchase accordingly.

We have from time to time added to the variety of our manufacturing commodities to which this name or mark has always been applied; as for example, a chewing gum product of somewhat recent production upon our part. While we have never as yet manufactured tobacco, the taking on of such manufacture in the future is by no means impossible or improbable. You will also see that the name or word "BEECH-NUT" is a part of our corporate name. We have been thus particular to state this matter to you by reason of the acts upon your part which now follow.

We have been shown a lined bag evidently employed for packing "Beech-Nut Scrap Tobacco," apparently manufactured by one of your factories at Middletown, O. A prominent feature upon the bag is our trade name "BEECH-NUT," including the oval band and our characteristics burrs and nuts. It is difficult to believe that the presence of our trade name "Beech-Nut" and mark upon the bag will not deceive the purchasing public in the belief that the contents of the bag are of our manufacture, and to us there is no other explanation to be given to the presence of our trade name "Beech-Nut" and mark upon this bag except the intention on your part that the public shall be so deceived: and you will sell your tobacco by reason of the presence thereon of our name and mark. In other words, these acts strongly indicate to us intentional unfair trading.

We have decided in the first instance to write you fully as to this matter and present to you our view of your acts and to request to you immediately to cease this use of our name and mark and give us written assurance of the same.

We have confidence that now your attention is called to it you will recognize the justice of our position and that there will hereafter be no necessity of using any harsher course to enforce recognition of the same. We have been thus particular also for the reason that there can be no contention hereafter that we have not fully stated your position and ours in this matter. An early reply upon your part is requested and expected.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

6/18/15.

P. LORILLARD CO.,
Middletown, O.

Dear Sirs:

Will you kindly advise if we may expect an early reply to our recent communication with reference to the use of the word "Beech-Nut" in connection with your new brand of chewing tobacco?

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

June 23, 1915.

BEECH-NUT PACKING COMPANY,
Canajoharie, N. Y.

Dear Sirs:

Your letters of June 11th and June 18th addressed to this Company at Middletown, Ohio, relative to the use by us of the name "Beech-Nut" for Scrap Tobacco, have been referred to me.

Preliminary to any discussion of the matter, will you be good enough to let me know when you first began to use the name "Beech-Nut?" I notice on your letterhead, "Incorporated 1899," but this of course does not necessarily mean that you began to put products on the market under the name "Beech-Nut" at that time.

The statement in your letter of June 11th, that you believe we are using the name "Beech-Nut" with the intention that the public shall be deceived into thinking that our product is of your manufacture, is not only without the slightest warrant, but is little short of ridiculous. As a matter of fact, if such an impression should be formed, it would be to our detriment.

Yours very truly,

TSF/L

BEECH-NUT PACKING COMPANY

Canajoharie, N. Y.

7/2/15.

P. LORILLARD Co.,
119 W. 40th St.,
New York.

Mr. Thomas S. Fuller.

Dear Sirs:

Your favor of the 23rd ult. duly received.

Our "BEECH-NUT" trade mark and trade name has been used by ourselves and our predecessors since and prior to the year 1891. Both our trade mark and our trade name "BEECH-NUT" has been used continuously since that date in our business and to such an extent and in such manner that both the name and the mark long since came to have a "secondary significance and meaning"; that is, wherever the mark and name "BEECH-NUT" is seen and no matter with what product it is associated with, it has a "secondary significance" and means only the product and products of the Beech-Nut Packing Company.

You are woefully mistaken and entirely misinformed in your assumption and, indeed, your statement that the public is not deceived by your clients use of our trade mark and name "BEECH-NUT." We know as an absolute truth what is apparent on the face of the facts that the general purchasing public is deceived by your use of our "Beech-Nut" trade mark and trade name and, indeed, this could not well be otherwise, but we know further that your salesmen and agents deliberately push your goods and trade under this identity of use of their mark and name.

We beg to call your attention in this connection to our former communication to you in this matter and to again urgently request that you immediately stop the use in every way and manner of our trade name and mark "BEECH-NUT," in your business without further action upon our part.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

July 8, 1915.

BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

(Attention F. E. Barbour, Esq.)

Gentlemen:

We have your letter of July 2nd, further with reference to our use of the name "Beech-Nut" on scrap tobacco, and informing us that you and your predecessors have used the name since and prior to the year 1891.

That the name "Beech-Nut" has acquired a secondary significance and meaning in the packing industry and is associated in the public mind with goods of your manufacture may be perfectly true, but this would not give you the right to the name for all purposes. The authorities are overwhelming on this subject. You seem to proceed upon the assumption that we have recently begun to use the name on the tobacco. This is not the case. This Company and its predecessor in ownership of this brand have used it continuously since prior to

the year 1898, as shown by records in my office. I have not made a search beyond that time, but I have no doubt that I can find that the brand is very much older.

We would not desire to have it thought that our "Beech-Nut" tobacco is made by your Company, and if you can give us the name of any salesman of ours who has made such a representation, we would be very glad to have it, and we can assure you that if he did make such a representation, his discharge will immediately follow. It could be of no conceivable advantage to us to have the public think that our tobacco product was manufactured by a packing establishment. Our concern has been in business for more than one hundred and fifty years, and in that length of time has built an enviable reputation for the excellence of its tobacco products.

Though you may turn out an excellent quality of bacon, it does not follow that you could turn out an excellent quality of tobacco, or steel rails, or pianos or aeroplanes. If your contention were true, we, who have a brand of tobacco called "Climax," could enjoin the use of the name on a well-known threshing-machine which is sold in the Western States, or we could enjoin the use of our name on the Lorillard Refrigerators. It has never occurred to us to attempt either.

If you will look at our package of Beech-Nut Tobacco, you will see that the name "Lorillard" is prominently displayed thereon. This was done with the desire that people should know the tobacco is coming from the Lorillard Company. It has been our belief that the fact that Lorillard made it would of itself be of value to the brand.

It is difficult to see how you can seriously claim that there is the slightest similarity in the marking of the package and the fac-simile of your mark as displayed on your letterhead.

If you desire me to point out to you authorities which I consider completely sustain my view as expressed herein, I will take pleasure in doing so.

Yours very truly,

TSF/L

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

7/26/15.

P. LORILLARD Co.,
119 West 40th St.,
New York.

Thomas S. Fuller.

Dear Sirs:

Please pardon the delay in acknowledging receipt of your favor of July 8th.

We will greatly appreciate it if you will send us samples of your product showing the manner of use of the word "BEECH-NUT" since the year 1898, copies of advertisements or of letter-heads showing your use of this name. We trust you will consider this a fair request as we would like to reach a prompt and friendly termination of the correspondence on this subject.

We also desire to take advantage of the offer contained in the last paragraph of your letter to point out to us the authorities which sustain your views.

Thanking you in advance for the information requested herein, we remain,

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

9/2/15.

Mr. Thos. S. Fuller,
119 W. 40th St.,
New York.

Dear Sir:

Kindly refer to your favor of July 29th in which you advised that you would collect the information requested in our letter of July 26th after your return from a week's absence. Up to the present we do not seem to have heard from you and will greatly appreciate the information requested.

In this connection, we received to-day an inquiry from New River Gro. Co., Hinton, W. Va., asking the best jobbing price on Beech-Nut scrap tobacco, from which you will note that in the minds of some, at least, Beech-Nut scrap tobacco is credited to the Beech-Nut Packing Co.

Thanking you to favor us at your early convenience, we remain,

Yours very truly,

Beech-Nut Packing Co.,
F. E. Barbour.

September 15, 1915.

F. E. Barbour, Esq.,
Beech-Nut Packing Company,
Canajoharie, N. Y.

Dear Sir:

I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco, and enclose them herein. I am also sending you an old package showing the use of the name "Beech-Nut" and our present package.

Beech-Nut chewing and smoking tobacco (scrap) was made by Harry Weissinger Tobacco Company, of Louisville, Kentucky. This Company was bought out by The American Tobacco Company some time in 1903. Prior to the acquisition of the Weissinger Tobacco Company by the American Tobacco Company the Luhrman & Wilbern Tobacco Company of Middletown, Ohio, was acquired by the Continental Tobacco Company. In 1904 the American Tobacco Company and the Continental Tobacco Company were merged into a new company formed for that purpose and known as The American Tobacco Company.

Under a decree of the Circuit Court of the United States for the Southern District of New York, the so-called Tobacco Combination, which included The American Tobacco Company, was split up. In this disintegration proceeding the Luhrman & Wilbern Tobacco Company, which had always been maintained as a separate entity, was acquired by P. Lorillard Company. In the meantime some of the brands formerly manufactured by the Weissinger Tobacco Company had been taken over and manufactured in the Luhrman & Wilbern factory in Middletown, and after the acquisition by our Company

of the Luhrman & Wilbern business, including these brands, we continued to operate it as a separate Company until about two years ago, when we dissolved it, taking over all of the business and brands directly in our own name.

I give you this history so that you may understand the various price lists in the name of Luhrman & Wilbern Tobacco Company and the package in the name of Harry Weissinger Tobacco Company. I do not know the exact date of the old package, as the stamp is not legible, but it was prior to 1903.

The price lists that I send you are dated January 2, 1904; May 6, 1907, July 1, 1910, and November 3, 1910.

It is difficult for me to see how anyone can claim that there is any similarity in our products and yours, or in your label and ours, other than the name "Beech-Nut." Your claim that we would not have the right to use the name "Beech-Nut" on tobacco products must find its basis in the idea that you can appropriate the name "Beech-Nut" for all products of whatever character.

That the law does not permit of such a claim is elementary. If your claim were maintainable, then the Lion Brewery in New York could enjoin the manufacture of Lion brand collars, or vice versa. Suppose that the J. B. Williams Company should tomorrow put out a new brand of shaving soap, called "Beech-Nut." Do you argue that you could stop it because you have first used the name on hams and bacon? It seems to me that your argument must lead to this conclusion. The law of unfair competition, so far as it assumes to protect the public, assumes to protect the purchaser of average intelligence. It is difficult to believe that a person of average intelligence who enters a store for the purpose of buying "Beech-Nut" hams or bacon could be deceived into thinking he was getting either if he were handed a package of "Beech-Nut" chewing tobacco, or that the "Beech-Nut" chewing tobacco was manufactured by the

manufacturer of the hams and bacon. It is no more the custom in this country for a packer to manufacture chewing tobacco than it is for a manufacturer of beer to manufacture collars, and the purchaser of average intelligence perfectly well knows this.

We have tried to make it evident on our package that our "Beech-Nut" chewing tobacco is of our manufacture, by stamping across the top of the package, before the name "Beech-Nut," "Lorillard's." We have also on the other side of the package, plainly printed that it is manufactured at Middletown, Ohio. There is nothing in the get-up of the label, whether in design, color or wording, which could suggest to a person of average intelligence that it was of your manufacture, or in fact the manufacture of anyone except the Lorillard Company.

As I have written you before, we consider it of immense value to the brand itself that it is manufactured by the Lorillard Company, and we desire the consumers of tobacco to know this, because we believe that the Lorillard name carries with it a vast amount of good-will and a guarantee of excellence. We are justified in this belief by reason of the immense increase in the sales of "Beech-Nut" Scrap since we took the former manufacturer's name off and put "Lorillard's" thereon.

I think this covers the situation except with respect to any representations which you claim that some of our salesmen made, to the effect that our "Beech-Nut" Scrap was a product of your Company. I have written you before that if you will give me the name of any salesman who has made such representation, and that fact can be determined, his discharge will be immediately forthcoming, as he can be of no service to us. If you will point out to me anything in the conduct of our business which tends to create a belief in the trade that our "Beech-Nut" Scrap is made by you, we will thank you, so that we may rectify it. I assure you that we are just as anxious as you are, if not more so, to prevent any

impression that our tobacco is made by you. Will you let me have a copy of the letter you received from the merchant in West Virginia making inquiry of you for "Beech-Nut" tobacco?

On this general subject, if you have not already done so, you might consult Nims on Unfair Business Competition, pages 200 to 300; therein I think you will find a very complete and satisfactory discussion of the law governing this subject. I will quote you paragraph 117 on page 236:

> "Property in a place name for all purposes cannot exist in one person, under ordinary circumstances. The defendant must be using it in the same or a similar business as the plaintiff. Large amounts of rubber as well as licorice might be found in Anatolia. If there were, the rights which the complainant has acquired in the use of the name in the licorice business, would not prevent another under certain conditions from acquiring a sole right to use the name in the rubber trade."

There is no distinction so far as the principle here laid down is concerned between a place name, a generic name, or a fanciful name. You might also consult the cases of Bordens Ice Cream Company against Bordens Condensed Milk Company, 201 Fed. 510 and Wells v. Ceylon Perfume Company, 105 Fed. 621.

I apologize for the length of this letter. I desire to give you the facts fully, together with our views, and I sincerely hope that this will satisfy you as to the law and our entire good faith. We are as proud of our goodwill and the excellence of our products in the tobacco business as you are of yours in the packing industry, and we believe with good reason.

Yours very truly,

(Sgd.) THOS. S. FULLER.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

9/20/15.

MR. THOS. S. FULLER,
119 West 40th St.,
New York.

Dear Sir:

We have your very interesting letter of Sept. 15th together with the pricelists referred to and the package of tobacco.

Your letter is a very interesting one and before giving a definite reply to same, desire to review the matter as presented by you so that we can give you an intelligent reply.

At this time, however, we may express our agreement with you that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence. So does the name "Beech-Nut Packing Co." and we take the view that the increase in sales of Beech-Nut Scrap Tobacco is due to the exploitation of the name "Beech-Nut" with the oval label, and we cannot help but assume that the general impression is that these goods are manufactured by this Company rather than by Lorillard, at least to a considerable degree, for since writing you last we have another inquiry, and this time from Wm. Edwards Co. of Cleveland, O., asking us to ship them 5 cases of Beech-Nut scrap tobacco. The previous inquiry came from New River Gro. Co., Hinton, W. Va.

Yours very truly,

BEECH-NUT PACKING CO.
F. E. Barbour.

June 28, 1919.

BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

Gentlemen:

Some four years ago, there occurred a correspondence between the two companies begun by your Mr. F. E. Barbour's letter of June 11th, 1915, complaining of our use of "BEECH-NUT" for tobacco products. Several letters having intervened, we wrote you on September 15th, 1915, setting forth at some length the title to and use of this trade-mark for tobacco products, asserting our ownership of it for tobacco products and denying that you had cause or right to call this ownership in question. Your response was an acknowledgment, dated September 20th, 1915, characterizing our letter as very interesting and stating that before giving definite reply you desired to review the matter presented by us so that you could give us an intelligent reply.

On your part, there the matter was dropped, you having made no further reply or objection. On our part, we have continued the manufacture and sale of tobacco products under the trade-mark "BEECH-NUT" until today it is one of the leading tobacco trade-marks of this country.

On or about the 17th of this month information came to us of small shipments to two jobbers in this locality of cigarettes bearing the trade-mark "Beech-Nut" and your name, but manufactured by The American Tobacco Company. Our counsel immediately by phone took the matter up with Mr. Junius Parker, counsel for the Tobacco Company and, on being told by Mr. Parker that

the Tobacco Company did not claim any title to the trade-mark, but was manufacturing cigarettes under it for your account, our counsel asserted our ownership of the trade-mark for tobacco products and demanded that the Tobacco Company cease making these cigarettes. We now have Mr. Parker's letter dated June 25th, 1919, stating that the Tobacco Company has "easily and definitely concluded" not to manufacture any tobacco products under the name "Beech-Nut". We do not enclose copy of this letter, as we take it for granted that the Tobacco Company has made you fully cognizant.

We very much hope that further consideration will bring you to a like conclusion, as we must and do insist that you respect our rights and cease using "Beech-Nut" as a trade-mark for cigarettes. You have never heretofore used this trade-mark for tobacco products. Indeed, you have never heretofore manufactured or sold any tobacco products, but always goods of an entirely different class. "BEECH-NUT' has been used by ourselves and our predecessors in title for many, many years as a trade-mark for tobacco products, and under numerous decisions this gives us ownership of the trade-mark "BEECH-NUT' for cigarettes.

We are mailing a duplicate original of this letter to your New York Office.

Very truly yours,

P. LORILLARD COMPANY,

President.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

July 7, 1919.

P. LORILLARD COMPANY,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Dear Sirs:

At the request of Mr. B. Arkell, you are advised in Pittsburg, Pa., there is a firm trading under the name of Beech-Nut Stogie Co. It is our understanding that this firm markets Beech-Nut Big Havana Stogies.

On 5/25/18 our Pittsburg salesman sent us an order for shipment of Beech-Nut Gum to H. Myers, 305 Wood St., Pittsburg, Pa. This party re-ordered under the name of Beech-Nut Stogie Co.

Yours very truly,

BEECH-NUT PACKING CO.
W. C. Arkell.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

July 7, 1919.

P. LORILLARD COMPANY,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Dear Sirs:

Wm. A. Stickney Cigar Co., 105 West 2nd South, Salt Lake City, Utah, has written us requesting us to make shipment to Fred Vogel, Ogden, Utah, of 5 gross Beech-Nut Scraps.

We are writing them that this product is made by your concern.

Yours very truly,

BEECH-NUT PACKING CO.
W. C. Arkell.

July 9, 1919.

"BEECH-NUT."

MR. W. C. ARKELL,
c/o BEECH-NUT PACKING COMPANY,
Canajoharie, N. Y.

Dear Sir:

I have your two letters of the 7th inst.—one calling to our attention the manufacture of "BEECH-NUT" Big Havana Stogies by the Beech-Nut Stogie Company of Pittsburg, Pa., and the other calling our attention to an order received by you from Wm. A. Stickney Cigar Co., for 5 gross of "BEECH-NUT" Scrap, and enclosing copy of your reply to the Cigar Company.

We thank you very much for this information and the same shall have our prompt attention.

Very truly yours,

P. LORILLARD COMPANY,

(Sgd.) THOS. J. MALONEY,
President.

TJM/ELM

July 15, 1919.

MR. BARTLETT ARKELL, President,
BEECH-NUT PACKING CO.,
New York City.

Dear Mr. Arkell:

Pursuant to our interview, I am sending you by registered mail, under separate cover, a sample of the old package for BEECH-NUT cigarettes, also one showing color scheme for the new package.

The new package will carry the same printing and gilt as the old package, except that the printing on the reverse side of the new package will be: "Cigarettes of this quality have never before been offered to the public. Guaranteed by P. Lorillard Company (Established 1760)." in lieu of that now appearing on the old package.

The color scheme we have adopted for the new package is not only strikingly different from the old package, but it is a distinctly new color, in so far as we know. Our lithographer tells us it is a recently "created" color.

In making this change we are destroying wrapping and advertising material that cost us $10,231.36. I mention this, as I feel sure you will not permit us to suffer such a loss in accommodating ourselves to your wishes.

Yours very truly,

President.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

Room 1818, 120 Broadway, New York City.

July 17, 1919.

Mr. THOMAS J. MALONEY, President,
P. LORILLARD COMPANY,
119 West 40th Street,
New York City.

Dear Mr. Maloney:

I am in receipt of your courteous favor of the 15th inst. together with sample packages, which I will submit to my associates, and also to our counsel. As soon as I hear from them, I will take the matter up further with you.

I do not understand the last paragraph of your letter. Do you mean that we should pay for all, or part of, the loss which you suffer, or what? If so, such a request is not in accord with my recollection of our interview.

Yours sincerely,

BEECH-NUT PACKING CO.

BARTLETT ARKELL,
President.

LAW OFFICES OF OFFIELD & POOLE.

Attorneys and Counselers.
1225 Monadnock Building, Chicago.

JAMES R. OFFIELD. CHARLES H. POOLE.

July 22nd, 1919.

Mr. W. C. ARKELL,
c/o BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

In Re Beech-Nut Stogie Company.

Dear Sir:

In reply to your letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any bearing upon your right to stop the use by them of your mark. Of course, the time to have taken the matter up was upon the first shipment but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Company.

Very truly yours,

(Sgd.) JAMES R. OFFIELD
for O. and P.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

Room 1818, 120 Broadway, New York City.

July 25th, 1919.

Mr. THOMAS J. MALONEY, President,
P. LORILLARD COMPANY,
119 West 40th Street,
New York City.

Dear Mr. Maloney:

I am enclosing letter addressed by our counsel, Mr. Offield, to my son, William Clark Arkell, in reference to the Beech-Nut Stogie Company, thinking that you would be interested in same.

Yours sincerely,

B. ARKELL.

Enclosure
Cy/Canajoharie.

July 28, 1919.

Mr. BARTLETT ARKELL, President,
BEECH-NUT PACKING COMPANY,
Room 1818, 120 Broadway,
New York City, New York.

Dear Mr. Arkell:

I have your letter of the 25th, enclosing letter from your counsel, Mr. Offield, to your son, Mr. William Clark Arkell, in reference to the Beech-Nut Stogie Company.

We are now opposing in Washington an attempted registration by this concern of the name "Beech-Nut" for some tobacco products. This is the beginning of measures which we hope will result in stopping the use of the name by this concern for tobacco products.

I also received your letter of the 17th, with respect to the sample package sent you, and as to which I hope you will find yourself in position to reply at an early date.

You state you do not understand the last paragraph of my letter of the 15th. Should we change from the label we had adopted for "BEECH-NUT" cigarettes, it will result in our being unable to use the labels and advertising and wrapping material which we had procured for this brand of cigarettes, and which cost us the figures stated in my letter. Mr. Perkins mentioned this to you—though not the figures—in our interview when you were here. There was no discussion of the point. It seems to me that we should not stand this loss and that you would not wish us to stand the loss, inasmuch as any change that we might make would be simply to accommodate ourselves to your wishes.

Yours very truly,

President.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

August 7, 1919.

P. LORILLARD COMPANY,
119 West 40th St.,
New York.

Mr. Thomas J. Maloney.

Dear Sirs:

Our President, Mr. Arkell, was here yesterday and your letter of July 28th was presented at a meeting of our Executive Committee.

In discussing the situation, a suggestion was made which possibly has not occurred to you, and therefore we are submitting it to you for your consideration. In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your cigarettes: in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product. Our thought in regard to the above is prompted by the procedure of the Patterson Co. in connection with their Lucky Strike Smoking Tobacco and Lucky Strike Cigarettes.

Should you not care to follow the suggestion offered above, we hope you will abandon the red background and change the same to blue or some other color, and we would like to see the words "Beech-Nut Brand" a straight line instead of a curve, provided you could work out this idea to your satisfaction.

Mr. Arkell has no recollection of hearing mentioned the advertising matter or wrappings you have provided for your Beech-Nut cigarettes, and while Mr. Lipe recollects some mention made of it, no reference, as far as he can recall, was made in regard to the quantity and neither of these gentlemen gained the inference that you would expect the Beech-Nut Packing Co. to absorb the cost of these supplies.

Yours very truly,
BEECH-NUT PACKING CO.
F. E. BARBOUR.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.
Room 1818, 120 Broadway, New York City.

August 9, 1919.

Mr. THOMAS J. MALONEY, Pres.
P. LORILLARD CO.,
119 West 40th Street,
New York City.

My dear Mr. Maloney:

I am enclosing copy of letter written by my son relative to the Beech-Nut Stogie Company, at Pittsburgh.

Yours sincerely,
B. ARKELL.

Enclosure.

August 8, 1919.

MR. JAMES R. OFFIELD,
1225 Monadnock Building,
Chicago, Ill.

Dear Sir:

We are in receipt of a communication from Mr. V. P. Burby our Pittsburgh representative under date of August 5 as follows:

> "The Beech-Nut Stogie Co. is not incorporated. Mr. H. Meyers trades under the name. Mr. Meyers mentioned the other day that A. Schulte, who operate a string of Cigar Stores in New York, recently offered $5000.00 per year for the use of the name. This may be bunk but I thought it might be of interest."
>
> Mr. Meyers claims he has secured a copyright on the word Beech-Nut for stogies."

We have answer as per attached copy. We are also sending copy of this letter to Mr. B. Arkell with the thought that he will call it to the attention of the Lorillard people.

Yours very truly,

BEECH-NUT PACKING COMPANY.

August 27, 1919.

MR. F. E. BARBOUR, Secretary,
Beech-Nut Packing Company,
Canajoharie, New York.

Dear Sir:

Your letter of the 7th has been received and its contents noted, and we appreciate very much your suggestion of our use for the cigarette package of the design now upon our scrap package. This thought occurred to us when we were originating the package for the cigarette and was tried out, with the result that in our opinion the design was not adaptable to a package the size of a cigarette package.

The matter of the oval upon the package was mentioned by Mr. Arkell, but he did not press the point against our objection, the only things remaining for discussion between us being the color of the background of the package and the wording as respects "BEECH-NUT" quality. In the light of this interview the sample which we sent you made changes in both these respects, and we still very much hope that it will prove acceptable.

Indeed, your averseness to assuming the loss which a change in wrapping material would occasion us indicates that the matter is of such small importance to you as not to justify further consideration, for you could not expect us to bear the loss of changes made just to accommodate ourselves to your wishes.

As we are anxious to get along with this matter, will you not let us have your prompt and full answer.

Very truly yours,

President.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

8/28/19.

P. LORILLARD Co.,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Gentlemen:

Your letter of the 27th is received and the same will have prompt consideration.

Yours very truly,

BEECH-NUT PACKING Co.,

F. E. Barbour.

September 17, 1919.

MR. BARTLETT ARKELL, President.
Beech-Nut Packing Company,
Room 1818, 120 Broadway,
New York City, New York.

Dear Mr. Arkell:

Although from my interview and correspondence which ante-dated your application for the registration of "BEECH NUT" for cigarettes, makes me feel sure that you did not intend to press this application, the appearance of a notice of it in the "Official Gazette" of September 9th compels us to file a formal opposition in order that the registration may not become complete through our default.

I am writing you in advance of the filing of this opposition, so that you will understand the circumstances.

I hope that you may be able to let me hear at an early date something further as to the proposed package for "BEECH NUT" Cigarettes.

Very truly yours,

(Sgd.) T. J. MALONEY,

President.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

Room 1818 120 Broadway, New York City.

September 19th, 1919.

Mr. Thomas J. Maloney, President,
P. Lorillard Company,
119 West 40th Street,
New York City.

Dear Sir:—

I take the liberty of acknowledging receipt of your courteous favor of the 17th inst. which has arrived during Mr. Arkell's absence from the city.

It is expected that Mr. Arkell will return to the city the forepart of the coming week, at which time your letter will be placed before him for his attention.

Yours very truly,

M. E. Carroll,
Secretary to Mr. Arkell.

BEECH-NUT PACKING COMPANY
Canajoharie, N. Y.

Room 1818 120 Broadway, New York City.

September Twenty-second, 1919.

MR. THOMAS J. MALONEY, President,
P. Lorillard Company,
119 West 40th Street,
New York City.

My dear Mr. Maloney:

I appreciate, and understand thoroughly, your courteous favor of the 17th inst.

I take it for granted that the application for registration of Beech-Nut Cigarettes was a procedure advised by our Legal Department. I understand that Mr. Offield, who has offices in Chicago, and who has these matters in charge, has been in California and for that reason there has been this unusual delay. Or it may be that we felt that our suggestions as to your package should have been regarded in a more favorable light by you.

Yours sincerely,

BARTLETT ARKELL.

BEECH-NUT PACKING COMPANY

Oct. 8, 1919.

Mr. THOMAS J. MALONEY,
Pres. P. Lorillard Co.,
119 West 40th St.,
New York City, N. Y.

Dear Mr. Maloney:

We have just had a communication from our attorney regarding our application for the registration of our trade-mark "Beech-Nut" for cigarettes. It is his opinion that this application should stand in the Patent Office in order to preserve the rights of the Beech-Nut Packing Company and that no doubt your attorneys will advise the filing of a formal opposition against this registration to preserve any rights that you may have, and that it would be unwise for us to abandon this application for registration without contest unless we reach some definite agreement.

Up to the present time we have come to no final understanding and as the matter stands to date you have agreed to make certain changes in your label and submit your proposed changes to us, but have asked us to assume the loss which your company will incur by reason of making such change.

We do not feel disposed to reimburse your company for losses sustained by reason of adopting trade-mark and common law property which rightfully belongs to this company although such adoption may have been a mistake on the part of those in your employ who prepare such illustrative matter.

Briefly stated, our position is this—That regardless of the trade-name or mark "Beech-Nut" your company

adopted our oval trade-mark and our general color scheme and other embellishments for your cigarette package, and this your company had no right to do regardless of any rights that you may have had in so far as the name "Beech-Nut" is concerned.

From a pure equitable standpoint we therefore believe that you should make the necessary changes so that there will be no similarity as to designs or marking upon the package other than the name "Beech-Nut."

The mistake, we believe, is due entirely to your organization and therefore this company should in no wise contribute to its correction. On the other hand, we are advised that for a sum less than the amount which you have suggested we contribute to reimburse you for the necessary changes, our legal rights could be determined and regardless of what the court might hold as to our respective rights in the trade-name "Beech-Nut" we are assured that a court would sustain our contentions as to the subject-matter which we now ask you to abandon.

Of course we know that lawyers cannot always foretell the outcome of any litigation on any given set of facts, and contests of this kind are undesirable to both parties.

The matter has been given very thorough consideration by us and we feel that your package should be changed and that such changes should be made at your expense. Our other differences, such as the opposition proceeding, can be very readily adjusted after we have definitely agreed upon the main issue, and we should be pleased to hear from ~~you~~ further.

Very truly yours,

BEECH-NUT PACKING CO.,

F. E. Barbour.

October 15, 1919.

Mr. F. E. Barbour, Secretary,
Beech-Nut Packing Company,
Canajoharie, New York.

Dear Sir:

Replying to your letter of the 8th inst., this Company has not adopted any trade-mark or common-law property or design or color scheme or other embellishments belonging to your Company, nor have we agreed to make changes in our labels.

When knowledge of your attempted marketing of a "BEECH NUT" Cigarette reached us, we at once wrote asserting our ownership of the trade-mark "BEECH-NUT" for all tobacco products and asked your Company to respect this ownership. There followed an interview with Mr. Arkell and Mr. Lipe. In this interview it developed that the only real matters in difference as respects our use of the trade-mark "BEECH NUT" for cigarettes were the color of the background and the wording of the catch-phrase on our proposed package of "BEECH NUT" cigarettes, and we promised to submit a sample package with a different background and a different catch-phrase, in an endeavor to see if these differences could not be amicably adjusted, stating to you at the time, however, that if we did come to an agreement in this respect it would involve the loss of material we had already bought and that this loss should be borne by your Company. We subsequently submitted the sample as promised.

What we did and said in this connection was without any waiver of our rights and without recognition of any

right in your Company to require any such change; but solely as explained in the interview and as we have tried to make plain in our correspondence, in a friendly endeavor to get together in this matter. Our ownership of the brand "BEECH NUT" for all tobacco products is clear and we are exercising our ownership of this brand, including the proposed package for "BEECH NUT" Cigarettes, in an entirely legal manner.

If we have failed in this endeavor, as your letter seems to indicate and which we sincerely regret, will you kindly return the sample package which we sent you.

Very truly yours,

President.

DEFENDANT'S EXHIBIT NO. 30—NEWTON'S LIST OF TRADE-MARK REGISTRATIONS.

THE FOLLOWING REGISTRATIONS APPEAR IN VOLUME I.

(in the order listed)

CLIMAX

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Lorillard Co.	Oct. 22, 1907	1873	65,759	Chewing & Smoking tobacco	17 ~~21~~
max Coffee & Baking Powder Co.	Feb. 11, 1908	1884	67,563	Coffee	46
rth Alaska Salmon Co.	July 14, 1908	1900	69,849	Canned Salmon	46
max Aramic Co.	July 21, 1908	1907	70,007	Gold paint	16
dor Levin	Sep. 22, 1908	1883	70,692	Canned fruits & Veg.	46
sign-Bickford Co.	July 6, 1909	1889	74,342	Gun-powder	9
C. Blair Co.	July 27, 1909	1878	74,625	Paper Envelopes, etc.	37
nders, Frary & Clark	Sep. 30, 1902	1902	38,971	Food choppers	—
mford Mfg. Co.	June 23, 1903	1902	40,641	Flavoring Extract	Drugs & Chem.
itney & Co.	July 12, 1904	1890	43,004	Folding paper Boxes	Paper Mfgrs.
tt & Woodrow	Sep. 13, 1904	1897	43,364	Baled hay	Feed
la. Watch Case Co.	Feb. 7, 1905	1904	44,150	Watches	Time-keeping instruments
tional Tag Co.	July 4, 1905	1893	44,454	Tags and Labels	Marking Devices
rtland Welding Compound Co.	Aug. 22, 1905	1891	45,443	Welding Compounds	Chemicals
nstock Mfg. Co.	Sep. 5, 1905	1895	46,019	Steam Engines	Machines
W. Conklin Son	Sep. 5, 1905	1899	46,093	Grass seed	Seeds
bert & Bennett Mfg. Co.	Sep. 26, 1905	1894	46,529	Wire netting	Woven Wire Goods
w Eng. Conf. Co.	Oct. 3, 1905	1886	46,683	Chocolate drops	Confectionery
y State Forge	Oct. 17, 1905	1898	46,971	Toe Calks for horse-shoes	Metals
de & Dangh Paper Co.	Dec. 26, 1905	1896	48,402	Cartons	Wrappers
plin, Rice Clerkin Co.	Dec. 7, 1909	1866	76,048	Heating App.	34
ver-Harris Wire Co.	Mar. 8, 1910	1899	77,050	Metallic wire	14
ie W. Jones Brewing Co.	May 10, 1910	1905	77,851	Ale	48
rke-Fuller Co.	June 7, 1910	1898	78,306	Rivets	13
shington Standard Slate Co.	Feb. 21, 1911	1910	81,042	Roofing slate	12
dwin Refrigerator Co.	Apr. 25, 1911	1896	81,574	Refrigerators	31
n Products Refining Co.	Apr. 25, 1911	1903	81,593	Corn syrup	46
erican Mfg. Co.	July 25, 1911	1904	82,745	Jute Bagging	42
S. Cartridge Co.	Sep. 12, 1911	1911	83,450	Cartridges	9
& A. Wise	Sep. 12, 1911	1909	83,461	Hosiery	39
e Water Oil Co.	Oct. 10, 1911	1889	83,791	Lubricating Oils	15
tville Co.	Feb. 6, 1912	1894	85,280	Safety pins	40
rsaw-Wilkinson Co.	Oct. 8, 1912	1902	88,649	Ensilage-cutters	23
egren & Co.	May 6, 1913	1911	91,446	Cottonseed oil	46
st Salve Co.	Oct. 7, 1913	1912	93,632	Salves	6
ndard Paper Mfg. Co.	Dec. 23, 1913	1887	94,685	Blotting Paper	37
s. A. Mezger	July 7, 1914	1912	98,174	Spark-plugs	21
n. Peterman, Inc.	July 7, 1914	1914	98,316	Insecticides	6
nes Thompson & Co.	July 14, 1914	1900	98,439	Canopies for beds	32
ldes & Co.	Dec. 29, 1914	1904	101,604	Snap-Buttons	40
bbard Fertilizer Co.	Feb. 16, 1915	1886	102,606	Fertilizer	10
yers & Sheiner	Apr. 13, 1915	1908	103,788	Hair-tonic	6
Kohnstamm & Co.	Apr. 13, 1915	1914	103,818	Flavoring extracts	46
il Billups	Apr. 13, 1915	1873	103,840	Plows	23

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Wm. Focke's Sons	Apr. 27, 1915	1910	104,052	Ham and Bacon	46
Albany Perforated Wrapping Paper Co.	Dec. 28, 1915	1893	107,729	Toilet paper	37
Wadhams Oil Co.	June 6, 1916	1894	110,707	Gasoline	15
Fisher Bruce Co.	Aug. 1, 1916	1916	111,721	Fruit jars	33
Climax Underwear Co.	Aug. 8, 1916	1910	111,792	Union suits	39
Higrade Belting & Weaving Co.	Aug. 7, 1917	1917	117,863	Rubber belting	35
Elijah & Ballard	Sep. 25, 1917	1916	118,618	Furniture polish	16
Lantz Bros. Co.	Apr. 30, 1918	1874	121,458	Soap	4
American Mfg. Co.	Mar. 18, 1919	1917	124,811	Rope	7
Maude Sinclair George	July 13, 1920	1912	133,131	Sanitary Hospital Goods	44
Manufacturers Belt Hook Co.	Oct. 26, 1920	1914	136,088	Belt Fasteners	13
Giles T. Young	Oct. 26, 1920	1908	136,279	Hair Straightener paste	6
Climax Lumber Co., Ltd.	Nov. 9, 1920	1919	136,779	Rough Lumber	12
Climax Rubber Co.	July 11, 1922	1917	156,647	Automobile tires	35
International Sugar Feed Co.	Mar. 8, 1921	1913	140,150	Poultry feed	46
Samuel Williamson	Aug. 16, 1921	1920	145,871	Phonographs	36
Jewett Mfg. Corp.	Oct. 10, 1922	1921	159,916	Radio Receivers	21
Marshall Field Co.	Jan. 2, 1923	1917	163,123	Cotton batting	1
Climax Engineering Co.	Feb. 6, 1923	1917	163,912	Internal Combustion Engines	23
Miller Lock Co.	Sep. 18, 1906	1900	56,373	Locks & Keys	25
Climax Road Machine Co.	Oct. 30, 1906	1888	56,955	Road Grading Machinery	26
Sibley & Pitman	Oct. 30, 1906	——	57,068	Dry Batteries	—
National Malleable Castings Co.	Nov. 27, 1906	1904	57,754	Journal Boxes for Railway cars	27
Missouri Valley Milling Co.	Dec. 4, 1906	1906	58,151	Wheat Flour	44
H. Kohnstamm & Co.	Dec. 11, 1906	1896	58,406	Laundry starch	6
Sibley & Pitman	Dec. 18, 1906	1905	58,453	Oil Lamps	34
New Home Sewing Machine Co.	Jan. 22, 1907	1893	59,942	Sewing machines	28
Climax Coffee & Baking Powder Co.	Aug. 13, 1907	1872	64,628	Baking powder	6
American Wringer Co.	Nov. 12, 1907	1875	66,124	Clothes wringers	24
Frank O. Mattag	May 29, 1906	1890	53,254	Typewriter ribbons	Typewriter supplies
Anderson Computing Scale Co.	June 5, 1906	1904	53,536	Counter Scales	Measuring instrument
do	June 5, 1906	1906	53,537	Computing Cheese cutter	do
Acme Cement Plaster Co.	June 12, 1906	1889	53,675	Wall plaster	Plaster
Climax Road Machine Co.	June 19, 1906	1889	53,973	Rock crushers	Machinery
Climax Boiler Compound Co.	Mar. 5, 1901	1900	36,012	Boiler Scale preventive	Protective Compound
Atlantic Match Co.	Aug. 20, 1901	1901	36,947	Matches	Matches
Climax Cleaner Mfg. Co.	Mar. 6, 1906	1895	50,092	Wall Paper Cleaner	Cleaning App.
National Malleable Co.	Apr. 3, 1906	1903	50,952	Car-couplings	Car-couplers
Wolff Process Leather Co.	Apr. 17, 1906	1905	51,489	Enameled leather	Leather

Between the Acts.

P. Lorillard Co.	July 27, 1920	1877	133,489	Cigars, little Cigars and Cigarettes	17
Morris V. Dunn	Feb. 24, 1920	1919	129,450	Cosmetics	6

Red Cross.

Justin, Seubert, Inc.	Jan. 4, 1910	1874	76,340	Cigars	17
J. & J. W. Elsworth Co.	Sep. 22, 1908	1865	70,691	Oysters	46
Mohawk Condensed Milk Co.	Nov. 24, 1908	1892	71,394	Condensed Milk	46
Cuddy Cheese Co.	June 22, 1909	1896	74,124	Cream cheese	46
Rouse, Hempstone Co.	Aug. 23, 1910	1903	79,302	Certain named clothing	39
Albany Perforated Wrapping Paper Co.	June 13, 1911	1897	82,193	Toilet Paper	37
Co-operative Drug Mfg. Co.	Sep. 15, 1914	1901	99,701	Furniture polish	16

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Co-operative Drug Mfg. Co.	Sep. 15, 1914	1901	99,702	Machine oil	15
Albany Chemical Co.	Nov. 24, 1914	1888	101,258	Liniment	6
Krohn-Fechheimer Co.	Feb. 25, 1919	1898	124,550	Ladies' shoes	39
Roundy Peckham & Dexter Co.	Sep. 20, 1921	1884	146,855	Tea and Coffee	46
St. Paul Roller Mill Co.	Jan. 27, 1885	1880	11,889	Flour	Flour
F. Korbel & Bros.	Aug. 8, 1899	1898	33,324	Wines	Wines & Liquors
M. Michaeles & Son	Feb. 8, 1887	1886	14,068	Flavoring Extracts	Flavoring Ext.
Ricker, Crombie & McLeran	June 2, 1885	1884	12,294	Baking powder	Groceries
Va. Carolina Chem. Co.	Aug. 28, 1906	1898	56,198	Fertilizers	10
John E. Ahrens	June 10, 1902	1892	38,426	Whiskey	Distilled Liquors
Nebraska Mercantile Co.	Feb. 4, 1908	1895	67,532	Cereal foods	44
William D. Rea	Oct. 1, 1901	1890	37,139	Pile cure	Medical Preparations
Arlington M. Betts	Mar. 21, 1893	1892	22,674	Rubber goods	Rubber goods
Nitedals Taendstik-fabrik	Dec. 1, 1908	1883	71,600	Safety Matches	9
Schoen & Sommer	Apr. 9, 1895	1895	26,372	Salt	Salt
Co-operative Foundry Co.	May 21, 1907	1882	67,721	Stoves	21
Ricker, Crombie & McLeran	Mar. 31, 1885	1884	12,070	Spices	Groceries
Sommer, Richardson Co.	July 20, 1886	1886	13,511	Crackers	Crackers
L. M. Sinclair Co.	Nov. 19, 1889	1886	17,203	Cooked tripe and tongue	Pickled meats
Norwood Mfg. Co.	Mar. 25, 1890	1889	17,711	Bundles of kindling wood	Kindling wood
Krieg & Co.	June 16, 1891	1891	19,737	Button fasteners	Fastening device
H. N. Palmer	June 30, 1891	1889	19,798	Bath robes	Wearing apparel
American Biscuit & Mfg. Co.	Sep. 29, 1896	1886	28,922	Peanuts	Peanuts
Eureka Fire Hose Co.	Feb. 23, 1897	1875	29,579	Hydraulic hose	Hydraulic H.
Canepa Bros.	Aug. 1, 1899	1872	33,290	Macaroni	Food
Atlas Shear Co.	Mar. 19, 1901	1900	36,109	Shears and scissors	Cutlery
R. G. Marcy Mfg.	Feb. 11, 1902	1900	37,800	Windmills and pumps	Windmills and adjuncts
J. B. & S. M. Knowles Co.	Apr. 15, 1902	1901	38,096	Spoons	Silverware
Hamilton Disinfectant Chem. Works	Nov. 18, 1902	1880	39,325	Disinfecting powders	Disinfecting agents
Chas. E. Whitehurst	May 12, 1903	1903	40,305	Insect powders	Insecticides
Am. Net & Twine Company	June 30, 1903	1903	40,661	Fish Nettings	Rope, Cord-Twine
Andrea Agosto	Aug. 16, 1904	1904	43,163	Olive oil	Oils
Wm. T. Shute	Dec. 5, 1905	1885	48,080	Dried and Canned fish	Food products
The Russ Co.	Mar. 6, 1906	1893	50,103	Laundry bluing	Bluing
Stephen J. Seneca	Mar. 6, 1906	1876	50,291	Canned vegetables and fruits	Canned goods
Chas. Toonen	Mar. 20, 1906	1899	50,470	Tooth brushes	Brooms & Brushes
Southern Spring Bed Co.	June 5, 1906	1904	53,573	Mattresses	Furniture
Am. Washboard Co.	Nov. 13, 1906	1885	57,526	Washboards	24
Nat. Biscuit Co.	Mar. 26, 1907	1886	61,568	Candy	47
Home Hosiery Co.	Aug. 20, 1907	1903	64,787	Hosiery	41
Marion Flint Glass Bottle	Feb. 4, 1908	1894	67,500	Glass bottles	33
HONEST.					
W. Duke Sons Co.	Oct. 30, 1888	1882	15,970	Smoking & Chewing tobacco	Tobacco
H. A. Tiedel Son	Dec. 13, 1921	1920	149,432	Graham & Whole Wheat flour, dairy, horse, hog, cattle and hen feeds	No. 46, foods and ingredients of foods
Am. Writing Paper Co.	Jan. 9, 1912	1891	84,803	Writing paper	37
F. L. Falck & Co.	Aug. 18, 1914	1897	99,090	Laundry, Toilet & shaving soap	4
New Jersey Enamel Paint Co.	June 27, 1899	1898	33,162	Paints	Paints
J. E. Lentz	July 30, 1889	1889	16,885	Shoes and boots	Leather articles

EUREKA.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
S. Alvarez & Co.	May 26, 1891	1885	19,591	Cigars	Manufactured tobacco
Albert Landreth Co.	Nov. 1, 1898	1895	32,106	Canned peas	Canned goods
Eureka Elect. Co.	Mar. 12, 1901	1898	38,074	Telephone App.	Telephone App.
Eureka Mfg. Co.	May 7, 1901	1901	36,388	Stove polish	Cleaning app.
Elias Bros. & Co.	Dec. 10, 1901	1875	37,434	Shirts	Wearing apparel
Eureka Blotter Bath Co.	June 3, 1902	1896	38,401	Copying Baths	Copying App.
Otto Wilcke	Nov. 11, 1902	1901	39,242	Metallic Brazing compound	Steel Mfg.
Zebulon Lincoln Chadbourne	June 16, 1903	1903	49,578	Hammocks	Hammocks
DeRoubaix Dedenkoven & Co.	Sep. 15, 1903	1894	41,113	Candles	Lamps, etc.
Levering Coffee Co.	Dec. 29, 1903	1902	41,767	Coffee	Coffee
E. Clinton & Co.	Sep. 27, 1904	1871	43,426	Sweeping brushes	Brooms, etc.
Whitney Eckstein Seed Co.	Dec. 20, 1904	1901	43,856	Clover seed	Seeds
Jones Improved Loose-leaf Specialty Co.	Dec. 27, 1904	1903	43,937	Book leaves	Book leaves
Besser Mfg. Co.	Sep. 5, 1905	1905	46,060	Tile molding machines	Machinery
Eureka Fire Hose Co.	Oct. 3, 1905	1875	46,677	Hydraulic hose	Hose
John Rutgert Planten	Oct. 24, 1905	1878	47,051	Gelatin capsules	Capsules
Park Steel Co.	Nov. 14, 1905	1900	47,636	Steel	Metals
E. Clinton & Co.	Dec. 12, 1905	1871	48,120	Varnish & paint brushes	Brushes
Phila. Rubber Works	Feb. 6, 1906	1890	48,481	Devulcanized rubber	India rubber
Amer. Hard Rubber Co.	Apr. 24, 1906	1895	51,860	Syringes	Rubber goods
James E. Reynolds	May 8, 1906	1878	52,373	Carpet warps	Carpets, etc.
J. G. Brill Co.	Aug. 14, 1906	1891	55,566	Motor trucks	27
Elmer E. Jennison	Aug. 21, 1906	1894	55,756	Non-explosive lamp powder	6
Harry H. Charles	Aug. 21, 1906	1893	55,971	Portable tanks	26
Va. Carolina Chemical Co.	Oct. 30, 1906	1865	57,083	Fertilizers	10
W. J. Barr Mfg. Co.	Nov. 6, 1906	1905	57,156	Electric heaters	21
Auto Equipment Co.	Nov. 13, 1906	1905	57,556	Valve grinding compounds	4
Albert Van Praag	Dec. 11, 1906	1898	58,208	Peanut butter	50
Woolner & Co.	Dec. 18, 1906	1903	58,511	Gin	49
James E. Reynolds	Dec. 18, 1906	1901	58,598	Sheetings	42
Wm. M. Shoemaker	Dec. 25, 1906	1906	58,714	Gape cure for fowls	67
Eureka Packing Co.	Dec. 26, 1906	1888	58,947	Packing for steam engines	35
VanWeet Mansfield Drug Co.	Mar. 5, 1907	1860	61,207	Itch ointment	67
James E. Reynolds	Apr. 9, 1907	1885	61,848	Cotton twine	7
Freidberg & Workmin	June 4, 1907	1870	63,032	Whiskey	49
Manhattan Brass Co.	June 25, 1907	1881	63,532	Oil lamp burners	34
Chas. H. Besly	July 30, 1907	1897	64,301	Letter files	70
Columbia Rope Co.	Sep. 10, 1907	1895	65,092	Certain cordage	7
Geo. E. Whittaker	Nov. 5, 1907	1898	65,968	Cough medicine	67
Eureka Machine Co.	Nov. 19, 1907	1906	66,326	Concrete Mixing machine	26
S. W. Miller Piano Co.	Dec. 17, 1907	1907	66,673	Pianos	65
Pacific Coast Rubber Co.	Dec. 31, 1907	1905	66,866	Certain Rubber goods	38
Dreyfus Bros.	Jan. 7, 1908	1903	66,920	Peanut candy	47
General Phonograph Supply Co.	Mar. 3, 1908	1907	68,047	Talking machines	65
John A. Throckmorton	Mar. 10, 1908	1907	68,177	Seat pads	39
M. D. Wells Co.	Apr. 21, 1908	1890	68,691	Shoes	39
E. W. Murphey & Co.	June 23, 1908	1902	69,634	Press Board	37
New England Confectionery Co.	Aug. 18, 1908	1894	70,262	Chocolate candies	46
Salt Union, Ltd.	Dec. 8, 1908	1877	71,614	Salt	6
Kutnow Bros.	Feb. 9, 1909	1908	72,687	Electric Clocks	27
Hendricks Novelty Co.	May 4, 1909	1908	73,641	Dynamos & Magnetos	21
Dodge Mfg. Co.	June 1, 1909	1904	73,936	Machine to purify water	23
John Morrel & Co., Ltd.	June 8, 1909	1899	73,996	Hams and Bacon	46
Edinger & Co., Ltd.	Aug. 3, 1909	1884	74,723	Wheat flour	46
Julius Schmidt	Aug. 24, 1909	1908	74,974	Gut Strings	36
America Pin Co.	Jan. 25, 1910	1895	76,500	Hooks & Eyes	40

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Robinson Bros.	Feb. 15, 1910	1895	76,746	Adhesive cement	5
Hingston & Breadlinger	Feb. 15, 1910	1909	76,812	Fly-paper	6
Eureka Suction Co.	Feb. 22, 1910	1905	76,909	Dental Suction Cups	44
Amer. Pin Co.	Aug. 16, 1910	1910	79,179	Safety pins	40
Fred. Wardell	Oct. 18, 1910	1910	79,946	Vacuum cleaner	23
John G. Higgins	Feb. 21, 1911	1906	81,003	Toilet combs	40
John F. Zelke	Mar. 7, 1911	1890	81,152	Oleomargarin	46
Variable Power Gas Engine Co.	Apr. 18, 1911	1910	81,561	Carburetors	23
Eureka Vibrator Co.	May 30, 1911	1906	82,063	Vibratory Apparatus	44
Pittsburg Meter Co.	Oct. 10, 1911	1906	83,768	Fluid meter	26
Eureka Water Heater Co.	Nov. 21, 1911	1908	84,222	Gas-valves	13
Seacoast Canning Co.	Sep. 24, 1912	1899	88,523	Sardines	46
McWhiter Chemical Co.	Sep. 24, 1912	1912	88,542	Bleaching powder	6
John Z. Jones	Dec. 31, 1912	1909	89,666	Anticorrosive paint	16
Eureka Safety Razor Co.	Feb. 4, 1913	1912	90,105	Razor Blades	23
Salt Lick Lumber Co.	Apr. 8, 1913	1909	91,036	Wood flooring	12
Ashland Mfg. Co.	June 3, 1913	1911	91,835	Automobile Jacks	23
Willis Bros.	July 22, 1913	1912	92,753	Hog-cholera cure	6
Wm. D. Foss	Oct. 14, 1913	1913	93,709	Chemical wood-preserver	6
E. Nuhauser	Aug. 30, 1881	1881	8,614	Watchman's time detector	Timekeepers
Howes, Babcock & Ewell	Oct. 18, 1881	1866	8,731	Grain separator	Grain cleaning machine
Woelfel & Linke	Jan. 2, 1883	1883	9,927	Harness leather	Leather
G. A. Jones	July 7, 1885	1868	12,384	Coffee pots	Kitchen articles
N. J. Bushby	Oct. 19, 1886	1886	13,733	Call bells	Call bells
W. E. Smith	Feb. 4, 1890	1886	17,499	Cheese	Dairy products
W. H. Rhodes	July 8, 1890	1876	18,136	Post hole diggers	Tools
John R. Planten	Nov. 22, 1892	1878	22,046	Capsules	Capsules
Samuel Pierce	Jan. 3, 1893	1892	22,281	Vegetable compounds	Preserving Compounds
Volk & Volk	Jan. 3, 1892	1890	22,291	Remedy for Catarrh	Medicines
American Wringer Co.	Apr. 6, 1897	1863	29,805	Clothes wringers	Laundry articles
Lofaro & Rossi	Apr. 21, 1914	1912	96,434	Olive Oil	46
Am. Chain Co.	June 16, 1914	1894	97,746	Chains	13
Kincaid Bros.	June 30, 1914	1899	98,060	Siphons	23
Herrmann, Aukam & Co.	Sept. 8, 1914	1913	99,583	Handkerchiefs	42
Hockensmith Wheel & Mine Car Co.	Oct. 20, 1914	1901	100,332	Carwheels	19
Northwestern Expanded Metal Co.	June 8, 1915	1913	104,642	Expanded metal lathing	12
Mishawaka Woolen Mfg. Co.	June 13, 1916	1890	110,864	Hosiery	39
Theo. J. Snyder	Feb. 20, 1917	1916	115,545	Bottle stoppers	50
Ely & Walker Dry Goods Co.	Aug. 3, 1920	1908	133,642	Oil cloth	20
Eureka Products	Sep. 28, 1920	1918	135,236	Soft drinks	45
Massasoit Mfg. Co.	Nov. 30, 1920	1909	137,652	Mops	29
Florasynth Laboratories	May 31, 1921	1917	143,336	Printing cup	11
S. V. Peiser & Co.	June 7, 1921	1920	143,710	Grape Syrup	46
Clifton Mfg. Co.	Jan. 3, 1922	1910	150,296	Tents	50
Wilkes & Seaman Co.	Feb. 7, 1922	1921	151,642	Baking powder	6
Chg. Eye Shield Co.	Mar. 7, 1922	1916	152,714	Eye shields	44
Josephine Hostitch	Nov. 7, 1922	1899	161,195	Skin lotion	6
Rufus W. Buser	Feb. 18, 1902	1899	37,804	Toys	Games
Abe Stiewel	Aug. 7, 1894	1880	25,111	Anthracite coal	Fuel
Lewis Mfg. Co.	May 1, 1888	1888	15,406	Boiler compound	Chemical Compound
William Houston Shockey	Jan. 31, 1893	1892	22,414	Coffins	Receptacles
Charles Dierke	Sep. 7, 1920	1915	134,493	Tooth brushes	29
C. M. Brown	Jan. 5, 1892	1890	20,546	Hair tonic	Toilet preparation
J. Bowers	Nov. 27, 1883	1881	10,744	Corsets	Corsets
J. L. Kreychie	Mar. 2, 1886	1885	13,070	Horse medicine	Medicines
P. Muller	Apr. 17, 1883	1883	10,199	Hop substitute	Compounds
Murphy & Mosier	Apr. 23, 1889	1887	16,521	Rubbing stones	Cleaning Preparation
Wadsworth, Howland & Co.	Oct. 20, 1896	1895	29,018	Shellac	Varnish
Meyer Bros. Drug Co.	Dec. 6, 1892	1892	22,126	Whiskey	Whiskey

THE FOLLOWING REGISTRATIONS APPEAR IN VOLUME II (in the order listed).

CAMEL.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
R. J. Reynolds Tobacco Co.	Sep. 30, 1919	1901	126,760	Smoking tobacco and cigarettes	17
Campbell Holton & Co.	Nov. 28, 1916	1907	114,087	Certain named foods including, among others, flavoring extracts for foods, canned clams, canned fruits, canned vegetables (string beans, asparagus, beets, lima beans, peas, corn, and hominy), sliced bacon, peanut butter, pickles, vinegar, salad dressing, spices, sugar and molasses.	46
S. B. McBeath	Nov. 26, 1889	1889	17,225	Pens	Stationery
Epstein, Pollitz & Co.	May 9, 1893	1892	22,981	Linen Dusters	Lap dusters
Union Pacific Tea Co.	June 12, 1894	1890	24,854	Coffee	Tea & Coffee
Wm. H. Priesmeyer	Aug. 10, 1897	1897	30,493	Borax	Laundry articles
Camel Company	Aug. 23, 1904	1903	43,237	Trimmings for freight car doors	Railway supplies
Geo. E. Sovereign	Nov. 24, 1908	1907	71,496	Babbitt metal	14
Campbell Holton & Co.	Feb. 1, 1910	1907	76,618	Certain foods, including olive oil, sardines, flour, mustard and preserves	46
Standard Oil Co. of N. Y.	Feb. 3, 1914	1913	95,171	Refined petroleum	15
Rossendale Reddaway Belting & Hose Co.	June 16, 1914	1893	97,797	Machine belting	35
Ashtabula Corrugated Box Co.	Jan. 3, 1922	1914	150,225	Shipping Containers	2
James A. Campbell	Apr. 6, 1920	1919	130,047	Eye-brow brushes	29
Americus R. Underwood, Jr.	Apr. 3, 1920	1919	133,851	Certain clothing	39

OMAR.

American Tobacco Co.	Aug. 19, 1919	1902	126,239	Cigarettes	17
Rust Parker Co.	Feb. 6, 1917	1915	115,399	Certain foods, including canned tomatoes, sweet potatoes, beets, pumpkins, spinach, stringed beans, corn, peas, fruits and salmon	46
Omaha Flour Mills Co.	Oct. 29, 1918	1918	123,380	Wheat flour	46
The Omar Co.	Nov. 9, 1920	1920	136,884	Root beer	45
Rust Parker Co.	Feb. 8, 1921	1914	139,622	Package-chocolates	46
John Frederick Vaughan	Jan. 18, 1916	1905	108,143	Tea	46
A. W. Faber	Apr. 6, 1915	1914	103,421	Lead, ink, erasers, penholders, etc.	37

OMEGA.

J. T. Fargason Co.	May 7, 1918	1917	121,549	Mustard and spices	46
Pressing & Orr Co.	Jan. 22, 1907	1904	59,896	Canned fruits and vegetables	50
H. C. Cole Milling Co.	Dec. 22, 1908	1883	71,897	Wheat and flour	46

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
J. T. Fargason Co.	Apr. 15, 1913	1912	91,083	Blended coffee	46
Conto & Co.	Oct. 12, 1915	1910	106,145	Salt	6
H. Kohnstamm & Co.	Oct. 27, 1914	1914	100,837	Laundry Starch	6
Louis Brandt & Frere	July 24, 1894	1894	25,036	Watch-movements	Horology
National Tool Company	June 16, 1903	1902	40,623	Certain named forms	Steel
Parker, Stearns & Co.	Mar. 11, 1913	1885	90,653	Syringes	44
Shultz Belting Co.	Mar. 3, 1914	1903	95,676	Leather belting	35
Aktiebolaget, etc., Omega	June 30, 1914	1912	98,031	Milking Machines	23
Wm. Crane Co.	May 23, 1906	1900	53,026	Gas stoves	Gas appliances
Alabama Chem. Co.	Dec. 22, 1908	1903	71,978	Fertilizer	10
John S. Tilley Ladders Co.	Dec. 19, 1916	1906	114,579	Ladders	50
Standard Crayon Mfg. Co.	Sep. 26, 1922	1903	159,540	Crayons	37
John Kiapos	June 17, 1919	1914	125,821	Shoe cleaner	4
Standard Oil Co.	Nov. 9, 1920	1919	136,946	Lubricating oil	15

Rainbow.

Flora W. Pinkus	May 28, 1922	1918	153,823	Cigarettes	17
Merrell S. Copeland	Sep. 6, 1921	1920	146,205	Chewing-gum	46
Package Confectionery Co.	Dec. 12, 1922	1911	162,335	Candy	46
J. Ralson Cargill	July 27, 1920	1919	133,371	Table Syrup	46
Ohio Dairy Co.	June 3, 1919	1918	125,709	Evaporated milk	46
Anderson Mfg. Co.	July 25, 1916	1916	111,547	Gelatin	46
National Milling Co.	Sep. 14, 1909	1908	75,212	Wheat flour	46
Edwin Shivell	Jan. 21, 1908	1907	67,167	Sea foods	54
Pressing & Orr Co.	Jan. 22, 1907	1903	59,897	Canned fruits and vegetables	50
W. H. Jones & Co.	May 22, 1906	1897	53,046	Wine	Wine
Peek, Frean & Co.	June 6, 1899	1899	33,032	Tea, coffee and cocoa	Tea, coffee and cocoa
N. K. Fairbank Co.	Oct. 23, 1900	1888	35,301	Laundry soap	Soap
Gulfport Grocery Co.	Oct. 27, 1914	1914	100,805	Stock-feed	46
Wald & Geller	June 13, 1916	1907	110,794	Hosiery, underwear, etc.	39
Buffalo Cereal Co.	Nov. 9, 1915	1914	106,940	Rolled oats	46
H. J. Hackett & Co.	Apr. 2, 1895	1880	26,338	Liniment	Medical compounds
R. J. Farquhar & Co.	June 30, 1896	1893	28,468	Flowering bulbs	Bulbs
Peerless Rubber Mfg. Co.	July 31, 1900	1899	34,974	Certain rubber goods	Rubber Goods
Horton Mfg. Co.	May 15, 1906	1905	52,756	Fishing-rods	Fishing tackle
Commercial Fertz. Co.	July 5, 1910	1910	78,690	Fertilizer	10
G. A. Lippincott	Jan. 9, 1912	1910	84,839	Buttons	40
Clayton Bros., Inc.	Apr. 22, 1913	1912	91,285	Shears and scissors	23
Louis Rodney Berg	Mar. 24, 1914	1913	95,870	Playing-cards	22
Geo. Borgfeld & Co.	Apr. 20, 1915	1914	103,887	Stationery Supplies	37
Etna Chemical Co.	Aug. 10, 1915	1915	105,652	Furniture polish	16
True's Oil Co.	June 11, 1918	1917	121,974	Liquid fuels	15
Herbert C. Crawford	Apr. 29, 1919	1917	125,270	Skin ointment	6
Waite Grass Carpet Co.	Dec. 23, 1919	1919	128,197	Floor-rugs	42
Crocker Broom & Brush Co.	Jan. 6, 1920	1919	128,346	Brooms	29
Illinois Razor Strop Co.	Apr. 12, 1921	1920	141,144	Razor strops	4
R. F. Johnston Paint Co.	May 10, 1921	1891	142,282	Paints	16
H. P. Rawlings Wall Paper Co.	July 12, 1921	1920	144,625	Wall-paper	37
W. N. Stevenson & Co., Inc.	Aug. 15, 1922	1922	157,773	Umbrellas	41
Rainbow Lawn Sprinkler Co.	Dec. 20, 1921	1919	149,719	Lawn sprinklers	13
John Oliver Johnson	June 13, 1922	1920	155,993	Bird gravel	1
Rainbow Import & Export Corp.	Sep. 26, 1922	1921	159,487	Kitchen utensils	13
Benjamin Franklin Collender	May 28, 1895	1895	26,584	Crayons	Crayons
Frank A. Ransom	June 10, 1884	1883	11,255	Package dyes	Dry dyeing material
Amelia Gladu Roy	Jan. 3, 1922	1921	150,548	Headache capsules	6
Rodeheaver Co.	May 16, 1922	1920	155,066	Phonograph records	36
Kellogg Seed Co.	May 4, 1920	1919	131,150	Field & Grass Seed	1

TUXEDO.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
American Tobacco Co.	May 17, 1921	1896	142,426	Smoking and chewing tobacco	17
F. P. Garrettson & Co.	June 20, 1899	1890	33,088	Coffee	Coffee and Tea
Charles T. Long	Mar. 27, 1894	1893	24,423	Baking-powder	Baking-powder
Semrad Chemical Co.	May 17, 1921	1895	142,757	Vanilla extract	46
Napa Fruit Co.	July 2, 1912	1909	87,240	Dried Fruits	46
R. B. Beaumont	June 9, 1891	1890	19,664	Jellies and confections	Food
Delafield, McGovern & Co.	May 23, 1893	1893	23,088	Canned fish, fruit and vegetables	Canned goods
Clover Leaf Wine Co.	Jan. 30, 1894	1893	24,139	Whiskey, wines, brandy, etc.	Liquors
Early & Daniel Co.	Jan. 18, 1916	1913	108,126	Horse feed	46
James C. Davis & Son	Nov. 20, 1894	1891	25,536	Washing powders	Washing compounds
Crampton Co.	May 24, 1887	1887	14,435	Fabrics	Surfaced fabrics
Rogers & Brother	Dec. 9, 1890	1890	18,693	Knives, forks and spoons	Plated ware
New Haven Sewing Machine Co.	June 20, 1899	1890	33,108	Sewing machines	Sewing Machines
Meyerhoff & Jacobs	Dec. 3, 1901	1901	37,405	Negligee shirts	Shirts
Auguste Silz	Apr. 28, 1903	1903	40,232	Certain poultry	Poultry
F. A. Hardy & Co.	Dec. 27, 1904	1903	43,932	Opera Glasses	Optical goods
New York Belting & Pkg. Co., Ltd.	Mar. 9, 1909	1901	73,027	Hose	35
Turner & Harrison Pen Mfg. Co.	Mar. 16, 1909	1901	73,145	Writing pens	37
Hood Rubber Co.	Oct. 22, 1912	1911	88,752	Rubber shoes	39
Naumkeag Steam Cotton Co.	Nov. 5, 1912	1911	89,052	Sheets and pillow cases	42
S. L. Allen & Co.	May 4, 1915	1914	104,116	Sleds	19
Badger Bag & Paper Co.	May 25, 1915	1914	104,373	Paper Bags	2
Parker Bros.	Sep. 14, 1915	1908	106,014	Games	22
Pioneer Suspender Co.	Aug. 7, 1917	1902	117,917	Suspenders	40
Harry Solomons & Son	July 18, 1922	1920	156,927	Ladies hats	39
Manufacturers Oil & Grease Co.	Dec. 26, 1922	1907	162,969	Oils & greases	15
Pings & Pinner	Apr. 26, 1892	1891	21,037	Kid gloves	Gloves
F. A. Palmer	June 17, 1890	1888	18,043	Wire mattresses	Bed-room furniture
Waterbury Watch Co.	Nov. 29, 1892	1892	22,070	Watches	Time keeping instruments

VELVET.

Liggett & Myers Tobacco Co.	Nov. 2, 1920	1907	136,516	Smoking and chewing tobacco	17
Edward K. Morris	Nov. 25, 1913	1913	94,299	Chewing-gum	46
Herbert L. Hildreth	May 1, 1906	1885	52,070	Candy	Confectionery
Herbert L. Hildreth	Aug. 13, 1895	1885	29,946	Confectionery, ice cream and beverages	Confectionery
Detroit Creamery Co.	July 9, 1912	1910	87,326	Butter	46
Mazo Bros.	Dec. 3, 1912	1912	89,280	Coffee	46
Terre Haute Brewing Co.	Nov. 13, 1906	1891	57,345	Beer	51
Borden's Condensed Milk Co.	Dec. 18, 1906	1904	58,577	Condensed milk	48
Central Fruit Mar. Co.	Mar. 3, 1914	1909	95,600	Citrus fruits	46
Harry T. Stewart	Aug. 31, 1915	1914	105,946	Bread	46
The Cabell Co.	Mar. 6, 1917	1916	115,733	Powdered egg	46
Interstate Cotton Oil Refining Co.	Aug. 7, 1917	1916	117,868	Shortening	46
Fabean Hedges, Inc.	May 4, 1920	1919	131,135	Mallow topping for deserts	46
Commercial Milling Co.	July 20, 1920	1898	133,230	Wheat flour	46
S. Ewart & Co.	June 25, 1907	1896	63,547	Rice	44
Proctor & Gamble	Dec. 19, 1882	1880	99,884	Soap	Soap
Joseph Potter	Apr. 27, 1920	1918	130,560	Safety-razors	23
Oswego Maize Products Co.	Jan. 31, 1905	1904	44,108	Starch	Groceries
American Lead Pencil Co.	July 9, 1912	1904	87,308	Lead pencils	37
Frank W. Witcher & Co.	Sep. 13, 1898	1898	31,961	Rubber heels	Foot-wear

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
George Lyman Snow	July 10, 1900	1900	34,861	Shoe-blacking	Leather dressing
North American Hat Co., Inc.	Sep. 19, 1905	1905	46,469	Hats	Headwear
Oscar H. Hersey	May 1, 1906	1905	52,205	Tooth-picks	Toilet articles
Schorsch & Co.	Feb. 12, 1907	1906	60,493	Paper bags	37
W. T. Schackley & Son Co.	Aug. 27, 1907	1906	64,907	Leather belting	35
Reynoldsville Brick & Tile Co.	Aug. 3, 1909	1906	74,743	Tile and bricks	12
Adelbert P. Little	Aug. 9, 1910	1910	79,134	Typewriter carbon paper	11
Ideal Mfg. Co.	Oct. 25, 1910	1909	79,980	Fly-killers	50
Columbia Cotton Oil & Provision Corp.	Dec. 20, 1910	1909	80,413	Lard, cured meats and cotton seed oil	46
Diamond Steel Truck Co.	Jan. 10, 1911	1909	80,582	Furniture casters	13
David C. Earnest	Nov. 21, 1911	1911	84,221	Grate bars	34
Frederick L. Sluper	Dec. 22, 1914	1911	101,539	Paints	16
American Lead Pencil Co.	Jan. 5, 1915	1914	101,614	Rubber erasers	37
Harley B. Burdick	Jan. 12, 1915	1911	101,829	Lawn seed	1
John Wigmore & Sons Co.	Feb. 9, 1915	1907	102,348	Bearings	23
Commercial Paste Co.	June 6, 1916	1915	110,635	Paste	5
Lee Tire & Rubber Co.	Feb. 6, 1917	1914	115,355	Inner tubes	35
Agricultural & Commercial Time Co.	Oct. 2, 1917	1915	118,729	Agricultural lime	10
A. V. Victorious & Co.	Dec. 11, 1917	1914	119,836	Hosiery	39
Willis Jason Kendrick, Inc.	Apr. 8, 1919	1915	125,113	Corks	50
W. N. Salisbury & Co.	Oct. 24, 1922	1912	160,653	Rubber tiling	12

LUCKY STRIKE.

R. A. Patterson & Co.	Dec. 14, 1886	1883	13,882	Plug tobacco	17
American Tobacco Co. as successor to R. A. Patterson & Co.	Sep. 4, 1917	1883	118,372	Smoking and chewing tobacco, tobacco plugs and cigarettes	17
The Vaccaro Cigar & Liquor Co.	Sep. 12, 1905	1889	46,371	Whiskey	Spirituous Liquors
Wilbur S. Burns	Jan. 6, 1920	1916	128,320	Laundry soap	4
Manchester Furniture Co.	Dec. 17, 1907	1907	66,646	Wash boards	24
Arthur E. Shultz	Oct. 21, 1913	1911	93,930	Certain Seeds	1
Lamor Brothers	Aug. 22, 1922	1921	158,111	Hosiery	39

EDGEWORTH.

Larus & Brother Co.	Dec. 23, 1919	1902	128,095	Smoking tobacco	17
Progressive Co-operative Asso. of Boston	Apr. 1, 1913	1912	90,920	Bread	46
John F. Edgeworth	Aug. 21, 1906	1901	56,037	Flour in sacks or barrels	44

PRINCE ALBERT.

R. J. Reynolds Tobacco Co.	June 27, 1911	1907	82,471	Smoking and chewing tobacco, cigars, cigarettes and snuff	17
F. S. Ainsa Co., Inc.	Aug. 2, 1921	1920	145,305	Coffee	46
Salter Silk Co., Inc.	Apr. 11, 1916	1895	109,551	Textile threads	43
Frank S. Dure Co.	June 24, 1902	1901	38,524	Harness	Leather goods
Rubber Clothing Co.	Oct. 4, 1881	1878	8,694	Rubber Coats	Wearing apparel
Earl & Wilson	Sep. 18, 1900	1900	35,052	Shirts	Underwear
Penn Bros. Mfg. Co.	Jan. 9, 1912	1911	84,873	Suspenders	40

REX.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
J. F. Zahm Tobacco Co.	Sep. 3, 1907	1895	64,983	Smoking and chewing tobacco	Tobacco products
Liggett & Myers Tobacco Co. as successor to J. F. Zahm	May 15, 1923	1915	168,082	Smoking and chewing tobacco and cigarettes	17
J. D. and R. S. Christian Co.	Nov. 19, 1895	1892	27,279	Baking powder	Food
Cudahy Packing Co.	July 7, 1896	1890	28,558	Hog products	Meats
William A. Megrath	May 26, 1903	1899	40,440	Certain beverages	Beverages
Duluth Brewing and Malting Co.	May 31, 1904	1902	42,717	Beer	Malt liquors
Hulman & Co.	Sep. 26, 1905	1885	46,619	Coffee	Coffee
Ralph Goldsmith	Aug. 23, 1910	1909	79,272	Rice	46
Corn Products Refining Co.	Jan. 10, 1911	1903	80,630	Corn Syrup	46
Alec Luneschloss	Nov. 7, 1911	1911	84,114	Olive Oil	46
New Orleans Manufacturers Agency Co., Ltd.	Dec. 26, 1911	1900	84,661	Canned sardine	46
American Candy Co.	May 5, 1914	1898	96,850	Chocolates	46
Cudahy P'kg. Co.	Mar. 6, 1906	1890	50,295	Lard	P'k'g house powder
Cudahy P'kg. Co.	Mar. 6, 1906	1890	50,296	Beef Extract	" " "
New Orleans Import Co., Ltd.	Jan. 1, 1907	1900	59,086	Spices	50
Cudahy P'kg. Co.	Jan. 1, 1907	1890	59,098	Smoked Meats	52
Griffin & Shelley Co.	Apr. 9, 1907	1900	61,857	Raisins	50
Humiston Food Preserving Co.	Apr. 17, 1883	1882	10,203	Food Preservatives	Chemicals
P. Hanson Hiss Mfg. Co.	Feb. 26, 1889	1888	16,298	Furniture Polish	Polish
Chadbourne and Moore	Mar. 2, 1897	1896	29,621	Goring	Rubber goods
Edward C. Smith	Feb. 8, 1898	1896	31,230	Scale remover	Chemicals
Obear-Nester Glass Co.	Oct. 23, 1900	1896	35,303	Prescription bottles	Bottles
The Weiss Mfg. Co.	Sep. 3, 1901	1897	36,996	Certain clothing	Wearing Apparel
John S. Burton	Feb. 3, 1903	1892	39,739	Liniment	Liniment
Flintkote Mfg. Co.	Feb. 10, 1903	1902	39,785	Roofing Felt	Roofing Materials
Fred. Gretsch	Sep. 1, 1903	1902	41,054	Musical Instruments	Musical Instrument
Crucible Steel Co. of America	Oct. 6, 1903	1903	41,265	Tool Steel	Steel
Lobel, Coleman and Marcus	Jan. 19, 1904	1903	41,911	Suspenders	Men's furnishings
William S. Carpenter	Jan. 26, 1904	1902	41,943	Embalming fluid	Disinfectants
Weiffenbach Mfg. Co.	Feb. 9, 1904	1901	42,017	Razor straps	Sharpening straps
Cumalena Mfg. Co.	Feb. 16, 1904	1903	42,070	Face Lotion	Medicinal compounds
Bauer and Black	Feb. 23, 1904	1898	42,143	Porous Plasters	Plasters
Arthur Blumer	Mar. 8, 1904	1900	42,223	Bottle Stoppers	Bottle stoppers
Rex Polish Co., Ltd.	May 24, 1904	1904	42,670	Shoe polish	Blacking
Crew Levick Co.	July 26, 1904	1902	43,066	Lubricating Oils	Oils
F. A. Hardy Co.	Aug. 9, 1904	1904	43,137	Nose Guards	Optical goods
Charles A. Fisher	Jan. 24, 1905	1904	44,023	Mattresses and Cushions	Mattresses
E. W. Conklin & Son	Sep. 5, 1905	1899	46,089	Grass Seed	Seeds
E. C. Atkins & Co.	Oct. 10, 1905	1889	46,786	Saws	Tools
Chicago Tubing & Braiding Co.	Feb. 6, 1906	1903	49,516	Flexible Tubing	Tubing
Albert Hochheimer	Oct. 5, 1909	1909	75,435	Ostrich Feathers	1
Coe-Stapley Mfg. Co.	Nov. 1, 1910	1909	80,036	Hand pumps	23
Prentiss Vise Co.	Dec. 13, 1910	1904	80,376	Vises	23
Corn Products Refining Co.	Dec. 27, 1910	1901	80,462	Laundry Starch	6
The Curtain Supply Co.	May 2, 1911	1910	81,679	Curtain Rollers	32
Adolph Muehlmatt	June 27, 1911	1904	82,460	Engraving Blocks	50
Royal Specialty Co.	Mar. 12, 1912	1910	85,769	Electric Vibrators	44
American Mfg. Co.	June 25, 1912	1910	87,031	Bagging	42
Rex Ignition Mfg. Co.	Aug. 6, 1912	1910	87,809	Spark plugs	21
Johann Lund	Nov. 19, 1912	1911	89,192	Portable Shelving	32
Rex Motor Co.	Feb. 4, 1913	1911	90,134	Engines	23
Rex Battery Co.	Feb. 18, 1913	1912	90,376	Batteries	21
Muralo Co.	Feb. 25, 1913	1907	90,464	Calcimine	16
Rex File & Saw Co.	Mar. 4, 1913	1906	90,580	Files and Rasps	23
Duplexo Vacuum Cleaner Company	Nov. 24, 1914	1912	101,272	Vacuum Cleaners	23
Columbia Guano Co.	May 18, 1915	1898	104,321	Fertilizer	10
Universal Feleu Mfg. Co.	June 15, 1915	1913	104,821	Moving-Picture Films	26
Union Bag & Paper Co.	Nov. 6, 1906	1903	57,191	Paper Bags	37

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Rex Fire Extinguisher Co.	Jan. 22, 1907	1894	59,974	Certain Fire Extinguishing Apparatus	26
Hammel, Riglander & Co.	June 4, 1907	1893	62,997	Pliers	23
Cudahy Packing Co.	Aug. 13, 1907	1903	64,629	Lye	6
Fort Pitt Bedding Co.	June 16, 1908	1905	69,480	Bed springs	32
Wm. H. Colgan Co.	Aug. 25, 1908	1905	70,392	Switch-boxes	21
Eagle Pencil Co.	Oct. 27, 1908	1908	71,046	Fountain pens	37
Rex Typewriter Co.	June 20, 1916	1914	110,989	Typewriters	23
American Wringer Co.	Aug. 1, 1916	1912	111,696	Clothes wringers	24
Chain Belt Co.	Oct. 3, 1916	1914	112,851	Concrete Mixing machines	23
United States Wire Mat Co.	Oct. 17, 1916	1916	113,458	Fly-killers	50
Cudahy Packing Co.	Feb. 6, 1917	1902	115,313	Canned pork and beans	46
Bystrom and Hull	June 19, 1917	1912	117,106	Bread and pastries	46
Waterbury Co.	June 19, 1917	1916	117,233	Manila rope	7
William E. Crutcher	July 3, 1917	1916	117,299	Cure for hog cholera	6
Edward Green	Apr. 19, 1921	1920	141,366	Soap dyes	6
Federal Rubber Co.	May 17, 1921	1912	142,521	Hoof-pads	3
Rex Leather Goods Corporation	June 28, 1921	1920	144,266	Brief cases	3
John Blue	Dec. 27, 1921	1905	149,848	Fertilizer Distributor	23
George Borgfeldt & Co.	Nov. 7, 1922	1915	161,076	China Tableware	30
C. A. Bear & Co.	Feb. 13, 1923	1921	164,166	Sherbet compound	46
Brunswick-Balke-Collender Co.	Apr. 24, 1923	1921	167,181	Game Table Cushions	22
Patent Cereals Co.	Aug. 13, 1918	1915	122,410	Adhesive paste	5

THE FOLLOWING REGISTRATIONS APPEAR IN VOLUME III.

(in the order listed)

NAVY.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
G. W. Gail & Ax.	Aug. 18, 1885	1884	12,512	Smoking & Chewing Tobacco	Manufactured Tobacco.
American Tob. Co. as successor to Gail-Ax.	Apr. 6, 1920	1865	130,034	do	17
National Candy Co.	Oct. 4, 1910	1906	79,778	Candy	46
Cobb. Preserving Co.	Mar. 24, 1914	1898	95,890	Canned fruits & Vegetables	46
Jos. L. McCready	Aug. 21, 1906	1893	55,766	Shucked Oysters	54
Wayne County Condensed Milk Co.	June 2, 1908	1908	69,324	Condensed Milk	46
Griffith-Durney Company,	July 14, 1908	1901	19,847	Canned salmon	46
Rowe Edward Kidder,	Oct. 23, 1917	1916	119,084	Wheat flour	46
Revere Rubber Co.	Mar. 12, 1889	1888	16,372	Rubber hose	Hose
Eugene S. Hylan	Nov. 5, 1895	1878	27,177	Bunting	Dry-goods
Chas. B. Mumford	Mar. 1, 1898	1884	31,344	Certain medicines	Medicines.
H. W. Johns Mfg. Co.	May 8, 1900	1898	34,641	Coating material	Fibrous Material.
Benj. H. Seabury	May 26, 1903	1899	40,460	Fusible metals	Metals.
A. J. Lower Co.	July 28, 1908	1908	70,090	Oiled Clothing	39
Union Card & Paper Co.	Sept. 20, 1910	1894	79,616	Writing paper	37
Roehm-Richards Co.	Apr. 13, 1915	1912	103,763	Linen & Cotton suits	39

Army and Navy.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
James Moroney	Jan. 28, 1908	1907	67,242	Cigars	Tobacco products
Gohl & King	Oct. 11, 1910	1899	79,828	Coffee	46
Thomas B. Kane	Jan. 10, 1922	1920	150,861	Soft Drinks	45
Matheas J. Lanx	Sep. 21, 1915	1915	106,050	Chocolate Flavored pop-corn	46
Grady Mfg. Co.	Sep. 12, 1916	1897	112,503	Metal polishes	4
National Brewing Co.	Feb. 10, 1891	1890	18,998	Beer	Malt Liquors
Parrish Bros.	May 28, 1895	1895	26,610	Baking Powder	Baking powder.
Chas. H. Parrish	Dec. 3, 1895	1895	27,404	Flavoring extracts	Extracts.
Jos. Mortimer Johnson	May 16, 1899	1898	32,897	Scouring powder	Scouring compounds.
Bryan Marsh Co.	Oct. 20, 1903	1899	41,343	Electric lamps	Lamps.
U. S. Playing Card Co.	Feb. 6, 1906	1890	49,419	Playing cards	Games.
T. S. Ruddock & Son,	Aug. 7, 1906	1906	55,188	Leather shoes	36
Rice, Stix Dry-Goods Co.	Dec. 11, 1906	1894	58,263	Hosiery	41
James Moroney,	Dec. 11, 1906	1885	58,370	Whiskey	49
Frank E. Fennessey	Jan. 1, 1907	1862	59,162	Leather Blacking	11
International Watch Co.	July 23, 1907	1907	64,141	Watches	59
Nonotuck Silk Co.	Nov. 11, 1919	1917	127,462	Thread	43
Geneva Cutlery Co.	Nov. 2, 1915	1910	106,853	Razors, etc.	23

Polo

Liggett & Myers Tobacco Co.	Feb. 20, 1923	1887	164,301	Smoking and chewing Tobacco and cigarettes.	17
Wm. Wrigley, Jr. Co.	Sep. 29, 1914	1914	100,065	Chewing gum	46
Pennsylvania Chocolate Co.	Jan. 8, 1907	1906	59,451	Chocolate & Cocoa	47
Stoddard, Gilbert & Co.	Aug. 15, 1911	1908	83,102	Canned fruits and vegetables and tomato catsup	46
do	Aug. 29, 1911	1911	83,290	Wheat flour	46
Rudolph F. Bartel	Mar. 27, 1906	1905	50,711	Suspenders	Underwear.
Covert Mfg. Co.	Apr. 16, 1907	1906	62,000	Snap hooks	13
C. G. de Tonnancour	Nov. 12, 1907	1905	66,191	Boots and shoes	11
F. S. Royster Guano Co.	July 6, 1915	1915	105,139	Fertilizers	10
Worumbo Mfg. Co.	Apr. 27, 1920	1910	130,595	Woolen goods	42
Egon Hassinger	Mar. 7, 1922	1916	152,815	Rubber erasers	37

Blue Ribbon.

American Tob. Co.	Feb. 18, 1908	1878	67,775	Chewing & Smoking Tobacco	Tobacco Products.
DuWane Norris	Jan. 1, 1907	1897	59,230	Chewing gum	47
Oakford & Fahnestock	Aug. 26, 1913	1891	93,246	Certain named foods	46
Thomas J. Knodie Co.	Feb. 10, 1920	1911	129,294	Hams, Bacon & Lard	46
D. Nicholson	Sept. 9, 1884	1867	11,470	Coffee	Groceries
J. Wassmer	Sept. 7, 1866	1884	13,648	Lager beer	Beverages
David W. Lewis	Aug. 8, 1899	1899	33,321	Butter	Dairy Products.
German American Provision Co.	Apr. 3, 1900	1900	34,410	Canned meats and lard	Canned foods.
Paragon Malt Extract Co.	Mar. 5, 1907	1906	61,117	Malt extracts	51
Blue Ribbon Mining Milling & Investment Co.	May 14, 1907	1902	62,518	Ginger ale & root beer	45
Regina Flour Mill Co.	Dec. 31, 1907	1873	66,788	Wheat Flour	44
Greever-Lotspeech Mfg. Co.	May 5, 1903	1899	40,273	Flavoring extracts	Flavoring Extracts.
George E. Bond	Oct. 31, 1905	1902	47,175	Eggs	Foods
Knickerbocker Chocolate Co.	Feb. 13, 1906	1893	49,714	Chocolate & cocoa	Foods
F. B. Chamberlain Co.	May 24, 1910	1897	78,038	Rolled oats	46
Yakima County Horticultural Union	July 4, 1911	1908	82,547	Fresh apples	46
Fresno Home Packing Co.	May 7, 1912	1895	86,397	Dried fruits and raisins	46
Somers & Co.	Apr. 1, 1913	1911	90,932	Stock food	46
Richard Hellman	May 5, 1914	1912	96,884	Mayonnaise dressing	46

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Standard Milling Co.	Oct. 26, 1915	1911	106,694	Rice	46
Wabash Chemical & Baking Powder Co.	Oct. 17, 1916	1915	113,463	Desert powder	46
Leon Renaker	Feb. 6, 1917	1911	115,390	Turkeys	46
Blue Ribbon Candy Co.	May 24, 1921	1875	142,936	Candy	46
Proctor & Gamble	Feb. 18, 1890	1890	17,553	Soap	Soap
Oakley Soap & Perfumery Co.	Feb. 12, 1895	1894	26,027	Perfumery	Toilet Articles
Hazard Powder Co.	June 4, 1895	1895	26,654	Powder	Explosives
William H. Fosmer	June 30, 1896	1896	28,480	Milk & Cream	Dairy products.
Daniel Oppenheimer & Anton Oppenheimer	Nov. 8, 1898	1894	32,120	Hats	Headwear
Rosemary Mfg. Co.	May 22, 1906	1903	52,962	Cotton Damask	Dry-goods.
Buegeleisen & Jacobson	Feb. 5, 1907	1901	60,406	Violin strings	65
Wiebusch & Hilder, Ltd.	Apr. 16, 1907	1901	62,082	Grass hooks	20
Charles Plunkett	Nov. 17, 1908	1906	71,341	Brooms	29
Durant-Dart Carriage Co.	Dec. 15, 1908	1894	71,805	Certain vehicle	19
Alabama Chem. Co.	Dec. 22, 1908	1903	71,973	Guano	10
Edw. K. Graham	Jan. 5, 1909	1908	72,181	Hosiery & underwear	39
National Enameling & Stamping Co.	Feb. 2, 1909	1907	72,559	Enameled sheet metal wear	13
International Metal Polish Co.	Feb. 16, 1909	1905	72,754	Metal polish	4
Geo. D. Snyder	Apr. 20, 1909	1904	73,481	Talcom Powder	6
Oakford & Fahnestock	July 20, 1909	1891	74,569	Chemical Preparations	6
Wood, Stubbs & Co.	Aug. 4, 1903	1903	40,866	Certain seeds	Agricultural products
Joseph Cogan	Aug. 1, 1905	1899	44,974	Dog collars	Dog trappings.
Southern Spring Bed Co.	Sept. 12, 1905	1903	46,204	Beds	Furniture
Rubber & Celluloid Harness Trimming Co.	Jan. 23, 1906	1902	49,131	Lather Brushes	Brushes
Peerless Rubber Mfg. Co.	Dec. 28, 1909	1891	76,258	Rubber hose	35
Keystone Steel & Wire Co.	Feb. 15, 1910	1909	76,791	Barbed wire	13
Edwin D. Hooey	Aug. 29, 1911	1910	83,252	Song birds	1
Chas. S. Moore	Jan. 28, 1913	1912	90,036	Milk pails	2
Geo. Borgfeldt & Co.	Oct. 21, 1913	1913	92,813	Hair nets	42
Paul H. Gesswein Co.	Dec. 2, 1913	1913	94,369	Jewelers saws	23
L. Hemmerdinger Co.	Apr. 28, 1914	1913	96,674	Gold paints	16
Gilbert Toilet Co.	May 19, 1914	1913	97,135	Head lotion & hair tonic	6
Buckley-Newhall Co.	Oct. 19, 1915	1910	106,206	Sewing machines	23
do	Oct. 19, 1915	1910	106,207	Baby carriages	19
do	Oct. 19, 1915	1910	106,210	Phonographs	36
do	Oct. 19, 1915	1910	106,211	Refrigerators	31
do	Nov. 9, 1915	1910	106,937	Gas Lamps	34
do	Nov. 9, 1915	1910	106,938	Electric stoves	21
do	Dec. 7, 1915	1910	107,487	Household furniture	32
do	Dec. 7, 1915	1910	107,488	Clothes wringers	24
do	Dec. 26, 1916	1910	114,622	Oil-cloths	20
do	Dec. 26, 1916	1910	114,624	Knitted Goods	42
do	Jan. 23, 1917	1910	115,065	Rain coats	39
Russel Playing Card Co.	Aug. 28, 1917	1907	118,332	Playing cards	22
Diamond Match Co.	Aug. 21, 1923	1905	171,989	Matches	9
Blue Ribbon Knitting Mills, Inc.	Oct. 2, 1923	1922	173,914	Bathing suits	39
Miller Rubber Co.	Mar. 7, 1922	1921	152,885	Water Bottles	44
Whitman Elect. Mfg. Co.	July 12, 1921	1919	144,650	Plug fuses	21
D. P. Harris Hdware & Mfg. Co., Inc.	Aug. 16, 1921	1919	145,687	Bicycles	19
New England Spun Silk, Corp.	Oct. 17, 1922	1921	160,252	Silk yarns	43
Electric Milker Corp.	Feb. 6, 1923	1921	163,915	Milking machine	23
Electrical Heating Appliance Co.	Mar. 6, 1923	1922	165,178	Waffle irons, etc.	21
George Alonzo Brown	Nov. 30, 1920	1919	137,565	Hen's nests	50
John L. Lansaman	Jul. 11, 1916	1915	111,429	Hog Cholera cure	6

CLIPPER.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Liggett & Myers Tobacco Co.	Apr. 20, 1897	1875	29,869	Plug Tobacco	Tobacco
do	Jan. 10, 1922	1897	150,881	Smoking & Chewing tobacco	17
Mrs. B. F. Lilley, Jr.	Aug. 24, 1920	1920	134,291	Candies	46
Wm. Numson & Sons.	Nov. 23, 1897	1878	30,887	Oysters, meats, fruits, vegetables, jellies and soups.	Canned and preserved goods.
Lyon & Greenleaf	Jun 25, 1907	1889	63,530	Wheat flour.	44
Merchants Coffee Co. of New Orleans, Ltd.	Feb. 11, 1913	1901	90,228	Coffee compound	46
J. B. Williams & Co.	Feb. 21, 1882	1876	9,131	Shaving soap	Soaps.
W. Ayres & Sons.	Aug. 20, 1889	1887	16,938	Horse nets	Horse clothing.
Grand Rapids Cycle Co.	Mar. 31, 1896	1889	28,051	Bicycles	Vehicles.
Albert T. Ferrell	Apr. 30, 1901	1879	36,353	Certain machinery	Machinery.
Wm. S. Cooper Brass Works.	Mar. 25, 1902	1890	37,995	Valves and spigots.	Miscellaneous.
Singer, Nemick Co.,	Dec. 26, 1905	1888	48,334	Steel	Metals.
Miller Lock Co.	Sep. 11, 1906	1903	56,305	Locks & Keys	25
Robin Hood Ammunition Co.	Jan. 19, 1909	1908	72,388	Shot Gun Shells	9
Flexible Belt Facing Co.	Mar. 2, 1909	1906	72,924	Belt hooks	23
Hartman Pharmacy	Oct. 26, 1909	1897	75,603	Remedy for corns	6
American Pin Co.	Apr. 11, 1911	1902	81,425	Safety pins	40
Diamond Rubber Co.	Jan. 14, 1913	1898	89,829	Rubber tubing	35
Henry Disston & Sons.	Feb. 3, 1914	1870	95,075	Saws	23
American Mfg. Co.	Jan. 16, 1917	1916	114,920	Oakum	1
do	Feb. 6, 1917	1916	115,269	Rope and cord	7
Mount Vernon-Woodberry Mills, Inc.	May 1, 1917	1917	116,443	Cotton duck	42
J. C. Blair Co.	Oct. 8, 1918	1918	123,014	Paper & Stationery.	37
Dunlap America, Ltd.	May 24, 1921	1920	143,989	Golf balls	22
Clipper Lawn Mower Co.	Dec. 13, 1921	1898	149,569	Lawn mowers	23
Watkins Cottrell Co	Sep. 10, 1901	1901	37,035	Knives & Razors	Cutlery

HORSE SHOE.

American Snuff Co.	July 3, 1900	1900	34,842	Snuff	Tobacco
Wm. Wrigley Jr. Co.	Sept. 29, 1914	1914	100,068	Chewing gum	46
Freeman & Shaw	July 11, 1882	1882	9,537	Canned goods	Canned goods
Habricht, Braun Co.	Nov. 9, 1915	1915	107,065	Dried fruits and Veg.	46
Wisconsin Condensed Milk Co.	Nov. 9, 1915	1914	107,132	Condensed milk	46
A. L. Bauman	Aug. 8, 1882	1882	9,588	Crackers	Breadstuffs
Angelo Fazzio	Apr. 23, 1907	1902	62,170	Pickles-mustard, etc.	50
Thomas Armstrong	July 19, 1892	1892	21,470	Washing powder	Washing powder
Felix H. Hunicke	Nov. 24, 1896	1896	29,190	Gloves,	Gloves
Meirecke & Co.	Mar. 5, 1901	1900	35,991	Cushions	Sick Room supplies
E. J. Brooks & Co.	Nov. 14, 1905	1897	47,674	Car seals	Seals
Abbot Augustus Low	Nov. 19, 1907	1907	66,332	Branding irons	21
Amer. Agricultural Chem. Co.	Sep. 23, 1913	1875	93,514	Fertilizers	10
Sangnoit Toilet Paper Co. Inc.	Oct. 21, 1913	1913	93,919	Toilet paper	37
Rennous, Kleinle & Co.	June 6, 1916	1887	110,608	Brushes and tools	29
Racine Auto Tire Co.	Jan. 30, 1917	1910	115,225	Inner tubes	35
do	July 22, 1919	1919	126,063	Rubber heels	39
Emil Goodwirth	Sep. 14, 1920	1919	134,662	Writing ink	11
Kansas City Smelting Co.	Nov. 8, 1921	1921	148,103	Babbitt metal	14
Altoona Overall factory.	Apr. 26, 1921	1914	141,470	Overalls	39
Alsing & Co., Ltd.	Apr. 14, 1894	1887	25,120	Matches	Matches
Dr. Decker Medicine Co.	July 29, 1884	1880	11,363	Certain medicines	Medicines
C. A. Griswold	Apr. 12, 1887	1886	14,274	Corsets	Apparel
Vacheron & Constantine	Oct. 14, 1884	1883	11,578	Watches	Time-keepers

KING PIN.

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Liggett & Myers Tobacco Co.	July 27, 1920	1919	133,454	Smoking and chewing tobacco and cigarettes.	17
Columbia Salmon Co.	Oct. 3, 1916	1916	113,697	Canned Salmon	46
Manser Mill Co.	June 19, 1917	1916	117,180	Wheat flour	46
Siegfried Ellbogen	Apr. 29, 1913	1912	91,329	Coats, vests and trousers	39
Sinclair Mfg. Co.	Sep. 14, 1920	1915	134,805	Powdered lye	6
U. S. Rubber Co.	May 24, 1921	1920	143,202	Rubber boots and shoes	39

LIBERTY BOND.

Chas. P. Stanley Cigar Co.	Nov. 13, 1917	1917	119,396	Cigars, cigarettes and smoking and chewing tobacco	17
John J. Dalton	Nov. 13, 1917	1917	119,275	Chewing gum and mints	46
Winter Park Citrus-Growers Asso.	June 18, 1918	1917	122,050	Fresh citrus fruits	46

LIBERTY BELL.

Rucker & Witten Tobacco Co.	July 31, 1900	1893	34,983	Chewing tobacco	17
Pacific Coast Syrup Co.	June 7, 1921	1920	143,704	Cane and Maple syrup	46
Pillsbury Flour Mills Co.	May 31, 1921	1885	143,430	Wheat flour	46
Smith & Nessle Co.	Jan. 21, 1919	1918	124,207	Canned sardines	46
George B. Foley	Oct. 30, 1894	1887	23,415	Medals	Medals
Beatrice E. Linquist	Jan. 10, 1922	1919	150,886	Phonographs	36
Ferry & Napier	May 2, 1899	1895	32,783	Hats	Wearing apparel
Assy Shahien & Co.	Aug. 1, 1905	1903	44,934	Razors	Cutlery
Arneth & Minton Mfg. Co.	Mar. 29, 1921	1919	140,736	Salve	6
Frank E. Morse Co. Ltd.	June 4, 1895	1895	26,653	Portland Cement	Cement
Frederick S. Gwyer	Feb. 18, 1896	1895	27,829	Nails and Tacks	Hardware
Chas. Heinrich	Nov. 29, 1904	1901	43,782	Saddle polish	Polishing Compounds
Ganss-Langenberg Hat Co.	Oct. 17, 1905	1892	46,914	Hats	Wearing apparel
Alabama Chemical Co.	Dec. 22, 1908	1903	71,952	Guano	10
McAdoo & Allen	Oct. 19, 1915	1915	106,462	Leather Welting	39
Estate of Geo. Pabst, Dec'd	May 1, 1917	1895	116,446	Window shades	42
Rice-Stix Dry Goods Co.	June 5, 1917	1915	116,921	Hosiery	39

LIBERTY.

American Tobacco Co.	May 17, 1921	1891	142,428	Smoking and chewing tobacco	17
Eckhart & Swan	June 23, 1891	1885	19,748	Flour	Flour
Duty S. Thompson	May 2, 1893	1892	22,914	Baking powder	Leavening preparation
B. S. Janney, Jr. Co.	May 23, 1893	1893	23,082	Syrup & Molasses	Sugar products
James Butler	May 16, 1899	1892	32,883	Condensed Milk	Food
Alvah L. Reynolds	Dec. 26, 1899	1899	33,938	Cheese	Dairy products
James Butler	June 5, 1900	1900	34,739	Tomato catsup	Food
Hancock & Co.	Oct. 7, 1902	1901	38,996	Dried fruits	Evaporated fruits
Colonial Salt Co.	Nov. 21, 1905	1901	47,770	Salt	Salt
Rheinstrom, Beltman, Johnson & Co.	Dec. 18, 1906	1905	58,662	Preserved fruits	50
Henry Maillard	Jan. 28, 1913	1884	90,032	Chocolate	46
F. G. Vogt & Sons, Inc.	Mar. 3, 1914	1912	95,723	Lard, ham, Bacon	46
Triumph Mills	Jan. 19, 1915	1889	101,989	Coffee	46
T. E. Wareheim & Bro.	Jan. 26, 1915	1907	102,227	Butter	46
Hollock-Denton Co.	Oct. 31, 1916	1899	113,728	Flavoring extracts	46
G. H. Wetteran & Sons Grocer Co.	Apr. 16, 1918	1899	121,229	Canned meats & vegetables	46

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
John L. Kellogg	Sep. 10, 1918	1918	122,713	Toasted Corn flakes	46
Richardson Corp.	Dec. 31, 1918	1918	124,045	Soft drinks	45
Apalachee Packing Co.	Jan. 21, 1919	1917	124,186	Canned oysters	46
S. H. Grinstead Co. Inc.	Mar. 18, 1919	1918	124,845	Dressed poultry	46
James R. McCleskey	Apr. 29, 1919	1917	124,276	Cake	46
P. W. Coppersmith Co.	May 13, 1919	1918	125,330	Fresh tomatoes	46
Waukesha Pure Food Co.	June 3, 1919	1918	125,693	Jelly powders	46
Pioneer Fruit Co.	Sep. 30, 1919	1917	126,750	Fresh fruits	46
Liberty Baking Co.	Apr. 19, 1921	1914	141,404	Bread	46
Liberty Maccheroni Mfg. Co.	Aug. 2, 1921	1905	145,400	Macaroni	46
Fred Hollander & Co.	Sep. 19, 1905	1878	46,456	Beer	Malt liquors
C. Gardner	Feb. 2, 1892	1890	20,664	Remedy for heart disease	Medicine
The Liberty Cycle Co.	Oct. 8, 1895	1893	27,146	Bicycles	Vehicles
Weingarten Bros.	Nov. 10, 1896	1896	29,125	Corsets	Wearing app.
Piebes & Co.	Aug. 4, 1903	1903	40,850	Children's headgear	Wearing app.
Standard Wall Paper Co.	Aug. 25, 1903	1899	41,005	Wall paper	Paper
Josiah T. Hair	Dec. 22, 1903	1898	41,728	Fire extinguisher	Chemicals
Davis Sewing Machine Co.	Apr. 26, 1904	1898	42,504	Sewing machines	Sewing Machines
Liberty Silk Co.	May 1, 1906	1902	52,153	Dress silk	Dry goods
American Thread Co.	May 7, 1907	1893	62,386	Spool cotton	43
Charles H. Besly	July 30, 1907	1896	64,304	Letter files	70
Eberhard Faber	Nov. 26, 1907	1899	66,361	Lead pencils	70
Simmons H'dware Co.	Sep. 1, 1908	1908	70,440	Lanterns	34
Peerless Rubber Mfg. Co.	Feb. 9, 1909	1904	72,666	Rubber hose	35
Illinois Watch Case Co.	Aug. 1, 1911	1893	82,890	Watch cases	27
Western Electric Co.	Aug. 15, 1911	1906	83,114	Batteries	21
Liberty Vending Co.	Mar. 5, 1912	1911	85,664	Vending machines	23
Liberty Paint Co. Inc.	July 9, 1912	1908	87,350	Calcimine	16
Waldes & Co.	July 14, 1914	1913	98,447	Snap buttons	40
Carl Essbach	Sep. 22, 1914	1886	99,883	Musical instruments	36
Liberty Motion Picture Co.	Oct. 6, 1914	1914	100,129	Motion picture films	26
Carter Paint Co.	Dec. 15, 1914	1914	101,442	Dry cleaner	4
Ed. Seevers	May 16, 1916	1915	110,298	Lumber	12
Cohn & Rosenberger Inc.	June 13, 1916	1915	110,727	Jewelry	28
Innovation Elect. Co.	July 4, 1916	1914	111,237	Vacuum cleaner	23
Liberty Motor Car Co.	Oct. 10, 1916	1916	113,092	Automobiles	19
John Braun & Sons.	Nov. 14, 1916	1905	113,940	Lawn-mowers	23
John S. Tilley Ladder Co.	Dec. 19, 1916	1914	114,578	Ladders	50
Automatic Pencil Sharpener Co.	Oct. 30, 1917	1917	119,166	Pencil sharpener	37
Liberty Stove Polish Co.	Dec. 25, 1917	1917	119,969	Stove polish	4
H. W. Doughten	Feb. 12, 1918	1917	120,482	Grass seed	1
International Shoe Co.	Feb. 12, 1918	1916	120,497	Boots and shoes	39
The Standard Ultra-marine Co.	Apr. 23, 1918	1917	121,349	Laundry blues	6
American Optical Co.	May 14, 1918	1917	121,573	Measuring appliances	26
Busch & Jolles, Inc.	June 11, 1918	1917	121,863	Turpentine	16
Halcomb Steel Co.	June 11, 1918	1917	121,892	Tool steel	14
Alexander N. Pierman	July 2, 1918	1917	122,156	Signal horns	21
Morris C. Shriver	July 9, 1918	1918	122,237	Thermometers	26
Hoyt Metal Co.	Sep. 17, 1918	1918	122,798	Babbitt metal	14
A. J. Reach Co.	Oct. 8, 1918	1918	123,058	Sporting goods	22
J. Michael Eilers	Oct. 15, 1918	1918	123,113	Hand bags	3
Apothecaries Hall Co.	Oct. 29, 1918	1916	123,314	Fertilizer	10
Annin & Co.	Jan. 14, 1919	1918	124,074	Flags	50
Jacob W. Elvyn	Feb. 18, 1919	1918	124,445	Toys	22
E-Z-Fit Artificial Limb Co.	Mar. 18, 1919	1918	124,839	Artificial limbs	44
Chas. M. Drinkwater	May 20, 1919	1918	125,419	Ash sifters	23
Ezekial Brothers	May 20, 1919	1918	125,422	Dyes	6
The Deming Co.	Aug. 26, 1919	1918	126,410	Spraying machines	23
The Dwelle-Kaiser Co.	Sep. 16, 1919	1919	126,527	Window glass	33
Consolidated Pharmacal Laboratories	Oct. 11, 1919	1918	126,929	Foot powder	6
Morris Leader	Nov. 18, 1919	1919	127,682	Hair tonic	6
Crown Cork etc. Co.	Dec. 9, 1919	1917	127,818	Bottle Capping Machine	23

Registrant	Date of Registration	Date of Adoption	No.	Subject	Patent Office Class
Liberty Chemical Co.	Dec. 9, 1919	1919	127,850	Auto Freezing solution	6
Clearfield Clay Working Co.	Dec. 16, 1919	1918	127,914	Brick & Tile	12
American Aluminum Co.	Feb. 10, 1920	1918	129,257	Cooking utensils	13
Hyman Julius	Mar. 9, 1920	1919	129,760	Writing ink	11
Liberty Chain Co.	Apr. 20, 1920	1919	130,345	Tire grip chains	13
Liberty Bread slicer Co. Inc.	May 11, 1920	1918	131,338	Bread slicing machine	23
Geo. W. Hartzell	June 29, 1920	1917	132,700	Airplane propellers	19
Diamond Grinder Co.	Aug. 3, 1920	1918	133,633	Grist-mills	23
Liberty Knife Co.	Nov. 2, 1920	1919	136,515	Pocket knives	23
John T. Hunter, Inc.	Jan. 4, 1921	1918	138,643	Matches	9
Joseph Rene Ayotte	May 3, 1921	1916	141,853	Spark-plugs	21
Kansas City Broom Co.	May 17, 1921	1918	142,647	Brooms	29
Russell Mfg. Co.	May 31, 1921	1917	143,446	Garters and Suspenders	40
Marshall Field & Co.	June 28, 1921	1917	144,199	Knitting needles	40
J. M. Ernst & Son	July 26, 1921	1920	145,091	Scratch feed	46
W. W. Bevan Co.	Jan. 31, 1922	1918	151,315	Paper cups	2
Liberty Mirror Works	Feb. 14, 1922	1922	151,844	Mirrors	19
Liberty Machine Works	Nov. 14, 1893	1860	23,828	Printing presses	Printing presses
Woolner Distilling Co.	July 9, 1907	1907	63,769	Denatured alcohol	6
Thomas E. Clark	Apr. 20, 1920	1918	130,280	Electric fans	21
M. M. Rhodes & Sons Co.	Apr. 26, 1921	1919	141,821	Shoe laces	40
Robinson Bros. Co.	Jan. 24, 1893	1892	22,364	Toilet soap	Soap
Archer Starch Co.	Jan. 14, 1902	1900	37,646	Starch	Starch

DEFENDANT'S EXHIBIT NO. 34.—PATENT OFFICE PAMPHLET SHOWING TRADE-MARKS CLASSIFICATION.

UNITED STATES PATENT OFFICE.

UNITED STATES STATUTES CONCERNING THE REGISTRATION OF TRADE-MARKS

With the Rules of the Patent Office Relating Thereto.

Revised July 26, 1920.

(SEAL) Department of the Interior.

Washington

Government Printing Office, 1920.

(Page 46 only of above is printed):

CLASSIFICATION OF MERCHANDISE UNDER THE ACT OF MAY 4, 1906.

1. Raw or partly prepared materials.
2. Receptacles.
3. Baggage, horse equipments, portfolios, and pocketbooks.
4. Abrasive, detergent, and polishing materials.
5. Adhesives.
6. Chemicals, medicines, and pharmaceutical preparations.
7. Cordage.
8. Smokers' articles, not including tobacco products.
9. Explosives firearms, equipments, and projectiles.
10. Fertilizers.
11. Inks and inking materials.
12. Construction materials.
13. Hardware and plumbing and steam-fitting supplies.
14. Metals and metal castings and forgings.
15. Oils and greases.
16. Paints and painters' materials.
17. Tobacco products.
19. Vehicles, not including engines.
20. Linoleum and oiled cloth.
21. Electrical apparatus, machines, and supplies.
22. Games, toys, and sporting goods.
23. Cutlery, machinery, and tools, and parts thereof.
24. Laundry appliances and machines.
25. Locks and safes.
26. Measuring and scientific appliances.
27. Horological instruments.
28. Jewelry and precious-metal ware.
29. Brooms, brushes, and dusters.
30. Crockery, earthenware, and porcelain.
31. Filters and refrigerators.
32. Furniture and upholstery.
33. Glassware.
34. Heating, lighting, and ventilating apparatus, not including electrical apparatus.
35. Belting, hose, machinery packing, and nonmetallic tires.
36. Musical instruments and supplies.
37. Paper and stationery.
38. Prints and publications.
39. Clothing.
40. Fancy goods, furnishings, and notions.
41. Canes, parasols, and umbrellas.
42. Knitted, netted, and textile fabrics.
43. Thread and yarn.
44. Dental, medical, and surgical appliances.
45. Beverages, nonalcoholic.
46. Foods and ingredients of foods.
47. Wines.
48. Malt extracts and liquors.
49. Distilled alcoholic liquors.
50. Merchandise not otherwise classified.

NOTE.—Class 18 was abolished February 24, 1909.

DEFENDANT'S EXHIBIT NO. 35—LIST OF BRANDS.

P. LORILLARD COMPANY.

CIGARETTES.

S. ANARGYROS.

A. A. G. Gold
A. C. K. Special Plain
A. D. S. J. Special No. 3 Plain
A. D. S. J. Special Cork
A. B. D. Special Cork
A. E. H. Special No. 3 Cork
A. F. J. Cork
B. A. R. Plain
B. P. O. E. Cork
Bairam
Bouton Rouge
Calumet
Coat of Arms
Columbian Cork
Columbian Plain
C. T. H. Special Pl.
Dardenelles Plain
Dabs Plain
Dabs Cork
Deities No. 1 Plain
" " 1 Cork
" " 3 Cork
" " 3 Plain
" " 3 Straw
" " 3 Gold
Deities After Dinner Pl.
" " " Cork
" Ladies Gold
" " M. P.
" A. D. Splits
Du Lux Egyptian Pl.
D. A. B. S. Plain
D. A. B. S. Cork
De L. N.
D. E. L. N. Plain
D. C. M. Plain
E. C. H. Special No. 3 Cork
E. A. Special No. 1 Plain
E. A. Special No. 3 Plain
E. C. Korah Plain
E. F. M.
E. K. (in Gold) Cork
E. R. H. Cork
Earl King
Egyptienne Du Lux Pl.
Egyptian Fairies Pl.
Egyptian Luxury Pl.
Egyptian Luxury Cork
El Karah
Erbers Cork
Europa Special
F. B. Co. Gold
G. D. C.
Thos. Garvin No. 3 Cork
" " " 3 Gold
G. W. Lange Spec. Straw
Helmar
House of Lords
H. L. P. Spec. Gold
H. E. W. Special Pl.
H. E. W. Spec. No. 1 Pl.
J. A. A. Ck. No. 1
J. A. A. Ck. No. 3
J. D. L. Spec. No. 1 Pl.
J. R. Special
J. F. Plain
King Edwards Plain
K. H. C. Special Plain
La Reine
Luxus Plain
Mi Lady
Mogul Cork
Mogul Plain
Mogul Ex. Plain
Mogul Ex. Cork
Motor Cork
Murad
M. W. W. No. 3 Cork

Nebo Cork
O. L. A. Special Plain
Otto Special Pl.
Oriental Zephyrs Pl.
P. H. R. Plain
R. E. S. Special Gold
R. E. S. Special Cork
Sacket Special
Sir Don Spec. Pl. J. C. A.
" " " Ck. R. A. D.
" " " E. F. M.
Specials Ck. (Val Electric Sign Co.)
St. E. W. Plain
Turkey Red Plain
Turkey Red Cork
Turkish Trophies Pl.
Turkish Trophies Cork
Twelfth Night Ck.
Utmost
V. F. Special No. 3 Pl.
W. D. Special Cork
Yuslick Plain
Zelmo.
Zira

P. LORILLARD COMPANY.

LITTLE CIGARS.

Between the Acts
Bengal L. C.
Big Run
Big Run Specials
Blue Rings
Buffo 5s
Caliph
Cameretts
Cupid Bouquet
Gilt Edge
Golden Rod
Grenadier
Grenadier Special
Half Dime
Havana No. 1
Hoffman House L. C.
Hustler
Jack Rose
Le Roy
Lyceum
New French
New Light
Puritan
Spanish Puffs
St. Leger
Sub Rosa L. C.
Sub Rosa Cigarros
Van Bibber L. C.

P. LORILLARD COMPANY.

PLUG.

Big Lump
Boston
Boston Gem
Bullion
Climax
Forget-me-not
Good Smoke
Green Turtle
Hot Shot
Job Lot
La Favorite
Mechanics Delight
Neptune
Nickle Nugget
No Brand
Old Navy
Overall
Planet
Pride of Regiment
Prince Nugget

Rations
Rebecca
Redicut
Rose Leaf
Scrapno Pressed
Splendid
Teaser
Terrapin
Three Black Crows
Washington ¼s

P. LORILLARD COMPANY.

LONG CUT.

Best Dark
Bright Red Cross
Challenge
Comet
Extra Eagle
Extra Oronoko
Extra Oronoko Grade
Hoyt's Medium
Hoyt's No. 1
Five Cent Ante
Flower of Kentucky
Flying Eagle
Four Thirties
Golden Cupid
Green Turtle
King Koal
Level Head
Live Stock
Long
Lorillard's I. X. L.
Lorillard's Stripped
Mechanics' Delight
Miner's Stript
Mixed
Moonbeam
Night Watch
No. 1
No. 1 Oronoko
No. 2
No. 49
Old Crisis
Old Joy
Old Monmouth
Old Plantation
Punch & Judy
Push
S. S. & S.
Shorts Dark & Bright
Snow Flake
Sweet Banner
Sweet Red Cross
Sweet Scented
Totem
W. & S. Oronoko
Warpath
Wedding Cake
Yellow Jacket

P. LORILLARD COMPANY.

PLUG CUT.

Alligator
Bagdad
Bald Eagle
Black Joe
Black & Tan
Brotherhood
Bull's Eye
Bull's Head Mixture
Chips
Duplex
Flagman
Friends
Ideal
Just Suits
Kozy

Little Rhody
Lucky
Lucky Grade
Canada
Kensington
Myrtle Navy Grade
Pippin
Old Pepper
Omega
Our Dandy
Ripple
Rose Leaf
Sensation
Sincero Fumo
Social
Trout Line
Union Leader
Veribest
West Grizzly
Wild Rose
World's Fair

P. LORILLARD COMPANY.

GRANULATED.

Bantam ?
Boston
Eureka
Gold Block
Honey Dew
Kent Mixture
Simon Pure
Tube Rose
Two Nickels
White Puff
Yacht Club
Bamboo

CLIPPINGS & SCRAP.

P. LORILLARD.

B. & L. Clips
Cigar Clips
Climax Clips
Happy Thought R. C.
Havana Blossoms
High Grade Navy Clips
Kosciuszko Clippings
Mechanics Delight
Mugsy Scrap
O. S. Clips
Pan Handle Scrap
Rebecca Clips
Scotten Navy Clips
X. X. Clips

LUHRMAN & WILBERN.

Bag Pipe
Beech Nut
Honest Scrap
Natural Leaf
Old Nut
Polar Bear
Scrap Iron

P. LORILLARD COMPANY.

FINE CUT.

Bee
Blot
Boss Bite
Cavendish
Century Bright
Century Red
Challenge
Choctaw
Chow Chow
City Century
Cornucopia
Croton
Eureka
Five Cent Ante
Full Weight
Golden Thread
Golden Thread Grade
  Chesapeake
G. & A. 5¢ Chewing
Hard Cash
Hard Cash Grade
  Olymp
Hearts Ease
Kimball Shorts
Lils. Cavendish
Luxury
Neptune
Old Fashion
Old Fashion Grade
  Albany
  Common Sense
  Troy
Old Timer
Orange
Oriental Grade
  S. & S.
  Snow Flake
  Spot Cash
Oriole
Oriole Grade
  Crown of Delight (Oriole Grade)
  Faultless (Oriole Grade)
Peerless
Peerless Grade
  Honey Dew
Picnic
Pineapple
Pioneer
Plain
Plain Grade
  Banner Plain
Prairie Rose
Protection
Protection Grade
  Strawberry
Prowler
Punkin Pie
Punkin Pie Grade
  Farmers
Red Label
Rose Leaf Bright
Rose Leaf Dark
Royal
Stag
Sweet Home
The Buck
Tiger Bright
Tiger Dark
Tiger O. S.
Try It
Twin Sisters
Wage Worker

P. LORILLARD COMPANY.

PACKAGE CHEROOTS AND CIGARS

MARKETED BY

THE DUKE'S MIXTURE DEPARTMENT A. T. Co.

American Chief
Blue Seal (No Wrapping Mat. 6/9)
Cannon Ball's 3's
" " 6's
Canvas Back
Champion Victor
Charmers
Cloth Top
College Tips
Crete
Early York
Famous Red Flag
First Quality
Five Beauties (No Wrap. Mat. 7/19)
Florodora
Florodora 50s
Giants
Havana Plums
Havana Sprouts
Havana Infantes
Havana Specials
Havanette Threes
Havanette Londres
Le Roy Cubanas
Life Preservers
Modern Times
New Wrinkle
Nickel Treat (No Wrap. Mat. 6/9)
Old Glory Cheroots
Old Hickory
Old Mexico
Old Virginia Cheroots
Perfection Cigarros
Plantation Trip
Perfection 3's
Porcupine Quills
Possum
Prince Cheroots
Puritan
Red Cross
Red Rocket
Richmond 3's
Rough Cheroots
Royal Taste
Seal Skipper
Sly Boy
The Three of Us
Three Black Crows
Three Cuckoos
Three Jacks
Two Orphans
U. S. Bond
U. S. 5's
U. S. 3's
Virginia Cheroots
Walker's Giants (Name appears on Label)
War Eagle
Whitlock Club

List made Nov. 22, 1911.

P. LORILLARD COMPANY.

FEDERAL CIGAR COMPANY BRANDS.

LITTLE CIGARS.

Allwin
Beaux Arts
Bengal Invincibles
Black & White
Buck
Buffo Cigars
Buffo Grand
Capt. Marryat Opera
Columbia
Consols
Cuban Dainties
El Belmont Quarters
El Solano
Estabrook & Eatons Students
Figaro
Flexo Giants
Florodora Operas
Flor de Madrid
Havana Amer. Matinees
Hoffman House Cavalier
" " Chicos
" " Magnums
" " Manhattans
" " Petit Dues
" " Specials
Isle of Pines Minuetes
Jaynos 10-13
King Roger
La Belle Creole Tots
X La Plaza
La Preferencia Trios
Le Roy Majors
Le Roy Brevas
Minuet
No. 445 Cigarros
Orlando Juniors
Palma de Cuba No. 10
Pioneer
Poncico
Prince George Cadets
Prince George Petit Dues
Royal Bengals
Royal Princess
Spanish Trophies
Van Bibber Bouquets
" " Lilliputanos

X To be discontinued when wrapping material is exhausted. Have not clear title to brand.

DEAD BRANDS.

El Fenix Students
Famous Havana Juniors
General Run
La Linda
Mardi Gras Jrs.
Opera Perfection
Red Swan Special
Sergeant Club
Temple Bar

P. LORILLARD COMPANY.

ACTIVE CIGAR BRANDS—FEDERAL CIGAR COMPANY

JANUARY 1, 1911.

A. B.'s Londres
Adad
Adamezyk's Special
Adelosa
Admar
A. H. Frie's Special
Alden Supply Co.'s 1858
Alfred the Great
Alice Nielsen
Alles' No. 139
Alta
Alvina
Amarilli
Amco
American Beauties
Andrew M. Luksic's Special
Armory Hotel
Atkinsin's Special
Atlas
A. T. Parfrey Special
Auditorium
Austin's Special
Austrienne
Auto Girl
Autogo
Awenda
Balajszis' Special
Banner Havana Seconds
Barger's Choice
B. C. K. Special
Beeswing
Beldame
Berger's Special
Bernatzki's Leader
Berne
Bertig Bros. Famous
B. H. Special
Biddy McGee
Big Bill T
Big Gun
Blank Seconds
Block House
Blue Teal
Blue Violet
Boehm's Special
Boney's Pride
Boyer's Poke Hollow Smokers
Boyer's Special
Brenan's Pride
Brindle
Brod Vana
Buffalo Pearl
Bug Pincher
Cabinet Council
Campbell's Special a 10¢ Cigar for 5¢
Canego
Capitola
Captoco
Carrozza's Special
Cerine's Best
Chesco
Christmas Greetings
Ciampala's Pastime
Clark's 76 Special
Clearosa
Cliff Weil Cigar Co.'s Shop Smokers
Clubdom
Club House
Club Night
Cohen's Cotton Palace
Coldato
Colonel Bill
Colonists
Comedian

Commercial Queen
Cooney's Special
Cornelius
Count Gondomar
Country Lasses
Cow Boy
Crabtrees Guarantee Unequalled
Cracker Jack
Cream Puffs
Creola
Crescello
Crowned Beauty
Cuba Florrie
Cuban Favorite Resagos
Cuban Panetelas
Cuban Smokers
Cupido
Daily Choice
Daily Service
Daniel Cohen's Special
Dave Powell Special
Davison Bros. Londres
Democrat
Dempsey's Best
Dew Drop
Dextet
Diana
Diploma Grande
Dixie Doodle
Dixoletta
Dominick's Special
Don Alvar
Don Brave
Don Ramire
Dot. (S. & P. Co.)
Dragoon
Dropiewski's Choice
Dwyer's Best
Edrena
Edw. J. Phelps
El Cafe Bouquet
El Captain General
El Enfatico
El Top
Elkinton's Special
El-Ko
El Processo De Cuba
El Mecanico
El Merito de Cuba
El Rizado
El Rement
El Tino
El Toreador
El Trillo
El Vase
Emma Abbott
Empire Girl
Empire State
Evan's 408
Evergood
Entre
Factory Leaders Selected
Factory Smokers Selected
Factoryville House Special
Fair Helen
Falcon Special
Fancy Nancy
Favette
Federal Pride
Felix Garcia
Fermani's C. Columbo
Fermani's Special
Flashlight
Flor de Astro
Flor de Lone Star
Flor Mantanza
Flor de Union
Flor de Verdi
Franklin Throw Outs
Freeland Beauty
Fritch Bros. Tobacco Cigars
Frotana
Ftorkowski's Best
G. A. Marsh Special
Gencha's Special
General Corbin
General Dan Morgan
General Hannibal

Genuine Havana Seconds
Genuine Havana Rosages
General Woodford
George Chylak Special
Geo. Washington Smokers
Gerstin's Favorite
Globe Runner
Goddard's Superfine
Godshalk's 1006
Golden Prince
Golden Tower
Goldstein's Special
Golf Links
Goodman's Special
Gov. Hoffman
Grand March
Grand Order
Grand Union
Grand Union Special
Great Game
Great Scott
Greeley Square
Grenadier
Greskovich's Special
Grigger & Jaike's Special
Grumbler
Gulls Special
H. A. Munro's Special
Hance's Special
Happy Smoke
Harlequin
Harvest King
Havana Consul
Havana Creams
Havana Maid
Havana Rothchilds
Havana Seconds
Headline
Helmet
Hendrick Hudson
Henry Horn's Best
Hidden Fortune
Hildand Chieftain
Hildora
Holland Cigar Co.'s Smokers
Holz's Best Value for 5¢
Honest
Honey Tips
Hoppies Best
Hudson Brand
Hunt Club
Hyman's Favorite
Ideals
Ifhlejango's La Rampooza
Injun
Insalaco's Special
Irish Jaunting Car
J. A. McDonald Special
J. A. Young Special
J. & B.
J. Farina's Special
J. G. Blaine
J. G. N. Special
J. O. Connor's Special
J. J. Olenddyke's Special
J. P. La Brune's Favorite
J. S. R.
James Hamilton Lewis
Jennie Jones
John Frasco's Special
John Law
John's new one 5¢ Straight
John's Special
Johnetta Hotel
Johnie Smoke Born 1810 Still Smoking Good
Jones Supreme (Buck Hotel)
Jos. J. Sparks
Joy Smoke
Judicia
Junius
Justinian
Karvonis' No. 220
Kerpet's Special
Kilcullen's Special
King of India
Knickerbocker
Kocher & Picketts Premier
Koch's Leader
Kolobuk's Special

Kopec's Family
Kotarski's Leader
Krauser's Special
Krzyzanski's No. 48
Kucma Supreme
Kuhno
Kuni's Best
La Almilla
La Bella Vera
Labor Queen
La Cornola
La Cubec
Lady Bird
Lady George
La Flor de Alfonso Garcia
La Flor de Hence
La Flor de Kosciusko
La Fragosa
La Maradad
La Muleta
La Nacina
La Norita
La Pila
La Reina Regents
La Rosa Gloria
Lardie's Special
La Santilla
La Seradosa
La Vera
La Vana Rica
Leador Constant Rovenski
Leonard's Best
Leonard's Special 5¢ Cigar
Le Roy
Levin's Havana Seconds
Liberty Bird
Liberty Girl
Lillian Russell
Lisco
Little Beauty
Little Chief
Lonsdale
Lord Aston
Lord Dover
Lord Grey
Lord Dugdale
Lord Rochester
Lord Sheldon
Lord Talbot
Loreto
Los Trofeos
Loyalty
Lulu Gal
Lustig's Special
Levin's Special
La Rosa de Cuba
Lyon's Special
Los Puros
La Cresta
La Thais
Levenburg's Oley
Lazaro Lopez
Lenox Cafe Special
L. Vaglak Special
Lloyd's Special
Leo
London Swells
Louis F. Moritz's Specia
La Relacion
McNeil & Haggin's Co.'s Trade Mark
Mack's Leader
Madge Lessing
Mailey's Leader
Maggie Cline
Manila Caballeros
Manoel the Great
Manuela
Marjorie
Masavage's Pride
Marblehead
M. B.
McGill's Lake House Specials
Merceita
M. T. Cos. Dips
M. T. Co.'s Knickerbocker
Michael Turok's Best
Midvale
Mid Valley Cigar

Milbrodt's Leader
Milda
Miss North
Miss Swell
Mon Rovia
Moon Light
My Favorite
Mitchel House Special
Mandate (Manufactured for Newman & Snoddy)
Marca Royal
Monogram
M. J. Hasting's Special
M. D. Urso's Special
Nandora
Nash's Supreme
National Hotel
Nat Cig. Stands Resagos
National Seal
National Stock
Nautica
Nattrass' Best No. 16
Naylor's Special
Nefta
Nellie Power
New Market
New Rose
Newsboy
Nickel Winner
Nif-tee
Nita
Non-Pareil Seconds
Nordstrom's Special
Nugget's
Nutitus' Special
Nutitus' Leader
Novajovsky's Specials
Oath
Old Story
On Time
189 Earnest Special
Opie Read
Our Albert
Our Best
Our Big Three
Our Bob
Our Driver
Our Favorite
Our Leader
Our 127
Our Smokers
Pantano
Papas Bros. Best
Parker Blake Co. Knickerbockers
P. G. Cigar
Pearl Palace
Peck's Special
Penn Statue
Peola
Persian Belle
Perun's Leader
Peter's Best
Pfeiffer-Loeb Cigar Co.'s National
Stock
Pietro's Special
Piscotie's 642
P. J. McNulty's Crest
P. J. McNulty's Special
Pleasant Hill Special
Plover
Polly Prim
Pompei Cafe's Special
Poncico
Porto Rico Rockets
Post Master
Price's Special
Prime Beauty
Prime Choice
Primrose
Prince Teck
Princess de Rose
Purity
Quaker Queen
Queen Addie
Queen Cloe
Quigley's Favorite
Rail Road
Rapid Results

Rigoni's No. 72
Rebel Queen
Recreation
Red Boot
Red Chief
Red Cross Pharmacy's Special
Red Domino
Red Spot
Reginita
Regulator
Reilly's Special
Reese's Special
Restuccia's Best 5¢
Right U Are
Rittenhouse Square Perfectos
Rokoszs Special
Roman Queen
Rooney's Best
Rose de Syria
Rosa de Valle
Rose Bud
Roth Tobacco Co.'s No. 1
Rovinski's Special
Roxy King
Royal Blood
Royal Harvest
Royal Hunt
Royal Iris
Royal Maid
Royal Nibs
Royal Swell
Royal Perfecto
Russia's Best
R. & G. Club Favorite
Rex Cigar Co.'s Factory Smokers
Royal Duke
Ross Special
Reconciler
Sahv[illegible]'s Supreme
Sale[illegible]s Leader
San[illegible]'s Pride
Sar[illegible]Bana
Saturday Special
Saxon Chief
Savitsky's Columbus Cigar
Scotch Seal
Scottie
Seconds
Senior
Servi's Special
Seth Jones Special
Shells
Shelly & Lewis' Londres
Shining Light
Shop Smokers
Shorter's Havana Seconds (a good 5¢ Smoke)
Ship Champions
Signola
Sinke's Londres
Skirmish
Slugoski's Town Seller
Smile
Smoker's Paradise Big Value
Smoke Penn Dandy 5¢ Cigar
Smokettes
Solitaire
Spanish Belle
Spanish Bride
Star
Standard Beauty
Standard Havana Seconds
Staunton's Best
Steel Trap
Steele Wedeles Crest
Sternberg & Sons Gold Medal
St. Julien
St. Lawrence
Strohl's Best
Strongheart
Stryjak's Special
Stuyvesant Club
Sudana
Sweet Songstress

Santa Rosa
St. Paul Custom House
Shanbacher Special
Selected Havana Rosagos
Shonholtz's Special
Smith's Special
Stein's Special
T. A. Harrington's Favorite
Tallman's Preferred
Tamposa
The B. Feiock Havana Seconds
The Big Gun Perfectos
The Boar
The Celebrated K. B. C.
The Colonnade
The Dozier Drug Co.'s Dips
The Dream
The Dremios
The Eagle (Panatelas)
The Eastern (J. H. Collins Prop.)
The Flirt
The H. H. Brams Club
The Inn Special
The Massie
The New Imperial
Theo. S. Robaczewski's Zbyszko
The Sign of Quality
The Three Authors
The Towns Favorite
The Victor
Throw Outs
Thunder & Lightning
Tillman's Havana Specials
Town Seller
Trilby
Tropical
Tropical Bouquet
Turkana
Two Brothers
Turco
The Palace Special
The Invincible Schley
Tampanita
The Presto 5¢ Cigar
Top Notch
The Putnam Special
U-No-Us Club
Uncle John's Special
Uncle Sam
Uncle Peter's Straight 5s
Upshur
Valley Belle
Vanities
Victor Biagioni's 63
Vintage
Vote
Velvet
Walsh' Special
Wavel Cafe
Wego
Wendling Special
Wilkes Barre Record
Winnie Worth
Winnita
Wintor's Pioneer
Womolsdorf's Best
Waw Waw Smokers
W. A. Special
Wm. A. Stickney's Flor de Colonna
Young America
Youchumas Special
Zada
Zadejkas Sisters
Zannoner's Special
Zurenda's Dobra

DEFENDANT'S EXHIBIT NO. 36—ASSIGNMENT, AMERICAN TOBACCO COMPANY TO P. LORILLARD COMPANY, DEC. 1, 1911.

THIS INDENTURE, made and entered into this First day of December, Nineteen Hundred and Eleven, by and between

THE AMERICAN TOBACCO COMPANY, a corporation duly created, organized and existing under and by virtue of the laws of the State of New Jersey (hereinafter called the "VENDOR," party of the first part, and

P. LORILLARD COMPANY, a coporation duly created, organized and existing under and by virtue of the laws of said State of New Jersey (hereinafter called the "VENDEE," party of the second part.

WITNESSETH: That for and in consideration of the sum of One Dollar ($1.00) and divers other good and valuable considerations to the Vendor through its duly appointed and authorized agents in hand paid by the Vendee, the receipt whereof is hereby fully acknowledged by the Vendor, the Vendor has given, granted, bargained and sold, and doth by these presents give, grant, bargain, sell, alien, assign, transfer, set over, deliver, confirm and convey unto the Vendee, and its successors and assigns absolutely and forever, the factories, plants, brands and businesses, and capital stocks of tobacco manufacturing corporations as follows:

All the rights of The American Tobacco Company in the old P. Lorillard Company, to-wit: All the common stock, and One Million Five Hundred and Ninety-six Thousand One Hundred Dollars ($1,596,100) at par out of a total issue of Two Million Dollars ($2,000,000) of 8% preferred stock.

All the stock of S. Anargyros, a corporation existing

under the laws of the State of New York, engaged in the manufacture of cigarettes;

All the stock of Luhrman & Wilbern Tobacco Company, a corporation of the State of New Jersey, engaged in the manufacture of scrap tobacco;

All the stock of Federal Cigar Company, a New Jersey corporation, engaged in the manufacture of cigars;

Philadelphia Branch B at Philadelphia; Wilmington Branch B at Wilmington; Penn Street Branch at Brooklyn; Danville Branch B at Danville, Virginia; and Ellis Branch B at Baltimore; all branches of The American Tobacco Company, engaged in the manufacture of little cigars, the principal brand being "BETWEEN THE ACTS";

Each of the foregoing properties is conveyed as a going concern;

With proper and adequate storage houses, leaf tobacco, and other materials and supplies, provision for book accounts, and a proportion of the cash held by The American Tobacco Company on December 31st, 1910, proportionate to the businesses and properties conveyed.

It is the purpose of this conveyance to convey to the said P. Lorillard Company in book value as carried on the books of The American Tobacco Company, tangible property useful in the tobacco business, including storage houses, leaf tobacco, supplies and materials and cash, and stocks of other companies of the value of Twenty-eight Million Ninety-one Thousand Seven Hundred Forty-eight Dollars and Eighty-six Cents ($28,091,748.86), and Vendor covenants and agrees to deliver the certificates of stock endorsed to the P. Lorillard Company, the said Vendee, or as it may direct, and to execute further deeds, bills of sale, assignments and conveyances as at any time or from time to time hereafter the Vendee may reasonably request as necessary to fully vest said title.

And Vendor, for the consideration aforesaid, covenants

that it will warrant and defend said title against all claims and demands of every person whomsoever, it being understood that the Vendee takes this conveyance and all conveyances, transfers, assignments and deliveries subject to the unexecuted part or parts of all contracts that have application to the factories, plants, brands and businesses conveyed, so that they might be said to run with them, or not being carried out by the owner of the given factory, plant or business, to give the other party to the contract a claim for damages against the Vendor, and hereby indemnifies The American Tobacco Company against any claim on account thereof.

IN WITNESS WHEREOF, the Vendor has caused its corporate name to be hereto subscribed, and its corporate seal to be hereto affixed and attested by officers duly authorized so to do.

THE AMERICAN TOBACCO COMPANY.

(SEAL) By PERCIVAL S. HILL, President.

Attest:

J. T. WILCOX, Secretary.

State of New York, County of New York, ss.

On this first day of December, 1911, before me personally came Percival S. Hill, to me known, who being by me duly sworn, did depose and say, that he resides in New York City, New York; that he is the Vice-President of The American Tobacco Company, the corporation described in and which executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

R. J. BOYLAN,
Notary Public.

I, G. T. Minnigerode hereby certify that I am the Secretary of P. Lorillard Company, Inc., a corporation created under the laws of the State of New Jersey and Custodian of its records; that the foregoing indenture is a true and complete copy of the original thereof, which said original is in my possession.

Given under my hand and seal of said company this 19th day of December, 1924.

G. T. MINNIGERODE,
(SEAL) *Secretary.*

Sworn and subscribed to before me this 19th day of December, 1924.

S. E. SPENCE,
(SEAL) *Notary Public, New York Co., No. 425.*
New York Register No. 5085.

(Endorsed.)

ASSIGNMENT OF
BUSINESS
THE AMERICAN TOBACCO CO.
TO
P. LORILLARD CO.
Dated: Dec. 1st, 1911.

DEFENDANT'S EXHIBIT NO. 37—PACKAGE OF BAGLEY'S "HAZEL NUT" TOBACCO.

DEFENDANT'S EXHIBIT NO. 45—LORILLARD SPECIMEN WRAPPER DESIGN FOR BEECH-NUT CIGARETTES.

Part IV.

P. LORILLARD COMPANY EXHIBITS

In United States Patent Office Trade-Mark Opposition No. 2805, P. Lorillard Company vs. Beech-Nut Packing Company.

[Incorporated by stipulation as a part of the record herein (Transcript, Vol. I, p. 871).]

P. LORILLARD EXHIBIT NO. 1—STATEMENT OF SALES OF BEECH-NUT TOBACCO PRODUCTS BY LUHRMAN & WILBERN TOBACCO COMPANY AND P. LORILLARD CO. FROM 1904 TO 1919.

MIDDLETOWN BRANCH, P. LORILLARD COMPANY.

STATEMENT OF "BEECH NUT" SCRAP MANUFACTURED AND SHIPPED

"1904"	*Manufactured*	*Shipped*
January	1250	1200
February	——	——
March	1960–15	1800
April	814– 1	1025
May	800	800
June	800–15	800–15
July	200– 5	200– 5
August	2150	2150
September	1350	1350
October	1000	900
November	150	250
December	300	300
"1905"		
January	500	500
February	475	475
March	210	210
April	200	200
May	650	650
June	300	300
July	850	850
August	300	300
September	400	400
October	420	420
November	600	497– 3
December	225	327–13

"1906"		
January	200	200
February	525	525
March	400	400
April	300	300
May	400	400
June	25	25
July	200	200
August	500	500
September	300	300
October	300	300
November	325	325
December	125	125
"1907"		
January	400	400
February	——	——
March	400	400
April	525	525
May	125	125
June	300	300
July	225	225
August	——	——
September	130	130
October	200	200
November	100	100
December	200	200

"1908"

January	400	400
February	——	——
March	——	——
April	——	——
May	100	100
June	——	——
July	——	——
August	25	25
September	——	——
October	300	300
November	100	100
December	100	100

"1909"

January	——	——
February	——	——
March	200	200
April	——	——
May	——	——
June	100	100
July	125	125
August	——	——
September	——	——
October	——	——
November	——	——
December	——	——

"1910"		
January	——	——
February	——	——
March	——	——
April	25	25
May	——	——
June	——	——
July	——	——
August	——	——
September	——	——
October	——	——
November	——	——
December	——	——
"1911"	None	
"1912"	None	
"1913"	None	
"1914"	None	
"1915"		
January	——	——
February	14720– 7½	11251–11½
March	50885	49353– 7
April	309161– 9	296673–12
May	589443– 9½	596956–11½
June	768207–13	746806–14
July	1073073– 7	1062765
August	651914– 1¼	688985– 7½
September	713090–15¾	806894– 6
October	1042167– 6	1053655– 2¾
November	1034236– 8¾	1035380– 6¼
December	1115694–13½	1029055– 3½

"1916"

January	1007550– 3	1079725–11
February	1021429– 2	1018382– 1
March	1335668	1343017–10
April	1264470– 7½	1231666–14
May	1290522– ¾	1325275– 8¾
June	1212898–14¾	1199746– 4¼
July	1449981– 1¼	1446125–15¾
August	1688961–10½	1688371– 9½
September	1457303–11½	1478014– 6½
October	1572224– 7	1574509– 1
November	1438814– 2¾	1425644–10¾
December	1467044–12	1485590–14

"1917"

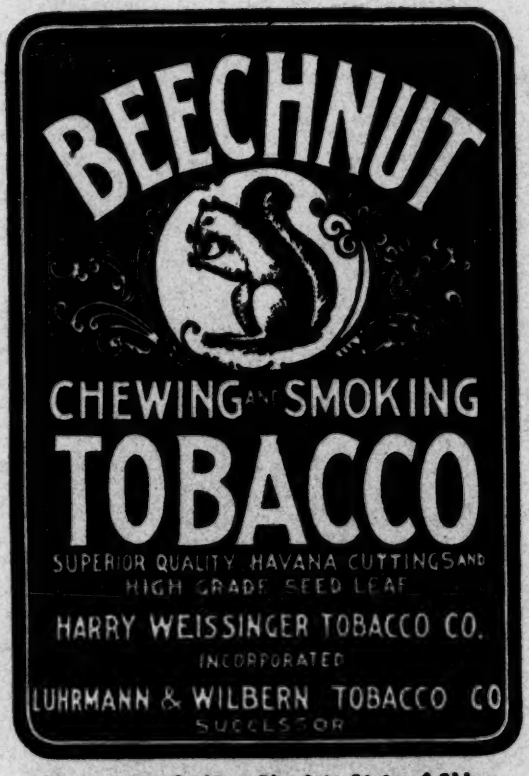
January	1607050– 1	1580759–12
February	1624617– 1¾	1637521–12
March	1867594–12½	1491763–12¼
April	1180203–15½	1444834– 2
May	1064526–13¾	1081891– 2¾
June	1556537	1495414– 8
July	1426579– 5½	1466712– ½
August	2568842–10	2459672– 7
September	1896577–14½	1997955– 7½
October	2115929– 1½	2109208– 8½
November	1572090– 2½	1599131–15½
December	1678775–10	1531816–11½

"1918"		
January	1127283– 9½	918236– 4
February	1882759– 1¼	2103950–12¼
March	2162745– 6¾	2037787– 2¾
April	2592644– 5½	2197612– 6½
May	1441968– 7½	1828721–13
June	1514477–13¾	1355845–13¼
July	1287322– 5	1518517– 2
August	1362235–14¼	1564699–14¼
September	1202413–14¾	1203866–13¾
October	1410611–10	1402560– 6¾
November	1371557–10¾	1364299–14
December	1679579– 7	1640674– 2
"1919"		
January	2072387– 4	2043954– 9
February	2275585–14	2300512–14
March	2364108– 4	2340144– 4
April	2027236	1913614
May	1599027–10	1623405–10
June	1612712–13¾	1737767–13¾
July	1983683– 1¾	1953166– 5¾
August	2069723–12¾	2118789– 8¾
September	2144352–12¾	2090899– 8¾
October	2166714– 4½	2192269–12½
November	2289646– 4¼	2329451– ¼
December	2798669–10¾	2628866–10¾

P. LORILLARD CO. EXHIBIT NO. 2—PACKAGE OF LORILLARD'S BEECH-NUT SCRAP TOBACCO.

[NOTE: Identical with Defendant's Cross Exhibit No. 1—which see, *supra*, p. 161.]

P. LORILLARD CO. EXHIBIT NO. 5—LUHRMAN & WILBERN "BEECHNUT" TOBACCO BAG.



Factory No. 6, First District, State of Ohio.

NOTICE.—The manufacturer of this Tobacco has complied with all the requirements of Law. Every person is cautioned under the penalties of the law, not to use this package for Tobacco again.

2972
264

P. LORILLARD CO. EXHIBIT NO. 6—PACKAGE OF LORILLARD'S BEECH-NUT CIGARETTES.

[NOTE: Photograph of the wrapper:]

2974

P. LORILLARD EXHIBIT NO. 7—LETTER DATED AUGUST 25, 1916, FROM WALCUTT BROTHERS COMPANY TO P. LORILLARD CO.

LEXINGTON BUILDING TELEPHONE MADISON SQUARE 3714-5-6

WALCUTT BROTHERS COMPANY

Embossing Specialists
Hot Pressing, Stamping, Color Printing
Paper, Cloth and Leather Covers
141-155 East 25th Street

CHICAGO OFFICE
1138-39-40 Unity Building

NEW YORK August 25, 1916.

P. LORILLARD CO.,
119 West 40th St.,
New York, N. Y.

Dear Sirs:

We will be pleased to furnish you with one million Beechnut Cigarette shells to be printed in three colors and embossed, as per sketch submitted for your O. K., size and specifications to be about 2 7/8 x 5 7/16, printed, cut and scored on 13 pt. stock, but not to include the making of the shell, as we are not equipped for this kind of work, and if it is possible for you to have this part of the work attended to, we furnishing you with the printed, cut and scored sheets, the first million will cost $1.67 per thousand. Two million will cost $1.45 per thousand.

Hoping to be favored with your valued order, we are,

Yours very truly,

AAS/B WALCUTT BROTHERS CO.

P. LORILLARD CO. EXHIBIT NO. 8—ORDER FOR BEECH NUT CIGARETTE SHELLS.

SUPPLY DEPT. ORDER NO. .....

No. 1721 9/14/16

SUPPLY DEPARTMENT
P. LORILLARD COMPANY
Incorporated
119 West 40th St., New York, N. Y.

Please ship us by .....(freight or express) the following:

1000 M Beech Nut 10 3/11 shells as per sample submitted & approved @ $1.18 per M.

Delivery in 5 to 6 weeks.

Amount used past six months ..... Am't on hand .....
Will last until .....

Yours truly,

CIGARETTE DEPT.
P. LORILLARD CO.
By J R HILL
Manager

OK WJB 9/14/16 O.K. C. C. G.

☞ Do not include more than one kind of wrapping or casing material on each order. Can use entire blank for repair and renewal supplies.

P. LORILLARD EXHIBIT NO. 9—"BROECKER" CORRESPONDENCE.

May 27, 1915.

THE BROECKER TOBACCO COMPANY,
New Albany, Indiana.

Dear Sirs:

Our attention has just been called to the statement in the "Western Tobacco Journal" of May 24th, 1915, that you have registered in the Western Tobacco Journal Registration Bureau the name of "BEECH NUT" for twist tobacco.

We are writing to call your attention to the fact that this Company and its predecessors in interest have for many years past, and still are manufacturing tobacco under the name of "BEECHNUT."

We therefore request that you refrain from using this name, and will be obliged if you will write us that you will do so.

Very truly yours,
ALFRED W. HAYWOOD, JR.

June 10, 1915.

THE BROECKER TOBACCO COMPANY,
New Albany, Indiana.

Dear Sirs:

I wrote you under date of May 27th, with reference to the statement appearing in the "Western Tobacco Journal" of May 24th, 1915, that you had registered in the Western Tobacco Journal Registration Bureau the name of "BEECH NUT" for twist tobacco.

I called your attention to the fact that this Company and its predecessors in interest had for many years past and still are manufacturing tobacco under the name

"BEECHNUT," and requested that you refrain from using this name, and asked that you write us that you would do so.

I have not yet heard from you in reply, and would be obliged if you would write me in accordance with my request.

Very truly yours,
ALFRED W. HAYWOOD, JR.

June 19, 1915.

THE BROECKER TOBACCO COMPANY,
New Albany, Indiana.

Dear Sirs:

I wrote you under date of May 27th, and also under date of June 10th, with reference to your registration in the Western Tobacco Journal Registration Bureau of the name "BEECH NUT" for twist tobacco. I enclose copies of both of these letters herewith.

I have not yet received a reply from you and will be very much obliged if you will write me as requested at once.

Very truly yours,
ALFRED W. HAYWOOD, JR.

Enclosures.

THE BROECKER TOBACCO CO.
309-311 West Sixth St.
NEW ALBANY, IND.

Manufacturers of
Twist and
Smoking Tobacco.

MR. ALFRED W. HAYWOOD JR.
New York N. Y.

Dear Sir:

We are receipt of your favors of May 27, June 10 & June 19 respecting your claim to the name "Beechnut" for twist tobacco, requesting that we refrain from the use of same. That is sufficient.

Yours Respectfully,
THE BROECKER TOB. CO.
per F. J. B.

July 14, 1915.

THE BROECKER TOBACCO COMPANY,
309 West Sixth Street,
New Albany, Indiana.

Dear Sirs:

I have received your recent favor, undated, reading as follows:

> "We are receipt of your favors of May 27, June 10 & June 19 respecting your claim to the name 'Beechnut' for twist tobacco, requesting that we refrain from the use of same. That is sufficient,"

and I thank you for the same.

I understand from your letter that you will refrain from using the name "BEECHNUT" for tobacco, and will be obliged if you will write me that my understanding is correct.

Very truly yours,
ALFRED W. HAYWOOD, JR.

P. LORILLARD EXHIBIT NO. 10—"SCHUTZ" CORRESPONDENCE.

October 1, 1915.

C. E. SCHUTZ, ESQ.,
Evansville, Indiana.

Dear Sir:

I wrote you under date of September 16th, with reference to the "BEECH-NUT" twist tobacco which you have been making, but have not yet heard from you.

This is a matter of considerable importance to us, and I would be obliged if you would write me that you will discontinue using this name in view of our prior rights.

Very truly yours,
ALFRED W. HAYWOOD, JR.

TELEPHONE 592 615 MAIN STREET

C. E. SCHUTZ
Jobber in
Cigars and Tobacco
Pipes Snuff
Cigarettes

EVANSVILLE, IND. Oct. 9, '15.

P. LORILLARD CO.,
New York City, N. Y.

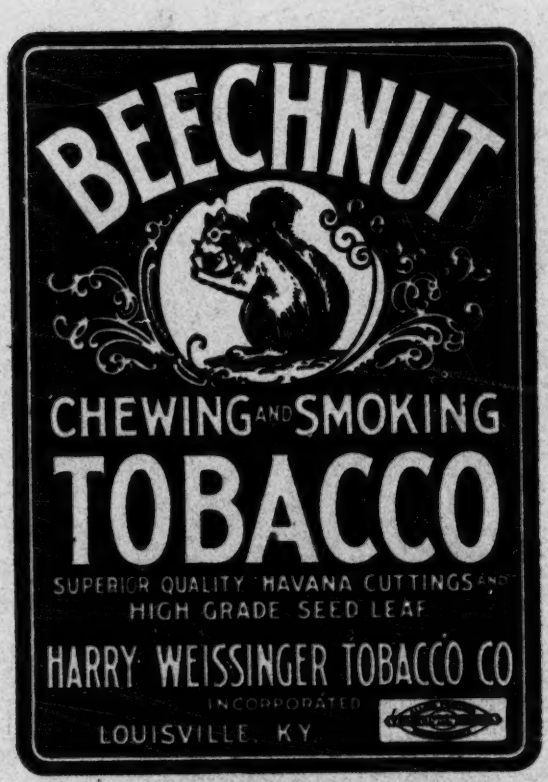
Dear Sirs:

In reply to your letter of Oct. 1st in regards to the Beech-Nut twist tobacco, wish to say we have discontinued the manufacture of this tobacco and will not have any more for sale after we have sold what we have on hand.

We would have replied sooner but have been moving to a new location.

Respectfully,
C. E. SCHUTZ.

P. LORILLARD EXHIBIT NO. 14—HARRY WEISSINGER TOBACCO CO. "BEECHNUT" TOBACCO BAG.



Factory No. 26, Fifth District of Kentucky.

NOTICE.—The manufacturers of this Tobacco have complied with all the requirements of law. Every person is cautioned, under the penalties of the law, not to use this package for Tobacco again

982
274

P. LORILLARD EXHIBIT NO. 16—PACKAGE OF LORILLARD'S BEECH-NUT SCRAP TOBACCO.

NOTE: Identical with Defendant's Cross-Exhibit No. 1—which see, *supra*, p. 161.

P. LORILLARD CO. EXHIBIT NO. 17—PACKAGE OF LUHRMANN & WILBERN TOBACCO CO.'S "BEECHNUT" TOBACCO..

NOTE: The wrapper of this Exhibit package is identical with P. Lorillard Co. Exhibit No. 5—which see, *supra*, p. 263.

P. LORILLARD CROSS-EXHIBIT NO. 20—CERTIFIED COPY, CERTIFICATE OF INCORPORATION OF IMPERIAL PACKING COMPANY.

IMPERIAL PACKING COMPANY

We the undersigned do hereby certify:

That we have associated ourselves together as a manufacturing corporation pursuant to the provisions of chapter 40 of the laws of 1848 of the State of New York, and the several acts amendatory thereof and supplementary thereto:

That the corporate name of said corporation is Imperial Packing Company:

That the time of existence of said corporation is to be ten (10) years:

That the object for which said corporation is formed is the smoking, curing and packing of hams, bacon and beef:

That the amount of capital stock of said corporation is Ten Thousand Dollars:

That the number of shares of which the capital stock of said corporation shall consist is one hundred of one hundred dollars each:

That the number of trustees of said corporation is three (3) and that the following are the names of the trustees who are to manage the concerns of the said corporation for the first year: David Zieley, Jr., Bartlett Arkell and Walter H. Lipe: who are respectively stockholders in said corporation, and all of whom are residents of the State of New York:

That the operations of said corporation are to be carried on at the village and town of Canajoharie, Montgomery County, New York.

Dated January 31st, 1891

DAVID ZIELEY JR
BARTLETT ARKELL
WALTER H LIPE
JOHN W ZIELEY

State of New York County of Montgomery ss

On this thirty-first day of January, 1891, before me personally appeared David Zieley, Jr., Bartlett Arkell, Walter H. Lipe and John W. Zieley, to me known to be the same persons described in and who executed the foregoing instrument, and severally acknowledged that they executed the same.

HIRAM L. HUSTON
Notary Public Mont. Co.

[Endorsed]

IMPERIAL PACKING COMPANY
CERTIFICATE OF INCORPORATION

Tax for privilege of organization of this corporation

$12 $\frac{50}{100}$

Under Chapter 143, Laws of 1886,
Paid to State Treasurer before Filing.

STATE OF NEW YORK
Office of SECRETARY OF STATE
Filed and recorded Feb 10 1891
TH E BENEDICT
Deputy Secretary of State

State of New York, Office of the Secretary of State. ss:

I have compared the preceding with the original Certificate of Incorporation of Imperial Packing Company filed and recorded in this office on the 10th day of February, 1891, and do hereby certify the same to be a correct transcript therefrom and of the whole of said original.

Witness my hand and the seal of office of the Secretary of State, at the City of Albany, this twelfth day of April, one thousand nine hundred and twenty.

E. W. TAFT,

[SEAL] *Second Deputy, Secretary of State.*

P. LORILLARD CO. CROSS EXHIBIT NO. 21.
Renewed to
Beech-Nut Packing Company, a corporation of New York

UNITED STATES PATENT OFFICE.

IMPERIAL PACKING COMPANY, OF CANAJOHARIE AND NEW YORK, N. Y.

TRADE-MARK FOR HAMS AND BACON.

STATEMENT and DECLARATION of Trade-Mark No. 19,838, registered July 7, 1891.

Application filed June 9, 1891.

STATEMENT.

To all whom it may concern:

Be it known that the IMPERIAL PACKING COMPANY, a corporation organized under and by virtue of the laws of the State of New York, and located at Canajoharie, in the county of Montgomery, in said State, and doing business at Canajoharie and at New York city, New York, has adopted for its use a Trade-Mark for Hams and Bacon, of which the following is a full, clear, and exact specification.

The trade-mark of said company consists of the word-symbol "Beech-Nut." This has generally been arranged as shown in the accompanying fac-simile, which represents a ham upon a frescoed panel. Upon the ham appears the word symbol "Beech-Nut" and underneath it a representation of the leaf of the beech-tree. Across the upper portion of the panel appear the words "The Sweet Beech Nut Ham," and across the bottom of the panel are the words "The Imperial Packing Company, Canajoharie, N. Y.;" but these words, with the exception of the word "Beech-Nut," may be omitted, and the various accessories of the picture may be varied or altogether omitted without materially altering the character of the said trade-mark, the essential feature of which is the word "BEECH-NUT."

This trade-mark has been continuously used by said corporation since the 1st of January, 1891.

The class of merchandise to which the trade-mark is appropriated is cured pork, and the particular description of goods comprised in such class on which it is used by said company is hams and bacon.

It has been the practice of the company to brand the trade-mark upon each article of its production. It may, however, be branded upon the boxes, barrels, or casks in which the goods are packed, or it may be applied to the goods or packages in the form of a label.

IMPERIAL PACKING COMPANY.
By BARTLETT ARKELL,
President.

Witnesses:
GEORGE H. BENJAMIN,
F. K. BUDD.

DECLARATION.

City, county, and State of New York, ss:

BARTLETT ARKELL, being duly sworn, deposes and says that he is the president of the IMPERIAL PACKING COMPANY, of Canajoharie, New York, a corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that the said corporation has at this time a right to the use of the trade-mark thereinin described; that no other person, firm, or corporation has a right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trade-mark is used by said corporation in commerce between the United States and foreign nations, and particularly with Great Britain, Germany, and Canada, and that the description and fac-similes presented for record truly represent the trade-mark sought to be registered.

BARTLETT ARKELL.

Sworn to and subscribed before me this 23d day of April, 1891.

[L. S.] THOMAS M. ROWLETTE,
Notary Public, New York County.

TRADE-MARK.

IMPERIAL PACKING COMPANY.

HAMS AND BACON.

No. 19,838. Registered July 7, 1891.

WITNESSES:
Millard F. Steltman
E. W. Cady

INVENTOR
Imperial Packing Company
BY
Geo. H. Benjamin
ATTORNEY.

Renewed to
Beech-Nut Packing Company, a corporation of New York.

UNITED STATES PATENT OFFICE.

IMPERIAL PACKING COMPANY, OF CANAJOHARIE AND NEW YORK, N. Y., AND CHICAGO, ILLINOIS.

TRADE-MARK FOR PORK LARD.

STATEMENT and DECLARATION of Trade-Mark No. 24,978, registered July 3, 1894.

Application filed June 6, 1894.

STATEMENT.

To all whom it may concern:

Be it known that the IMPERIAL PACKING COMPANY, a corporation organized under and by virtue of the laws of the State of New York, and located in the village of Canajoharie, in the county of Montgomery, in said State, and doing business in said village of Canajoharie, and also at the city of New York, in said State, and at the city of Chicago, in the county of Cook, in the State of Illinois, has adopted for its use a Trade-Mark for Lard, of which the following is a full, clear, and exact specification.

The trademark of said company consists of a representation of a leaf of the beech tree and the word-symbol "Beech Nut." These have generally been arranged as shown in the accompanying fac-simile, consisting of an oblong card in the lower left-hand corner of which is a representation of the leaf of the beech tree resting on an oval, and above and to the right of the oval appear the words "'Beech Nut' Lard. Imperial Packing Co., Canajoharie, N. Y." But these words, with the exception of the word "Beech Nut," may be omitted, and the various accessories of the picture may be varied at pleasure, or omitted altogether, without materially altering the character of the said trademark, the essential features of which are the words "BEECH NUT," and the representation of the leaf of the beech tree.

This trademark has been continuously used by said corporation since the 1st day of March, 1894.

The class of merchandise to which the trademark is appropriated is pork, and the particular description of goods comprised in such class on which it is used by said company is pork lard.

It has been the practice of the company to apply the trademark to the barrels, casks or cases in which the lard is packed, in the form of a label. It may however be branded upon the barrels or casks or cases in which the lard is packed.

IMPERIAL PACKING COMPANY,
By BARTLETT ARKELL,
President.

Witnesses:
WILLIAM J. MERRILL,
F. J. GALVIN.

DECLARATION.

City, county and State of New York, ss.

BARTLETT ARKELL, being duly sworn, deposes and says that he is the president of the IMPERIAL PACKING COMPANY of Canajoharie, New York, a corporation, the applicant named in the foregoing statement, that he verily believes that the foregoing statement is true; that the said corporation has at this time a right to the use of the trademark therein described; that no other person, firm or corporation has a right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the trademark is used by said corporation in commerce between the United States and foreign nations, and particularly with Great Britain, Germany, Canada and the Island of Cuba, and that the description and fac-similes presented for record truly represent the trademark sought to be registered.

BARTLETT ARKELL.

Sworn to and subscribed before me, a notary public, this 18th day of May, 1894.

[L. S.] FREDK. J. WINSTON
Notary Public, (No. 226,) N. Y. County.

TRADE-MARK.

IMPERIAL PACKING COMPANY.

PORK LARD.

No. 24,978. Registered July 3, 1894.

Witnesses
Fred. J. Winston
Geo. L. Cook

Proprietor
Imperial Packing Company
by
Herbert Allen President

UNITED STATES PATENT OFFICE.

BEECH-NUT PACKING COMPANY, OF CANAJOHARIE AND NEW YORK, N. Y.

TRADE-MARK FOR CURED, DRIED, AND SMOKED BEEF.

STATEMENT and DECLARATION of Trade-Mark No. 35,731, registered January 8, 1901.

Application filed December 13, 1900.

STATEMENT.

To all whom it may concern:

Be it known that the BEECH-NUT PACKING COMPANY, (successor to the Imperial Packing Company,) a corporation organized under and by virtue of the laws of the State of New York, and located at Canajoharie, in the county of Montgomery, in said State, and doing business at said place and also at New York city, in said State, has adopted for its use a Trade-Mark for Cured Meats, of which the following is a full, clear, and exact specification.

The trade-mark of said company consists of the word-symbol "Beech-Nut." This has generally been arranged as shown in the accompanying facsimile, which represents the fruit and leaves of the beech-nut tree. This is inclosed in a circle, and adjacent to the design appears the word-symbol "Beech-Nut." The circle may be omitted and the design of the beech-nut and its leaves may be omitted or may be varied without materially altering the character of said trade-mark, the essential feature of which is the word-symbol "BEECH-NUT."

This trade-mark has been continuously used by said corporation and the corporation of which it is successor since the 1st of June, 1893.

The class of merchandise to which the trade-mark is appropriated is cured meats, and the particular description of goods comprised in such class on which it is used by said corporation is cured, dried, and smoked beef.

It has been the practice of the company to brand the trade-mark upon each article of its production or upon the receptacles containing such articles—that is, upon the jars, boxes, barrels, or other packages in which the goods are packed—or it may be applied to the goods or packages in the form of a label.

BEECH-NUT PACKING CO.,
By BARTLETT ARKELL,
President.

Witnesses:
F. E. DOUBLEDAY,
J. WANKERL.

DECLARATION.

Town of Canajoharie, county of Montgomery, State of New York, ss:

BARTLETT ARKELL, being duly sworn, deposes and says: that he is the president of the BEECH-NUT PACKING COMPANY of Canajoharie, New York, a corporation, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true; that said corporation has at this time a right to the use of the trade-mark therein described; that no other person, firm or corporation has a right to such use, either in the identical form or in any such manner or resemblance thereto as might be calculated to deceive; that the trade-mark is used by said corporation in commerce between the United States and foreign nations, and particularly with colonies of South Africa; and that the description and facsimile presented for record truly represent the trade-mark sought to be registered.

BARTLETT ARKELL.

Sworn to and subscribed this 4th day of December, 1900.

[L. S.] NORMAN J. BRUMLEY,
Notary Public.

TRADE-MARK.

No. 35,731. Registered Jan. 8, 1901.

BEECH-NUT PACKING COMPANY.

CURED, DRIED, AND SMOKED BEEF.

(Application filed Dec. 13, 1900.)

Witnesses:

Jos. Merritt

Chas. P. Schmelz

Proprietor:

Beech-Nut Packing Company

per William A. Lorenz

Attorney

2994

UNITED STATES PATENT OFFICE.

BEECH-NUT PACKING COMPANY, OF CANAJOHARIE, NEW YORK.

TRADE-MARK FOR CANNED GOODS.

STATEMENT and DECLARATION of Trade-Mark No. 36,444, registered May 21, 1901.

Application filed April 29, 1901.

STATEMENT.

To all whom it may concern:

Be it known that the BEECH-NUT PACKING COMPANY, a corporation duly organized under the laws of the State of New York, and located and doing business at Canajoharie, county of Montgomery, in said State, has adopted for its use a Trade-Mark for Canned Goods, of which the following is a full, clear, and exact description.

The said trade-mark consists of the word-symbol "Beech-Nut." This has generally been arranged, as shown in the accompanying facsimile, in connection with the representation of a beech-nut and some leaves of the beech-tree. Different styles of letters may be employed for the word-symbol and the design of the beech-nut and leaves may be varied or omitted altogether without materially altering the character of the trade-mark, the essential feature of which is the word-symbol "BEECH-NUT."

This trade-mark has been continuously used in the business of the said corporation and of its predecessors since June 1, 1893, and in connection with canned goods since May 18, 1898.

The class of merchandise to which this trade-mark is appropriated is groceries, and the particular description of goods comprised in the said class upon which it is used is canned goods. It is usually displayed on the cans, jars, boxes, and other packages containing the goods by placing thereon a printed label on which the described trade-mark is shown.

[L. S.] BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL,
President.

Witnesses:
NORMAN J. BRUMLEY,
J. H. COOK.

DECLARATION.

State of New York, county of Montgomery, ss:

BARTLETT ARKELL being duly sworn, deposes and says that he is the president of the corporation BEECH-NUT PACKING COMPANY, the applicant named in the foregoing statement; that he verily believes that the foregoing statement is true, that said corporation has at this time a right to the use of the trade-mark therein described, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive; that the said trade-mark is used by the said corporation in commerce between the United States and foreign countries, and particularly with Canada, Mexico, France and Sierra Leone, and that the description and facsimile presented for record, truly represent the trade-mark sought to be registered.

BARTLETT ARKELL.

Sworn to and subscribed before me, a notary public, this 26th day of April, 1901.

[L. S.] J. H. COOK,
Notary Public.

TRADE-MARK.

No. 36,444. Registered May 21, 1901.

BEECH-NUT PACKING COMPANY.

CANNED GOODS.

(Application filed Apr. 29, 1901.)

Witnesses:
William A. Lorenz.
H. Mallon

Proprietor
Beech-Nut Packing Company
By W. H. Hollis. Atty.

2998

P. LORILLARD CO. CROSS EXHIBIT NO. 22—
Proposed BEECH-NUT PACKING COMPANY'S "BEECH-NUT CIGARETTES" LABEL.

P. LORILLARD CO. EXHIBIT A—BOOK SHOWING REVENUE STAMPS USED ON TOBACCO BRANDS 1904-1906.

[NOTE: The exhibit is a two-hundred page "Day Book" of stamp records and weights for Polar Bear, Old Nut, Cutlass, Bag Pipe, Beechnut, Honest, etc. All entries are in lead pencil. Only the entries relating to Beechnut are here printed.]

Page 88. March 1904.

. . . . . .

Beech Nut 1960 lbs. 15 oz.

. . . . . .

Page 89. March 1904.

. . . . . .

Beech Nut 2 627 S 10 st 627 S 10 st us 1960 lbs 15 oz

. . . . . .

Page 90. April 1904.

. . . . . .

Beech Nut 814 lbs 1 oz.

. . . . . .

Page 91. April 1904.

. . . . . .

Beechnut 13 252 S 10 st 252 S 10 st us 789 lbs 1 oz
15 8 Sheets us 8 us 25 lbs

814 lbs 1 oz

Page 92. May 1904

. . . . . .

Beech Nut 800 lbs

. . . . . .

Page 93. May 1904

. . . . . .

Beech Nut 256 256 us 800 lbs

Page 95. June 1904

. . . . . .

Beech Nut 800 lbs

. . . . . .

Beech Nut	20	32 Sheets	32 us	100 lbs	
Beech Nut	16	32 Sheets	32 us	100 lbs	
Beech Nut	14	96 Sheets	96 us	300 lbs	
Beech Nut	9	32 Sheets	32 us	100 lbs	
Beech Nut	2	64 Sheets	64 us	200 lbs	
			Total	800 lbs	

Page 96. July 1904.

. . . . . .

Beech Nut 200 lbs

. . . . . .

Beech Nut Samples 5 oz

. . . . . .

Beech Nut	20	32 Sheets	32 us	100 lbs	
	26	32 Sheets	32 us	100 lbs	
				200 lbs	

Page 98. July 1904.

. . . . . .

16 1 – 2½ oz Beech Nut Sample 2½ oz

. . . . . .

23 1 – 2½ oz Beech Nut Sample 2½ oz

Beech Nut Samples 5 oz

. . . . . .

Page 100. August 1904

. . . . . .

Beech Nut 2149 – 13½ oz

. . . . . .

	30	112	112 us	350 lbs.	
	24	32	32 us	100 lbs	
	23	64	64 us	200 lbs	
	19	96	96 us	300 lbs	
	18	63 Sheets 19 st us	63 S19st us	199 lbs	13½ oz
	15	64	64 us	200 lbs	
	12	96	96 us	300 lbs	
Beech Nut	8	160 Sheets	160 us	500 lbs	
				2149 lbs	13½ oz

Page 102. Sept 1904

. . . . . .

Beech Nut 1350 lbs

. . . . . .

	29	32 Sheets us		100 lbs
	28	96 Sheets us		300 lbs
	22	32 Sheets us		100 lbs
	21	32 Sheets us		100 lbs
	14	32 Sheets us		100 lbs
	12	96 Sheets us		300 lbs
	8	16 Sheets us		50 lbs
	6	64 Sheets us		200 lbs
Beech Nut	3	32 Sheets us		100 lbs
			Total	1350 lbs

Page 110. Oct 1904.

. . . . . .

Beech Nut 1000 lbs

. . . . . .

	26	32 Sheets us	32 us	100 lbs
	25	64 Sheets us	64 us	200 lbs
	13	32 Sheets us	32 us	100 lbs
	10	32 Sheets us	32 us	100 lbs
	8	32 Sheets us	32 us	100 lbs
	7	32 Sheets us	32 us	100 lbs
Beech Nut	4	96 Sheets us	96 us	300 lbs
			Total	1000 lbs

Page 112. Nov 1904

. . . . . .

Beech Nut 150 lbs

. . . . . .

	28	32 Sheets us	32 us	100 lbs
Beech Nut	3	16 Sheets us	16 us	50 lbs
			Total	150 lbs

Page 116. Dec 1904

. . . . . .

Beech Nut 300 lbs

. . . . . .

	16	32 –		32 us	100 lbs
Beech Nut	2	64	Sheets us	64 us	200 lbs
				Total	300

Page 118. January 1905

. . . . . .

Beech Nut 500 –

. . . . . .

	20	32	Sheets us	32 us	100 lbs
	17	32	Sheets us	32 us	100 lbs
	12	32	Sheets us	32 us	100 lbs
Beech Nut	11	64	Sheets us	64 us	200 lbs
				Total	500 lbs

Page 122 February 1905

. . . . . .

Beech Nut 470 –

. . . . . .

Beech Nut	27	64	Sheets us	64 us	200 lbs
	23	32	Sheets us	32 us	100 lbs
	17	32	Sheets us	32 us	100 lbs
	7	8	Sheets us	8 us	25 lbs
	2	16	Sheets us	16 us	50 lbs
					470 lbs

Page 125 March 1905

. . . . . .

Beech Nut 210 –

. . . . . .

Beech Nut	18	35	Sheets 4 stamps us		110 lbs
	21	32	Sheets us		100 lbs
				Total	210 lbs.

Page 128. April 1905

. . . . . .

Beech Nut 200 lbs

. . . . . .

Beech Nut	18	32	Sheets	us	100 lbs
	28	32	"		100 lbs
				Total	200 lbs

Page 132. May 1905

. . . . . .

Beech Nut 650 –

. . . . . .

Beech Nut	5	48	us		150 lbs
	11	32	us		100 lbs
	23	128	us		400 lbs
				Total	650 lbs

Page 134 June 1905

. . . . . .

Beech Nut 300 –

. . . . . .

Beech Nut	10	32	Sheets	us	100
	19	32	"	"	100
	28	32	Sheets	us	100
				Total	300 lbs

Page 138 July 1905

. . . . . .

Beech Nut 850 –

. . . . . .

		Sheets received	Sheets used	lbs	oz
Beech Nut	10	160	160	500	
	14	48	48	150	
	24	32	32	100	
	28	32	32	100	
			Total	850 lbs	

Page 140 August 1905

. . . . . .

Beech Nut 300 –

. . . . . .

Beech Nut	3	32	32	100	
	28	64	64	200	
			Total	300	lbs

Page 144 Sept 1905

. . . . . .

Beech Nut 400 –

. . . . . .

Beech Nut	5	64	64	200	
	15	32	32	100	
	18	32	32	100	
			Total	400	lbs

Page 146 October 1905

. . . . . .

Beech Nut 420 –

. . . . . .

	28	32	32	100	
	9	6 S 8 st	6 S 8 st	20	
Beech Nut	2	96	96	300	
			Total	420	

Page 150 November 1905

. . . . . .

Beech Nut 600 –

. . . . . .

	29	32	32	100	
	28	32	32	100	
	22	32	32	100	
	18	32	32	100	
	14	32	32	100	
Beech Nut	13	32	32	100	
			Total	600	lbs

Page 152 Dec 1905

. . . . . .

Beech Nut 225

. . . . . .

Beech Nut	13	8	Sheets	25
	27	32		100
	28	32		100
			Total	225 lbs

Page 156 Jan 1906

. . . . . .

Beech Nut 200

. . . . . .

	Date	Sheets Received	Sheets used	Lbs. oz.
Beech Nut	4	32		100
	26	32		100
				200

Page 158 Febr 1906

. . . . . .

Beech Nut 525

. . . . . .

	12	8		25
	9	32		100
	3	32		100
Beech Nut	2	32		100
	16	32		100
	26	32		100
			Total	525 lbs

Page 162 March 1906

. . . . . .

Beech Nut 400

. . . . . .

Page 164 March 1906

. . . . . .

Beech Nut	5	32		100
	14	32		100
	27	32		100
	30	32		100
			Total	400 lbs

Page 165 April 1905

. . . . . .

Beech Nut	6	32		100
	9	32		100
	24	32		100
			Total	300

Page 166 April 1906

. . . . . .

Beech Nut 300 –

. . . . . .

Page 170 May 1903

. . . . . .

Beech Nut 400 –

. . . . . .

Page 173 May 1906

. . . . . .

Beech Nut	5	32		100
	10	64		200
	28	32		100
			Total	400

Page 174 June 1906

. . . . . .

Beech Nut 25

. . . . . .

Page 177 June 1906

. . . . . .

Beech Nut	18		8 Sheets	25
			Total	25

Page 180 July 1906

. . . . . .

Beech Nut			200 –	

. . . . . .

Page 181 July 1906

. . . . . .

Beech Nut	16	32		100
	25	32		100
				200 lbs

Page 187 August 1906

. . . . . .

Beech Nut	1st	64		200
	2	32		100
	10	32		100
	20	32		100
				500 lbs

P. LORILLARD CO. EXHIBIT B—BOOK SHOWING REVENUE STAMPS USED ON TOBACCO BRANDS, 1906-1910.

(NOTE: The Exhibit is a three-hundred page "Day Book" of stamp records and weights for Polar Bear, Old Nut, Honest, Bag Pipe, Beechnut, Cutlass, Scrap Iron, Natural Leaf, etc. All entries are in lead pencil. Only the entries relating to Beechnut are here printed.)

Page 2. Sept 1906

. . . . . .

Beech Nut		300

. . . . . .

Page 5. Sept 1906

. . . . . .

Beech Nut 1st 96 300

Page 6. Oct 196

. . . . . .

Beech Nut 300

. . . . . .

Page 9. Oct 1906

. . . . . .

Beech Nut	12	32	100
	16	32	100
	27	32	100
			300

Page 11 Nov 1906

	Date	Sheets received	Sheets used	Lbs. oz.
				.
	23	32		100
	21	64		200
Beech Nut	6	8 Sheets		25
				325

Page 15. Nov 1906

. . . . . .

Beech Nut 325

Page 17. Dec 1906

. . . . . .

2½ oz Beech Nut 125

. . . . . .

Page 20 Dec 1906

. . . . . .

Beech Nut	1st	8 Sheets	25
	12	32	100
			125

. . . . . .

Page 27 Jan 1907

. . . . . .

Beech Nut 400

. . . . . .

Page 29. Jan 1907

. . . . . .

Beech Nut	3	32	32	100
	21	64	64	200
	29	32	32	100
				400

Page 39. March 1907

. . . . . .

Beech Nut 400

. . . . . .

Page 40. March 1907

	Date	Sheets received	Sheets used	Lbs. oz.
Beech Nut	5	32	32	100
	9	32	32	100
	23	32	32	100
	29	32	32	100
				400

Page 46 Apr 1907

. . . . . .

Beech Nut	4	40	40	125
	8	32	32	100
	11	32	32	100
	22	32	32	100
	29	32	32	100
				525

Page 49 April 1907

. . . . . .

2½ oz Beech Nut 525

. . . . . .

Page 55 May 1907

. . . . . .

Beech Nut	13	8	8	25	
	18	32	32	100	
			Total	125	lbs

Page 57 May 1907

. . . . . .

2½ oz Beech Nut 125

. . . . . .

Page 60. June 1907

. . . . . .

Beech Nut	6	32	32	100	
	24	64	64	200	
				300	

. . . . . .

Page 63. June 1907

. . . . . .

2½ oz Beech Nut 300

. . . . . .

Page 65. July 1907

. . . . . .

2½ oz Beech Nut 325

. . . . . .

Page 66. July 1907

. . . . . .

Beech Nut	10	8	8	25	
	11	32	32	100	
	26	32	32	100	
				325	lbs

[NOTE: error in addition as in the original]

Page 75 August 1907

. . . . . .

2½ oz Beech Nut

. . . . . .

Page 78. Sept 1907

Beech Nut	5	9 – 12 st	9 – 12 st	30
	9	32	32	100
				130

Page 81. Sept 1907

2½ oz Beech Nut			130	

Page 84. Oct 1907

Beech Nut	7	32	32	100
	16	32	32	100
				200

Page 87. Oct 1907

2½ oz Beech Nut			200	

Page 90. Nov 1907

Beech Nut	25	32	32	100

Page 93. Nov 1907

2½ oz Beech Nut			100	

Page 96 Dec. 1907

Beech Nut	18	64	64	200

Page 99 Dec 1907

. . . . . .

2½ oz Beech Nut 200

. . . . . .

Page 102 Jan 1908

. . . . . .

Beech Nut	20	32	32	100	
	22	32	32	100	
	27	64	64	200	
				400	lbs

. . . . . .

Page 105 Jan 1908

. . . . . .

2½ oz Beech Nut 400

. . . . . .

Page 114 March 1908

. . . . . .

Beech Nut

. . . . . .

Page 126. May 1908

. . . . . .

2½ oz Beech Nut 15 32 32 100

. . . . . .

Page 129 May 1908

. . . . . .

2½ oz Beech Nut 100

. . . . . .

Page 144 Aug 1908

. . . . . .

Beech Nut 17 8 Sheets 8 25

. . . . . .

Page 147 Aug 1908

. . . . . .

2½ oz Beech Nut 25

. . . . . .

Page 156 Oct 1908

Beech Nut	1	32		32	100
	9	32		32	100
	26	32		32	100
					300

Page 159 Oct 1908

2½ oz Beech Nut			300		

Page 162 Nov 1908

Beech Nut	3	32		32	100

Page 165 Nov 1908

2½ oz Beech Nut			100		

Page 168 Dec 1908

Beech Nut	7	32		32	100

Page 171 Dec 1908

2½ oz Beech Nut			100		

Page 186 March 1909

Beech Nut	9	64		64	200

Page 189 March 1909

2½ oz Beech Nut			200		

Page 195 April 1909

2½ oz Beech Nut

Page 197 May 1909

2½ oz Beech Nut

Page 203 June 1909

2½ oz Beech Nut 100

Page 204 June 1909

Beech Nut	23	32	32	100

Page 209 July 1909

2½ oz Beech Nut 125

Page 210 July 1909

Beech Nut	19	8	8	25
	29	32	32	100
				125

Page 228 Oct 1909

2½ oz Beech Nut

Page 234 Nov 1909

. . . . . .

2½ oz Beech Nut

. . . . . .

Page 242 Dec 1909

. . . . . .

2½ oz Beech Nut

. . . . . .

Page 248 Jan 1910

. . . . . .

2½ oz Beech Nut

. . . . . .

Page 256 Febr 1910

. . . . . .

2½ oz Beech Nut

. . . . . .

Page 260 March 1910

. . . . . .

2 4-2 oz Beech Nut Samples to Mr. Hutchings with Bag Pipe tob 4 8 oz

. . . . . .

Page 261 March 1910

. . . . . .

2½ oz Beech Nut 5 oz

. . . . . .

Page 262 March 1910

. . . . . .

2½ oz Beech Nut 12 2 st as sample Bag Pipe 2 st 5 oz

. . . . . .

Page 269 April 1910

2½ oz Beech Nut 25

Page 270 April 1910

2½ oz Beech Nut 11 8 Sheets 8 25

Page 276 May 1910

2½ oz Beech Nut

Page 284 June 1910

2½ oz Beech Nut

P. LORILLARD CO. EXHIBIT C—SALES SHEETS SHOWING SHIPMENTS BEECHNUT, 1904-1910.

Sheet 1.

SALES 1901

	Polar Bear	Old Nut	Total
Sept.	325835-10		325835-10
Oct.	603197-2	63245	666442-2
Nov.	287550-10	23005	310555-10
Dec.	689189	24600	713789
Total	1905772-6	110850	2016622-6

SALES 1902

			Bag Pipe	Cutlass	
Jan.	191520	9711-4			
Feb.	280907-13	7900		4805	201231-4
March	527390	13615		2850	293612-13
April	705040	14030		1350	543855
May	358704-1	16495-12		2100	720420
June	625327-8	31150	65369-4	104498	377299-13
July	195281-4	12000	298602	94008	826344-12
Aug.	434201-4	11950	169044	81325-14	599891-4
Sept.	441833-4	14700	176976	64080	696521-2
Oct.	655873-10	14518-12	227712	65448	697589-4
Nov.	396785-15	10600	181392	23904	963552-6
Dec.	447349-3	7600	173928	2832	612681-15
Total	5260213-14	164270-12	1293023-4	447200-14	631709-3
					7164708-12

SALES 1903

Jan.	344111-14	8400	37866	11856	
Feb.	679885-10	12600	40590	18360	402233-14
March	602870	13100	70002	26520	751435-10
Apr.	485705	12365	149646	25200	712492
May	477515	13940	163569-9	34824	672916
June	677763-12	25770	166956	32952	689848-9
July	258577-8	8500	153378	96105	903441-12
Aug.	306250	13200	281088	132025	516560-8
Sept.	461075-8⅓	18300	41812	30100	732563
Oct.	419915	11275	63221-12	32750	551287
Nov.	470978-7	13101-14	84972-9	15525	527161-12
Dec.	306705-9⅓	10281-14	80052	32325	584577-14
Total	5491353-5	160833-12	1333153-14	488542	429364-7⅓
					7473882-15

3019

Sheet 2.

SALES 1904

	Polar Bear	Old Nut	Bag Pipe	Cutlass	Beechnut		
Jan.	462040	23000	127566	12925	1200		626731
Feb.	374256-2	14582-13	90012	26100			504950-15
Mch.	414280	25275	113682	35425	1800		590462
April	514367-13	20357-13	150237-9	38500	1025		724488-3
May	498062-8	19211-4	149784	49700	800		717557-12
June	480002-7	24027-3	142969-2	27625	800-15		675424-11
July	481446-6½	23876-1½	135180	45750	200-5		686452-13
Aug.	484032-13	25275-10	126186	135750	2150		773394-7
Sept.	567555	25685	149928	30900	1350		775418
Oct.	502261-4	23851-6½	137662-5	26825	900		691499-15½
Nov.	481492-4	27910-10	153912-12	19100	250		682665-10
Dec.	471866-3½	25825-12½	144228-15	7625	300		649845-15
Total	5731662-15	278878-9½	1621348-11	456225	10776-4		8098891-5½

SALES 1905

	Polar Bear	Old Nut	Bag Pipe	Cutlass	Beechnut		
Jan.	570620-11	30750-10	137934-12	3350	500		743156-1
Feb.	527486-4	24611-4	135805-14	1650	475		690028-6
March	579425-4½	27325-10	141954-12	2500	210		751415-10½
April	402197-3	24420-2½	151884-15	5775	200		584477-4½
May	400226-4	27190-10	172788-12	4025	650		604880-10
June	582692-11½	22846-6½	187152-14	8900	300		801893
July	565579-5	21655-10	203796-15	10325	850		802206-14
Aug.	559428-7	23021-9	187104-12	12250	300		782104-12
Sept.	552269-6	26379-8	191894-4	7675	400		778618-2
Oct.	558830-11 1/6	25262-9½	184679-12	5725	420		774918-⅔
Nov.	616030	20225-12½	181316-10	6550	497-3		824619-9½
Dec.	363462-8 5/6	20640-10½	116353-2	9000	327-13		509784-2⅓
Total	6278248-12	294330-6½	1992668-1	77725	5130		8648102-3½

SALES 1906

	Polar Bear	Old Nut	Honest	Bag Pipe	Cutlass	Beechnut	Col. Long Leaf	
Jan.	681419-3	19856-6½		219294-6	10825	200		931594-15½
Feb.	701145-1	16270-10		252380-10	14925	525		985246-5
March	954451-15	16410-12½		293493-6	4825	400		1269581-1½
April	334869-2½	13980-7½		136282-5	5800	300		491231-15
May	504184-4	17500-10	39937-3	165260-13	4650	400		731932-14
June	515883-7	21225-12½	79594	209338-5	8875	25		834941-8½
July	565116	16517-10	114537	251358-12	6725	200		954454-6
Aug.	541701-4	17690-10	168001-11½	294627-12	5850	500		1028371-5½
Sept.	598077-7	15984-12½	140524-½	285459-3	5100	300		1045445-7
Oct.	435210-11	17265-10	197579-6	338211-3	6900	300		995466-14
Nov.	447866-4	13565-10	216107-5½	296175-14	9750	325		983790-1½
Dec.	559287-1	15670-12½	359979-13½	283325-4½	3225	125	1005	1191612-15½
Total	6819211-11½	201939-12	1316260-8	3015207-13½	87450	3600	1005	11443669-13

SALES 1907

	Polar Bear	Old Nut	Honest	Cutlass	Bag Pipe	Beech Nut	Hats Scrap	Col. Long Leaf	Total
Jan.	618399-2	14735-7½	216603-2	7200	271588-5	400		10798-10	1139724-10½
Feb.	497927-1	11705-10	265989-13½	4825	221920-2			39038-10	1041406-4½
Mch.	443331-4	16895-12½	342808-2	4300	175703-5½	400		28849-6	1012287-14
Apr.	502784-12⅜	18641-4	350452-8	5800	193562-8	525		2708-4	1074474-4⅜
May	522103-4	19040-10	518600-12½	3400	196010-15½	125		650-10	1259931-4
June	435982-2	14550-12½	377603-14½	3850	141070-10	300		125	973482-7
July	463848-10	16890-10	534132-8	6800	139791-9	225	30		1161718-5
Aug.	443177-8	16390-12½	480779-11	5400	133469-6				1079217-5½
Sept.	424691	14745-10	596782-8	4950	132629-1	130			1173928-3
Oct.	418813-4	12665-10	590002-8	6300	101849-6	200			1129830-12
Nov.	303913-4	12579-13½	425326-3	2100	84972-5½	100			828991-10
Dec.	330109-⅜	11250-10	591922-8	3350	64932-5½	200			1001764-8 1/6
Total	5405080-4⅛	180092-10½	5291004-2½	58275	1857499-15	2605	30	82170-8	12876757-8⅛

SALES 1908

	Polar Bear	Old Nut	Honest	Cutlass	Bag Pipe	Beech Nut			
Jan.	343027-4	14640-10	663882-8	5925	87987-8	400			1015862-14
Feb.	286388-4	11190-12½	674405	1550	75407-13				1048941-13½
Mch.	320714	12580-10	757118-2	6775	68877-10				1166065-6
Apr.	350983-14	14360-10	825067-10½		68050				1258462-2½
May	336758-12	14190-12½	889204-8½		78105-12½	100			1318369-13½
June	383868	14985-10	1039265-7½		64868-3				1502987-4½
July	371636	17110-10	1038983-4½		71345-10				1499075-8½
Aug.	328195-2	13435-12½	1084591-9		58951-6½	25			1485198-14
Sept.	333857-8	15490-10	1088888-2		56035-2				1494271-6
Oct.	308174-4	11735-12½	1174020-7½		49066-4½	300			1543296-12½
Nov.	297459-8	13120-10	1103687-8		46860-10	100			1461218-4
Dec.	323824-2	12640-10	1199505-2½		42840-10	100			1578910-8½
Total	3984886-10	165483-2	11538619-6	14250	768396-9½	1025			16472660-11½

SALES 1909

	Polar Bear	Old Nut	Honest	Natural Leaf	Bag Pipe	Beech Nut	Scrap Iron	
Jan.	280877-2	14730-12½	1152395-15	Cutlass	39727-10½			1487731-8
Feb.	236597-4	9515-10	1079374-6		32185-15			1357673-3
Mch.	279438-8	17562-8	1278947-13		59264-11	200		1635413-8
Apr.	257785-2	10809-6	1270924-6		36127-3			1575646-1
May	284417-14	16599-6	1320388-14½	1862-13	34466-3			1657735-2½
June	271104	14459-12½	1506448-2	3002-14⅜	33233-10½	100		1828348-1⅜
July	288909-6	17189-6	1537019-13½	2220	36160-3½	125		1881623-13
Aug.	275106	18844-15½	1553402-13	3330-6⅜	26895-8½			1877579-11⅜
Sept.	262951-4	19114-13	1426279-13½	4680-13⅛	56811-4			1769837-15 5/6
Oct.	250828-4	23130	1430323-2	6901-10⅜	17170-10			1728353-10⅜
Nov.	240634-14	19045-2½	1495858-7 5/6	4710-13⅛	22607-12		64816-6	1847673-7⅜
Dec.	225877-12	29630-15	1510618-2	2551-7⅛	20660-15		32964-14	1822304-1⅛
Total	3154527-6	210632-11	16561981-12⅛	29260-15	415312-10	425	97781-4	20469921-10⅛

PATENT OFFICE LORILLARD EXHIBITS.

1203

Sheet 4.

SALES 1910

	Polar Bear	Old Nut	Honest	Natural Leaf	Bag Pipe	Beech Nut	Scrap Iron	
Jan.	237829-12	15177-6	1500370-7½	4620 13⅛	23752-4		21255-11	1803006-5 5/6
Feb.	205130-8	11343-4	1278326-11½	4290-13⅛	18052-4		17114-8	1534258-5/6
Mch.	243637-12	14106-4	1642021-14	4080-13⅛	21426-14		15793-2	1941066-11⅛
Apr.	230334-12	15171-2	1512266-1½	4442-4⅜	23461-9	25	25798-8	1810899-12 1/6
May	269251-8	21087-3	1688776-6½	3076-2⅛	23051-4		22753-11	2027996-2 5/6
June	255684-9⅜	19691-4	1894032-8	4020-10	26526-4		31211-6	2231166-9⅜
July	207738-12	19719-11	1266214-13½	2620-1½	23716-9		22665-14	1542675-13
Aug.	229524	21335-10	1768087-8	4739-6	19866-4		34147-8	2077700-4
Sept.	242142	21360-4	1670575-1	4388-14	24106-4		36116-8	1998688-15
Oct.	234559-6	17185-14¾	1471471-14	4607-14¾	21082-3		43671-1	1792578-6½
Nov.	230256-4	14605-14	1439169-¼	3081-14	20087-8		44191-12	1751392-4¼
Dec.	226924-4	21398-14½	1400001-6¾	1804-1½	24934-13½		27664-6	1702727-14¼
Total	2813013-7⅜	212183-2¼	18531313-12½	45773-12¾	270064-½	25	341783-15	22214157-2⅜

SALES 1911

Jan.	232056	15974-14	1488784-14	2616-11	21542-3		35798-4	1796773-3
Feb.	215148	14420	1370246	2384-4¼	17006-14		28897-6	1648102-8¼
Mch.	238270-14	17757-4½	1534152-12	3150-7	19185-5		30284-10	1842801-4½
Apr.	220420-6	17017-14½	1408625-¾	1071-8¾	18546-9		30295-14	1695977-5
May	250517-12	13956-10	1618278-2¼	4057-15	17926-4		26346-12	1931083-7¼
June	253184-14	18245-12	1658968-6	1921-15	20723-12		27637-8	1980682-3
July	230811-12	16836-9½	1631870-2¾	1791-8¾	17662-13		29477-6	1928450-4
Aug.	235074-6	17770-8	1521656-1	2551-15	17745		28863-8	1823661-6
Sept.	231899-8	18192-10½	1522432-11¼	2016-8¾	18905-5		26043-6	1819490-1½
Oct.	236641-4	15865-8	1471153-2	1228-15	18123-12		29078-12	1772091-5
Nov.	205872-12	15947-14	1279390-2	1512-7	13776-4		27380-1	1543879-8
Dec.	193985	16630-½	1210385-12¾	1350-¾	18114-1		23194-14	1463660-5
Total	2743882-8	198615-9½	17715943-2¾	25654-12¼	219258-7		343298-5	21246652-12½

SALES 1912

		Tomahawk					Panhandle		
Jan.	219820-12		16278-10	1451869-7½	2336-11	14225		24679-8	1729210-½
Feb.	190540-1		12727-6½	1319070-15½	856-3	12256-4		19607-5	1555058-3
Mch.	195567-4	50420-4	19198-11½	1275691	693-8¾	13591-4		15853-2	1571015-2¼
Apr.	192724	42904-15½	20169-10	1308241-¼	1323-7	16322-8		21103-14	1602789-6¾
May	228641-8	33229-½	25900-5½	1414580-12½	757-5	17491-9		21993-9	1472594-1½
June	179104-2	37327-1¼	16396-6	1377141-4	1370-2¼	12593-2	29313-10½	18963-12	1672209-8
July	254463-14	44557-7	22048-11½	1580950-9¼	2557-13½	21519-3	294955-1	23525-12	2244578-2¼
Aug.	212731-12	43387-9½	24900-7½	1405051-10	2008-3¾	17855-5	221861-12	23937-6	1951734-1¾
Sept.	187349	44529-3	16072-14	1408931-2	745-15	11146-4	179527-8	17038-8	1865340-6
Oct.	190269-15¼	41007-15	16737-12	1344276-11	1100-5	14292-8	198327-6	19216-8	1825239-¼
Nov.	177467-2	36955-15½	18614-10¾	1296183-2½	586-⅛	9537-13	162966-4½	20899-14	1723210-14¾
Dec.	178781-3	24077-4	16353	1262557-6½	1169-14	11167-2½	127648-3½	21966	1643720-1½
Total	2407460-9¼	398396-11¼	225398-9¼	16444545-1	15505-8¾	171997-14½	1214599-13½	248785-2	21126689-5½

[Note: Sheets 5 and 6, "Sales 1913," show no "Beech Nut" entries.]

P. LORILLARD CO. EXHIBIT D—MEMORANDUM BOOK OF SHIPMENTS.

[Note: Only those pages showing "Beech Nut" entries are here printed.]

BEECHNUT.

1904.

		Ave
Jan	1200	
Feb	——	—
Mar	1800	67
Apr	1025	39
May	800 4825	
June	800–15/ 5625–15/	31
July	200–5/16 5826–4/16	8
Aug	2150 7976–4/	80
Sept	1350 9326–4/	54
Oct	900 10226	35
Nov	250 10476	10
Dec	300 10776	12

1905.

Jan	500	20
Feb	475 975	21

Mch	210 1185	8
Apr	200 1385	8
May	650 2035	26
June	300 2335	12
July	850 3185	34
Aug	300 3485	11
Sep	400 3885	16
Oct	420 4305	16
Nov	497–3/ 4802–3/	20
Dec	327–13/ 5130	13

BEECHNUT.

1906.

Jan	200	08
Feby	525 725	23
Mar	400 1125	15
Apr	300 1425	12
May	400 1825	15
Jun	25 1850	01

July	200	08
	2050	
Aug	500	19
	2550	
Sept.	300	13
	2850	
Oct	300	11
	3150	
Nov	325	13
	3475	
Dec	125	05
	3600	

1907.

BEECHNUT.

Jan	400	15
Feby	——	—
	400	
Mar	400	15
	800	
Apr	525	20
	1325	
May	125	5
	1450	
June	300	12
	1750	
	225	9
	1975	
	——	
	1975	
	130	5
	2105	

	200	7
	2305	
	100	4
	2405	
	200	8
	2605	
	1908.	
Jan	400	15
Feb	——	—
	400	
Mar	——	—
	400	
Apr		—
	400	
May	100	4
	500	
Jun	——	—
	500	
July	——	—
	500	
Aug	25	1
	525	
Sept		—
	525	
Oct	300	11
	825	
Nov	100	4
	925	
Dec	100	4
	1025	

1909.

BEECHNUT.

Jan	——	—
Feby	——	—
Mar	200 200	7
Apr	200	—
May	200	—
June	100 300	4
July	125 425	5
Aug	—— 425	—
Sept	—— 425	—
Oct	—— 425	—
Nov	425	—
Dec	425	—

1910.

Jan	——	—
Feby	——	—
Mar	——	—
Apr	25 25	1

May	25	—
June	25	—
July	25	—
Aug	25	—
Sept	25	—
Oct	25	
Nov	25	
Dec	25	—

BEECH NUT 1915.

Jan		July	1062765 2763807–8
Feb	11251–11½ 11251–11½	Aug	688985–7½ 3452792–15½
Mar	49353–7 60605–2½	Sept	806894–6 4259687–5½
April	296673–12 357278–14½	Oct	1053655–2¾ 5313342–8¼
May	596956–11½ 954235–10	Nov	1035380–6¼ 6348722–14½
June	746806–14 1701042–8	Dec	1029055–3½ 7377778–2

BEECH NUT 1916.

Jan	1079725–11	July	1446125–15¾ 8643940–¾
Feb	1018382–1 2098107–12	Aug	1688371–9½ 10332311–10¼
Mar	1343017–10 3441125–6	Sept	1478014–6½ 11810326–¾
Apr	1231666–14 4672792–4	Oct	1574509–1 13384835–1¾
May	1325275–8¾ 5998067–12¾	Nov	1425644–10¾ 14810479–12½
June	1199746–4¼ 7197814–1	Dec	1485590–14 16296070–10½

BEECH NUT.

1917.

Jan	1580759–12	July	1466712–½ 10198897–1½
Feb	1637521–12 3218281–8	Aug	2459672–7 12658569–8½
Mar.	1491763–12¼ 4710045–4¼	Sept	1997955–7½ 14656525
Apr.	1444834–2 6154879–6¼	Oct	2109208–8½ 16755733–8½
May	1081891–2¾ 7236770–9	Nov	1599131–15½ 18364865–8
June	1495414–8 8732185–1	Dec	1531816–11½ 19896682–3½

BEECH NUT.

1918.

Jan.	918236–4	July	1518517–2
			11960671–5¾
Feb	2103950–12¼	Aug	1564699–14¼
	3022187–¼		13525371–4
Mar	2037787–2¾	Sept	1203866–13¾
	5059974–3		14729238–1¾
Apr	2197612–6½	Oct	1402560–6¾
	7257586–9½		16131798–8½
May	1828721–13	Nov	1364299–14
	9086308–6½		17496098–6½
June	1355845–13¼	Dec	1640674–2
	10442154–3¾		19136772–8½

BEECH NUT.

1919.

[NOTE: No entries on the page headed "Beech Nut 1919."]

P. LORILLARD CO. EXHIBIT E—COPIES OF BEECH-NUT INVOICES, P. LORILLARD COMPANY.

No Claims or return of goods allowed unless made within five days after receipt of Goods.
No insurance on goods unless so ordered.

P. LORILLARD COMPANY

Established 1760. Incorporated.

[Cut]

TOBACCO—CIGARETTES—CIGARS
119 WEST 40TH STREET

MS Mid 9749 NEW YORK, May 1st, 1915.

Sold to THOMAS C. JENKINS,
Pittsburgh Terminal Warehouse
South Side, Pittsburgh, Pa

Terms Cash:

We allow a discount of 2 % for cash in 10 days from date of bill, payable in New York exchange

No Payment (except at this office) or Advances of any Nature on our Account are Authorized except on our written order.

Goods sold upon the express condition that transportation is at purchasers risk.

Shipped from Middletown, Ohio			Order of April 22nd.	
281–4 10-1¼ gr Beechnut 5¢ pkg	12½ Gro	5.76	72.00	
31–4 Free	Less 10%		7.20	
				64.80
200 pkgs Beechnut #90786	Free			

[P. Lorillard Co. Bill Head.]

19654-a NEW YORK, July 8th, 1915.

Sold to THOMAS C. JENKINS,
S. S. Pittsburgh, Pa.

Shipped from Middletown, Ohio — Order of J June 26th

150–1¼ gro Honest Scrap	5¢ pkg.	187½ gr	6.00	1125.00
50–1¼ gro Beechnut	"	62½ gr	5.76	360.00
				1485.00
1000 pkgs Beech Nut Free		Less 10%		148.50
				1336.50

Order No. 93488
Balance of order will follow.

[P. Lorillard Co. Bill Head.]

Mid 49791 NEW YORK, Jan 14/16

Sold to THOMAS C. JENKINS,
Terminal Warehouse Sta S. S.
Pittsburgh Pa.

Shipped from Middletown Ohio — Order of Jan 8

1– 1⅓ Gro Bag Pipe	5¢ Pkg	1⅓ Gro	5.88	7.80
50– 1¼ Gro Beechnut	"	62½ Gro	6.00	375.00
100– 1¼ Gro Honest Scrap	"	125 Gro	6.00	750.00
25– ½ Gro Honest Scrap	"	12½ Gro	6.00	75.00
20– 1¼ Gro Polar Bear	"	25 Gro	5.76	144.00
5– ½ Gro Polar Bear	"	2½ Gro	5.76	14.40
				1366.24
		Less 10%		136.62
#5525				1229.62

[P. Lorillard Co. Bill Head.]

Mid 76128 NEW YORK, July 11. 1916

Sold to THOMAS C. JENKINS,
Pittsburgh Terminal Warehouse
Pittsburgh Pa.

Shipped from Middletown Ohio Order of J June 22

4– 1¼ Gro Beechnut 5¢ pkg	5 Gro	6.00	30.00	
	Less 10%		3.00	
				27.00

To E Strong Cadiz Ohio

[P. Lorillard Co. Bill Head.]

108295-A NEW YORK, Jan 5/17

Sold to THOMAS C. JENKINS,
Pittsburgh Terminal Warehouses
So. Side Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J Dec. 23

100– 1¼ Gro Beech Nut	5¢ pkg	125 gro	6.00	750.00	
25– ½ gro Beech Nut	"	12½ gro	6.00	75.00	
20– 1¼ gro Polar Bear	"	25 gro	6.00	150.00	
10– ½ gro Polar Bear	"	5 gro	6.00	30.00	
				1005.00	
		Less 10%		100.50	
					904.50

#24135
Balance of order will follow.

[P. Lorillard Co. Bill Head.]

LW 22205-B NEW YORK, July 12/17

Sold to THOMAS C. JENKINS,
Pittsburgh Terminal Warehouse S. S.
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J June 12

100– 1¼ Gro Beech Nut 5¢ pkg	125 Gro	6.00	750.00	
	Less 10%		75.00	
				675.00

[P. Lorillard Co. Bill Head.]

R/S Mid 62005 NEW YORK, Jan 5-1918
Sold to THOMAS C. JENKINS,
Pittsburgh Term Warehouse Co.
Pittsburgh Pa.

Shipped from Middletown Ohio Order of J Dec 29-

100–	½ Gro Beechnut 10¢ pkg.	50	gro	11.52	576.00	
200–	1¼ Gro Beechnut 10¢ pkg.	250	gro	11.52	2880.00	
200–	½ Gro Honest 10¢ pkg.	100	gro	11.52	1152.00	
200–	1¼ Gro Honest Scrap 10¢	250	gro	11.52	2880.00	
25–	1¼ Gro Polar Bear 10¢ pkg.	31¼	gro	11.52	360.00	
50–	½ Gro Polar Bear 10¢ pkg.	25	gro	11.52	288.00	
					8136.00	
				Less 10%	813.60	7322.40

#38498

[P. Lorillard Co. Bill Head.]

R/S Mid 89025 NEW YORK, July 8-18
Sold to THOMAS C. JENKINS Co.,
Pittsburgh Term Warehouse S. C.
Pittsburgh Pa.

Shipped from Middletown Ohio Order of J Jun 29

50–10	Pl Climax 35¢ thn 3x12 w. b.	500	pl.	.28	140.00	
15– 6	Pl Climax 70¢ thk	90	pl.	.56	50.40	
100–	1¼ Gro Beechnut 10¢	125	gro	11.52	1440.00	
					1630.40	
				Less 7% on claim	13.33	
						1473.07

#44244

[P. Lorillard Co. Bill Head.]

AC Mid 14040 A NEW YORK, Jan 14, 1919.
Sold to THOS. C. JENKINS Co.,
Pittsburgh Term. Warehouse, So. Side
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J 11/30

150–	1¼ Gro Beech Nut	10¢	187½	Gro	11.52	2160.00
100–	½ Gro Beech Nut	10¢	50	Gro	11.52	576.00
100–	1¼ Gro Hon Scrap	10¢	125	Gro	11.52	1440.00
						4176.00
	Order #49334.		Less 10%			417.60
						3758.40

Balance of Order will follow.

[P. Lorillard Co. Bill Head.]

AC Mid 63064 NEW YORK, July 12, 1919
Sold to THOS. JENKINS Co.,
Pittsburgh Term. Warehouse, S. S.
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of

150–	2 Gro Beech Nut	10¢	300	Gro	11.52	3456.00
75–	⅔ Gro Beech Nut	10¢	50	Gro	11.52	576.00
150–	1¼ Gro Hon Scrap	10¢	187½	Gro	11.52	2160.00
75–	½ Gro Hon Scrap	10¢	37½	Gro	11.52	432.00
25–	2 Gro Polar Bear	10¢	50	Gro	11.52	576.00
25–	⅔ Gro Polar Bear	10¢	16⅔	Gro	11.52	192.00
						7392.00
	Order #5720		Less 10%			739.20
						6652.80

[P. Lorillard Co. Bill Head.]

City-4561 NEW YORK, June 3, 1915

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of A. E. H. 5-27-15

281– 4	Beech Nut 5¢ pkg	12½ Gro	5.76	72.00	
31– 4	Free Beechnut "	Less 10%		7.20	
		200 pkgs Free			64.80

L. & W. #3014
Delivered by our Mr. S. H. Handy, 5-24-15.

[P. Lorillard Co. Bill Head.]

22827 NEW YORK, July 27/15

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J July 16

5– 1¼ gr Beech Nut	5¢ pkg	6¼ gr	5.76	36.00	
10 5/9 gr Beech Nut	"	5 5/9 gr	5.76	32.00	
50– ¼ gr Honest Scrap	"	62½ gr	6.00	375.00	
50– ½ gr Honest Scrap	"	25 gr	6.00	150.00	
				593.00	
		Less 10%		59.30	533.70

[P. Lorillard Co. Bill Head.]

Mid 48096 NEW YORK, Jan 4, 1916

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J Dec. 24

10– 1¼ Gro Beechnut 10c	5¢ pkg	12½ Gro	6.00	75.00	
5– 1¼ Gro Polar Bear	"	6¼ Gro	5.76	36.00	
10– ¼ Gro Polar Bear	"	5 Gro	5.76	28.80	
				139.60	
		Less 10%		13.98	
					125.82

[P. Lorillard Co. Bill Head.]

Mid 82066 NEW YORK, Aug. 12, 1916

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J July 25

15– 1¼ Gro Beechnut 5¢ pkg	18¾ Gro	6.00	112.50	
	Less 10%		11.52	
				101.25

[P. Lorillard Co. Bill Head.]

110876 NEW YORK, Jan 18/17

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, O. Order of J Jan. 8

30– 1¼ Gro Beech Nut 5¢ pkg	37½ Gro	6.00	225.00	
30– 1¼ Gro Honest Scrap "	37½ Gro	6.00	225.00	
30– ½ Gro Honest Scrap "	15 Gro	6.00	90.00	
			540.00	
	Less 10%		54.00	
				486.00

[P. Lorillard Co. Bill Head.]

LW 20630-B NEW YORK, July 21/17

Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, O Order of J May 21

10– 1¼ Gro Honest Scrap 5¢ pkg	12½ Gro	6.00	75.00	
15– 1¼ Gro Beech Nut "	18¾ Gro	6.00	112.50	
			187.50	
	Less 10%		18.75	
				168.75

Balance of order will follow.

[P. Lorillard Co. Bill Head.]

R/C Mid 61507 NEW YORK, Feb. 5-18-
Sold to S. EWART & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J Jan 3

10–	1¼	Gro Polar Bear 10¢	12½ gro	11.52	144.00
50–	1¼	Gro Honest Scrap 10¢	62½ gro	11.52	720.00
50–	½	Gro Honest 10¢	25 gro	11.52	288.00
50–	1¼	Gro Beechnut 10¢	62½ gro	11.52	720.00
50–	½	Gro Beechnut 10¢	25 gro	11.52	288.00
					2160.00
			Less 10%		216.00 944.00

[P. Lorillard Co. Bill Head.]

R/S Mis 6600 NEW YORK, NOV. 16-1918
Sold to S. EWART Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J Oct. 5-20-

50–	1¼	Gro Beechnut 10¢	62½ gro	11.52	720.00
10–	6	Pl Climax 70¢ thk.	60 pl.	.56	33.60
5–10		Pl Climax 35¢ thn	50 pl.	.28	14.00
					767.60.
			Less 7% on Climax		3.33
					764.27
			Less 10% on Scrap		72.00 692.27

[P. Lorillard Co. Bill Head.]

AC Mid 12344 D NEW YORK, Jan 6, 1919
Sold to S. EWART,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of S 11/16

25–	½	Gro Beech Nut 10¢	12½ Gro	11.52	144.00
			Less 10%		14.40
					129.60

[P. Lorillard Co. Bill Head.]

AC Mid 71731 A
Sold to S. EWART Co., NEW YORK Sept. 16, 1919
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of

5–2	Gro	Polar Bear	10¢	10	Gro	11.52	115.20
10–⅔	Gro	Polar Bear	10¢	6⅔	Gro	11.52	76.80
50–2	Gro	Beech Nut	10¢	100	Gro	11.52	1152.00
50–⅓	Gro	Beech Nut	10¢	33⅓	Gro	11.52	384.00
16–2	Gro	Hon Scrap	10¢	32	Gro	11.52	368.64
10–⅔	Gro	Hon Scrap	10¢	12⅔	Gro	11.52	145.92

Balance of Order will follow. 2242.56
Less 10% 224.26
2018.30

[P. Lorillard Co. Bill Head.]

19069 NEW YORK June 30th, 1915.
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J June 24th

112–8	4–1¼Gr Beech Nut	5¢ pkg	5 gr	5.76	28.80
12–8	Free 80 pkgs Beechnut	Free		Less 10%	2.88
					25.92

[P. Lorillard Co. Bill Head.]

20239 NEW YORK July 8th, 1915.
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.
Terms Cash:

Shipped from Middletown, Ohio Order of J July 2nd

4–1¼ gr	Beechnut	5¢ pkg	5 gr	5.76	28.80
	Beechnut "	80 pkgs	Free	Less 10%	2.88
					25.92

[P. Lorillard Co. Bill Head.]

Mid 50120 NEW YORK Jan 14. 1916
Sold to ARBUCKLES & Co.
Pittsburgh, Pa.

Shipped from Middletown Ohio Order of J Jan 8

15–1 ¼ Gro Beechnut 5¢Pkg	18¾ Gro	6.00	112.50	
		Less 10%	11.52	
				101.25

[P. Lorillard Co. Bill Head.]

EW Mid 79146 NEW YORK July 19. 1916
Sold to ARBUCKLES & Co.,
Pittsburgh Pa.

Shipped from Middletown Ohio Order of J July 10

2–1				
20–1¼ Beechnyt 5¢ pkg	25 Gro	6.00	150.00	
		Less 10%	13.00	
Balande of order will follow				135.00

[P. Lorillard Co. Bill Head.]

LW 209–A NEW YORK Feb. 7/17
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J Jan 22

25–1 ¼ Gro Beech Nut 5¢ pkg	31¼ Gro	6.00	187.50	
		Less 10%	18.75	
Balance of order will follow.				168.75

[P. Lorillard Co. Bill Head.]

LW 21001–B NEW YORK July 21/17
Sold to ARBUCKLES & COMPANY,
Pittsburgh, Pa.

Shipped from Middletown, O Order of J May 21

20–1¼ Gro Beech Nut 5¢ pkg	25 Gro	6.00	150.00	
15–1¼ Gro Polar Bear "	18–¾ Gro	6.00	112.50	
			262.50	
(Balance of order will follow)		Less 10%	26.25	
				236.25

[P. Lorillard Co. Bill Head.]

R/S Mid 64579 NEW YORK Feb. 2–1918
Sold to ARBUCKLES & Co.,
Pittsburgh Pa.

Shipped from Middletown Ohio Order of S Jan 26-

50–1¼ Gro Beechnut 10¢	62½gro	11.52	720.00	
50–1¼ Gro Honest 10¢	62½gro	11.52	720.00	
			1440.00	
#7		Less 10%	144.00	1296.00

[P. Lorillard Co. Bill Head.]

R/S Mid 94968 NEW YORK, Aug. 16/18
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of S Aug 6

50–1¼ Gro	Honest	10¢	62½ Gro	11.52	720.00	
200–1¼ Gro	Beechnut	10¢	250 Gro	11.52	2880.00	
					3600.00	
			Less 10%		360.00	3240.00

[P. Lorillard Co. Bill Head.]

A Mid 18325 NEW YORK Jan 14, 1919
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of J 1/2

100–	1¼ Gro	Beech Nut	10¢	125	Gro	11.52	1440.00	
125–	1¼ Gro	Hon Scrap	10¢	156¼	Gro	11.52	1800.00	
25–	1¼ Gro	Polar Bear	10¢	31¼	Gro	11.52	360.00	
							3600.00	
						Less 10%	360.00	3240.00

[P. Lorillard Co. Bill Head.]

AC Mid 75239 A NEW YORK Aug 26, 1919
Sold to ARBUCKLES & Co.,
Pittsburgh, Pa.

Shipped from Middletown, Ohio Order of

50–	2 Gro	Beech Nut	10¢	100	Gro	11.52	1152.00	
30–	2 Gro	Hon Scrap	10¢	60	Gro	11.52	691.20	
							1843.20	
Balance of Order will follow.						Less 10%	184.32	1658.88

[P. Lorillard Co. Bill Head.]

2252 NEW YORK July 12, 1915.
Sold to UNITED CIGAR STORE Co.,
44 W. 19th St.,
New York City, N. Y.

Shipped from Middletown, Ohio Order of J July 3

2–1⅓ Gro	Bag	Pipe	5¢ pkg	2⅔	gr	5.88	15.68	
4–1¼ gr	Beech	Nut	"	5	gr	5.76	28.80	
							44.48	
#N–57507						Less 10%	4.45	40.03

[P. Lorillard Co. Pill Head.]

22844 NEW YORK July 24, 1915
Sold to UNITED CIGAR STORES Co.,
44 West 18th St.,
New York, N. Y.

Shipped from Middletown, Ohio Order of J July 17

2–1⅓ gr Bag Pipe	5¢ Pkg	2⅔ gr	5.88	15.68	
8–1¼ gr Beech Nut	"	10 gr	5.76	57.60	
				73.28	
		Less 10%		7.33	
#N 60293					65.95

Depot c/o Bush Terminal Co., 36th St. Sta. Brooklyn, N. Y.

[P. Lorillard Co. Bill Head.]

Mid 47494 NEW YORK Jan 3. 1916
Sold to UNITED CIGAR STORES Co.
314 W. Superior St.
Chicago Ill.

Shipped from Middletown Ohio Order of S Jan 3

10– 1¼ Gro Beechnut 5¢ Pkg	12½ Gro	6.00	75.00	
40– 1¼ Gro Polar Bear	50 Gro	5.76	288.00	
			363.00	
	Less 10%		36.30	
# 681996				
# 81997				326.70

[P. Lorillard Co. Bill Head.]

Mid 57574-B NEW YORK July 6/16
Sold to UNITED CIGAR STORES Co.
44 West 18th St.,
New York N. Y.

Shipped from Middletown Ohio Order of S June 17

40– ¼ Beechnut 5¢ pkg	50 Gro	300.00	
	Less 10%	30.00	
# N 49570			
Depot c/o Bush Terminal Co. 36th St. Sta. Brooklyn N Y			270.00

[P. Lorillard Co. Bill Head.]

LW 101132 NEW YORK Jan 8th/17

Sold to UNITED CIGAR STORES Co.,
44 West 18th St.,
New York City.

Shipped from Middletown, O Order of J Nov 11th

80– 1¼ Gro Beech Nut 5¢ pkg	100 Gro	6.00	600.00	
	Less 10%		60.00	
				540.00

N 81694

Depot Bush Term. Bldg 35th Sts. & 2nd Ave. Brooklyn, N. Y.

[P. Lorillard Co. Bill Head.]

LW 19560 NEW YORK July 7/17

Sold to UNITED CIGAR STORES Co.,
44 W. 18th St.,
New York City.

Shipped from Middletown, O Order of J May 15

2– 1¼ Gro Bag Pipe 5¢ pkg	2½ Gro	6.00	15.00	
80– 1¼ Gro Beech Nut "	100 Gro	6.00	600.00	
			615.00	
	Less 10%		61.50	
				553.50

P 21943

Depot c/o Bush Term. Co., 36th St. Sta. Bldg. 4 Brooklyn, N. Y.

[P. Lorillard Co. Bill Head.]

R/S Mid 62837 NEW YORK Feb. 20-18
Sold to UNITED CIG. STORES
44 W. 18th St.,
New York N. Y.

Shipped from Middletown Ohio Order of

80– 1¼ Gro Polar Bear 10¢ Order # P 73070	100	gro	11.52	1152.00	
80– 1¼ Gro Beechnut 10¢ Order # P 73060	100	gro	11.52	1152.00	
				2304.00	
		Less 10%		230.40	2073.60

To Depot Bush Terminal Co., 36th St. Sta. Bldg. #4 Bklyn N. Y.

[P. Lorillard Co. Bill Head.]

R/S Mid 5930 NEW YORK Nov. 21-1918
Sold to UNITED CIG. STORES CO. OF AMERICA,
44 West 18th St.,
New York City.

Shipped from Middletown Ohio Order of J Oct. 7-

160– 1¼ Gro Beechnut 10¢	200	gro	11.52	2304.00	
2– 1¼ Gro Bag Pipe 10¢ pkg.	2½	gro	11.52	28.80	
				2332.80	
		Less 10%		233.28	
					2099.52

To U. C. S. Co., 39th St., & 1st Ave., Bush Terminal Brklyn N. Y.
23291

[P. Lorillard Co. Bill Head.]

Mid 26880 NEW YORK Mar 20, 1919

Sold to UNITED CIG. STORES CO. OF AMERICA,
44 West 18th St.,
New York, N. Y.

Shipped from Middletown, Ohio Order of J 2/18

150– 2	Gro Beech Nut 10¢	300 Gro 11.52	3456.00	
		Less 10%	345.60	
	Order # B45088			3110.40

To Depot 39th St & 1st Ave., Bush Term. Bklyn, N. Y.

[P. Lorillard Co. Bill Head.]

AC Mid 70104 NEW YORK Aug. 7, 1919

Sold to UNITED CIG. STORES CO. OF AMERICA
44 W. 18th St.,
New York, N. Y.

Shipped from Middletown, Ohio Order of

25– 2	Gro Beech Nut 10¢	50 Gro 11.52	576.00	
		Less 7%	40.32	
	Order # B 80596			535.68

To Depot 39th St & 1st Ave., Bush. Term., Brklyn, N. Y.

[P. Lorillard Co. Bill Head.]

LW 29386 NEW YORK Aug. 11, 1917

Sold to METROPOLITAN TOB. CO., Yonkers Brch.,
Yonkers, N. Y.

Shipped from Middletown, Ohio Order of J July 3

4– 1¼	Gro Beech Nut 10¢ pkg	5 Gro 11.52	57.60	
		Less 10%	5.76	
	# 11Y			51.84

[P. Lorillard Co. Bill Head.]

R/S Mid 64056 NEW YORK Apr. 9-1918
Sold to METROPOLITAN TOB. Co.,
Yonkers Br.,
Yonkers N. Y.

Shipped from Middletown Ohio Order of J Jan 25-

4– 1¼ Gro Beechnut 10¢ pkg.	5	gro	11.52	57.60	
			Less 10%	5.76	51.84

Order # 104Y

[P. Lorillard Co. Bill Head.]

R/S Mid 92145 NEW YORK Aug. 1-18
Sold to METROPOLITAN TOB. Co.,
Brooklyn Br.,
649 Warren St.,
Brooklyn N. Y.

Shipped from Middletown Ohio Order of J Jul-19

4– 1¼ Gro Beechnut 10¢	5	gro	11.52	57.60	
8– 1¼ Gro Honest 10¢	10	gro	11.52	115.20	
				172.80	
			Less 10%	17.28	155.52

Order # 87B

[P. Lorillard Co. Bill Head.]

AC Mid 19479 NEW YORK Jan 21, 1919
Sold to METROPOLITAN TOB. Co.,
Yonkers Brch.,
Yonkers, N. Y.

Shipped from Middletown, Ohio Order of J 1/3

8– 1¼ Gro Hon Scrap 10¢	10	Gro	11.52	115.20	
8– 1¼ Gro Polar Bear 10¢	10	Gro	11.52	115.20	
8– 1¼ Gro Beech Nut 10¢	10	Gro	11.52	115.20	
				345.60	
			Less 10%	34.56	311.04

Order # 17Y

[P. Lorillard Co. Bill Head.]

AC Mid 67927 NEW YORK Aug. 7, 1919
Sold to METROPOLITAN TOB. Co.,
2234 4th Ave. Cor. Astor Pl. & Lafayette St.,
New York, N. Y.

Shipped from Middletown, Ohio Order of

25– 2	Gro Hon Scrap 10¢	50	Gro	11.52	576.00	
25– 2	Gro Beech Nut 10¢	50	Gro	11.52	576.00	
					1152.00	
				Less 7%	80.64	
	Order # 27					1071.36

[P. Lorillard Co. Bill Head.]

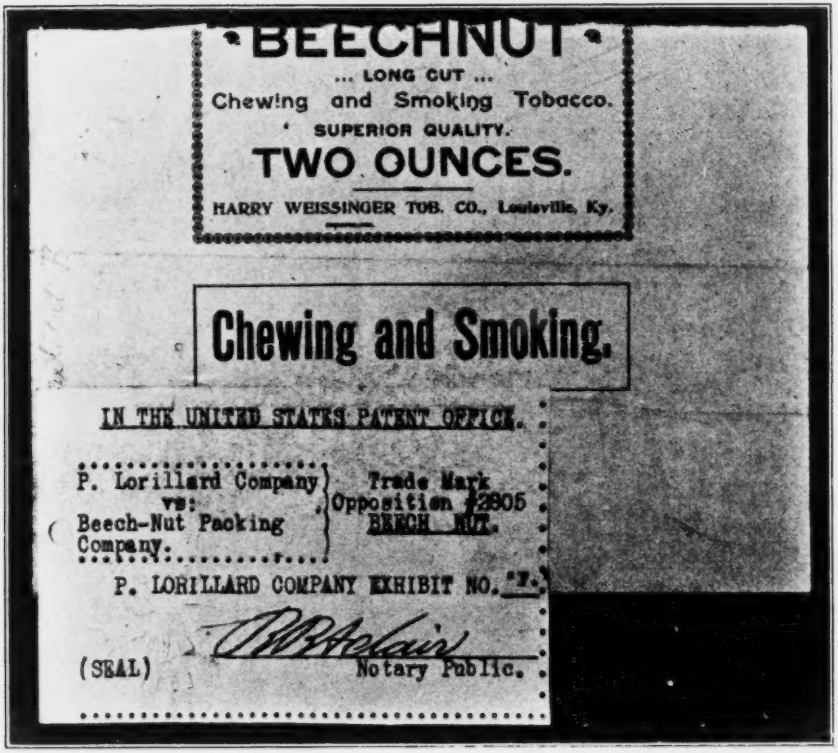
AC Mid 2909 NEW YORK Nov. 28, 1919
Sold to D. A. SCHULTE, Inc.,
384 Broadway,
New York, N. Y.

Shipped from Middletown, Ohio Order of

2– 2	Gro Beech Nut 10¢	4	Gro	11.52	46.08	
1– 2	Gro Hon Scrap 10¢	2	Gro	11.52	23.04	
					69.12	
				Less 10%	6.91	62.21

To—Columbus, Ohio.

P. LORILLARD EXHIBIT F—PORTION OF THE ORIGINAL WEISSINGER "BEECHNUT" TOBACCO WRAPPER.



P. LORILLARD CO. EXHIBIT H—WEISSINGER FORMULA BOOK.

(NOTE: 200 page Memoranda Book, of which only the front outside cover and the entry headed "Beechnut" are printed.)

[On outside front cover.]

JAS. F. SUMMERS.

H. W. TOB. Co.

[On a page about three-quarters way through the book:]

Beechnut
Chewing & Smoking (Cigar Clippings)

Sugar	110
Licorice	35
Salt	7
Glycerine	5
	157

Dip @ 22°
Cost .05⅓ ¢ per lb.

P. LORILLARD CO. EXHIBIT I—ORDERS TO SUMMERS FROM WEISSINGER.

NEW YORK Jan 12/03
H. W. TOB. Co.

Copy
Jim Summers

After filling orders for Beechnut on hand & those we may mail you today—pack Beechnut only in 1 size case of 100#

CONTINENTAL TOB. Co.

P. LORILLARD CO. EXHIBIT J—LETTERS PRODUCED BY SUMMERS.

HARRY WEISSINGER TOBACCO COMPANY.

INCORPORATED.

HARRY WEISSINGER, President.
JOHN MIDDLETON, Vice President.
F. E. PHILLIPS, Superintendent.
H. D. KINGSBURY, Treasurer.
H. Y. WEISSINGER, Secretary.
GEO. E. RAWSON, Asst. Secy.

LOUISVILLE, KY., Feb. 6, 1903.

Copy
Dictated to

HARRY WEISSINGER TOBACCO CO.,
Louisville, Ky.

Gentlemen:—

Referring to the box of advertising matter you sent us some days ago, we will request that you *destroy* the following:

2,000 Manila envelopes addressed to "Harry Weissinger Tob. Co."
5,300 BEECHNUT paper signs (white)
800 CLEAVER paper signs (Manila)
28,000 circulars addressed to Consumer, Nov 1st, 1902, (white)
56,000 circulars addressed to Consumer, Nov 1st, 1902, (yellow)
28,000 premium circulars No. 1 (yellow)
20,000 premium circulars No. 2 (yellow)
138,000 premium circulars No. 3 (yellow)
320,000 BURR OAK samples wrappers
50 New Hope, 15oz., sample boxes (red)
1,500 OUR FLAG cards reading "A Man Murdered" (Blue Card-board)
20,000 Yellow notices reading "This tobacco is made by an independent factory not in the trust."

2,500 BURR OAK box strips, (white card-board)
300 AUTUMN box strips (white card-board)
2,000 OLD KENTUCKY box strips (white card-board)
1,300 PEACE & GOOD WILL box strips (white card-board)
3,000 HOLD FAST box strips. (white card-board)
2,500 New HOPE box strips (white card-board)
4,400 CHECK show cards (yellow)
42,000 OLD KENTUCKY show cards (yellow)
38,500 BURR OAK show cards (yellow)
21,000 PEACE & GOOD WILL show cards (yellow)
3,400 premium hangers (tin top and bottom)
1,900 H. W. T. Co. Premium Books, 1902, containing complete list of premiums, (Retain 100)

Yours very truly,

CONTINENTAL TOBACCO CO.
W. H. MCALISTER,
Secretary.

[In pencil.]
Copy
Jim Summers

HARRY WEISSINGER TOBACCO COMPANY.

INCORPORATED.

HARRY WEISSINGER, President.
JOHN MIDDLETON, Vice President.
F. E. PHILLIPS, Superintendent.
H. Y. WEISSINGER, Sey. & Treas.

Dictated by LOUISVILLE, KY., December 11, 1903.

COL. HARRY WEISSINGER,
%Harry Weissinger Tobacco Co., Copy.
Louisville, Ky.

Dear Sir:—

You will kindly send all of thw Burley strips you have to the National, at 18th and Broadway, with the exception

of the K.K.'s, which will go to St. Louis, and the K.U.'s to Rich ond. Seed-Leaf strips hold until I can hear from Sorg. Bill all Bueley Leaf and strips to the Louisville Leaf Dept., of C T Co., but sent them to 17th and Broadway. Send all wrappers to the National, 18th and Broadway, except "C" extra bright, which they will be unable to use there. I will write Mr. H A Walker today, as it might be possible to place these wrappers in the West. If not, we will ship them to Richmond. Bill wrappers to the National Tobacco Works Branch, as we will take them into the factory. We will also take your 5,000 lbs. of Burley siftings at the National. They can be billed to the National direct.

As we decided in our conversation this morning, it will not be necessary to move any of the wrappers or strips in our own storage warehouse, but simply to bill them as directed as above and will take them out as needed.

Me. Hanlon says he is ready to take hold of your Licorice, sugar and other materials anytime you are ready to send them.

Yours very truly,

R. K. SMITH.

[In pencil.]
Col Phillips

[Underlining in lead pencil. Opposite underlining in right margin are some pencilled words:]

Beechnut only
scrap—send seed leaf for Beechnut.
HCB

P. LORILLARD CO. EXHIBIT K—BOX LIST.

[NOTE: Italics indicate items written in pencil.]

HARRY WEISSINGER TOBACCO CO.

SMOKING BOXES.

# 1	Smokers	*11¾ x 11½ x 9*	*10#*	*1⅔ oz*	*Flag* 11¢
# 2	"	11½ x 9⅝ x 6	5#	1⅔ oz.	Flag 10¢
# 3	"	18 x 17⅛ x 11¼	30#	" "	" 25¢
# 4	" Bat.	34⅛ x 18 x 11¼	60#	" "	" 40¢
# 5	" "	29 x 22¼ x 17⅞	100#	" "	" 41¢
# 6	"	11¼ x 9 x 8¼	10#	3⅓ oz.	" 9¢
# 7	"	9 x 6½ x 7⅜	6#	16 oz.	" 8¢
# 8	"	12⅞ x 9 x 7⅜	12#	" "	" 10¢
# 9	" Bat.	22½ x 13 x 12	50#	" "	" 30¢
#10	"	11⅜ x 9⅝ x 5⅝	5#	1⅓ oz.	Kip 10¢
#11	"	11¼ x 11⅜ x 9¾	10#	" "	" 12¢
#12	"	12⅜ x 8⅜ x 7⅜	5#	" "	B.R. 10¢
#13	"	10¾ x 9¾ x 9½	5#	3⅓ oz.	3 St. 10¢
#14	"	19⅛ x 10¾ x 9½	10#	" "	" 16½¢
15	"	*25⅜ x 14⅛ x 11*	*20#*	*2½ oz*	*B Nut 24¢*
16	"	*12¾ x 14⅛ x 11*	*10#*	*2½*	" " *17½¢*
17	"	*31½ x 28 x 22*	*100 lbs*	*B.N.*	" " *85¢*
18	"	*14⅜ x 11⅛ x 9⅛*	*10 lbs.*	*1st cabin*	*12¢*
19	"	*28⅝ x 11⅛ x 9⅛*	*20*	" "	"
20	"	*35½ x 22¼ x 18⅛*	*100 lbs*	"	" *67¢*
21	" *G. I.*	*14⅜ x 11⅛ x 9⅛*	*10 lbs*	*R. I.*	*x*
22	" *G. I.*	*28⅝ x 11⅛ x 9⅛*	*20*	" " "	*x*
23	" *G. I.*	*35½ x 22¼ x 18⅛*	*100 lbs*	" "	*x*
24	"	*11½ x 9¾ x 5¾*	*6#*	*Cleaver*	
25	"	*11⅞ x 11½ x 9⅝*	*12*	"	*12¼¢*
26	"	*19½ x 11½ x 11¼*	*24*	"	
27	"	*14 x 10¼ x 8⅝*	*10*	*3½ oz. 1st Cabin*	*11½¢*

New Smokers.

#1	*10 lb.*	*Flag*	*1⅔ oz.*	*11 x 10⅛ x 8⅞*	*10¢*
#	*20* "	"	*1⅔ oz.*	*20¼ x 11 x 8⅞*	*17¢*

#1	*10 lbs.*	*Flag*	*1⅔ oz.*	*11⅛ x 10¼ x 9*	*11¢*
#2	*20* "	"	"	*20½ x 11⅛ x 9*	*17½¢*

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA,
THIRD JUDICIAL CIRCUIT. } *Sct.:*

I, Saunders Lewis, Jr., clerk of the United States Circuit Court of Appeals, for the Third Circuit, DO HEREBY CERTIFY the foregoing to be a true and faithful copy of the original transcript of record, Vol. VI, Exhibits, in the case of: Beech-Nut Packing Company, appellant, vs. P. Lorillard Co., appellee, No. 3282, on file, and now remaining among the records of the said Court, in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of October, in the year of our Lord one thousand nine hundred and twenty-five, and of the Independence of the United States the one hundred and fiftieth.

SAUNDERS LEWIS, JR.,
Clerk of the United States Circuit Court of Appeals, Third Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed January 11, 1926

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

273

9

No. 249.

BEECH-NUT PACKING COMPANY,
Petitioner,

vs.

P. LORILLARD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Petition for Certiorari Filed December 8, 1925. Certiorari Granted January 11, 1926.

INDEX OF EXHIBITS.

INDEX OF EXHIBITS.

Part I.—Plaintiff's Exhibits.

[NOTE: The absence of a page number in the last column indicates that exhibit is not printed.]

	Offered Vol.	Page	Printed Vol. VI Page
Plaintiff's Exhibit No. 1, Package of Beech-Nut Cigarettes	I–	32	1
Plaintiff's Exhibit No. 2, Photograph, West Haven Drug Store Window Display	I–	325	3
Plaintiff's Exhibit No. 3, Package of Beech-Nut Scrap Tobacco	I–	330	5
Plaintiff's Exhibit No. 4, Package of Beech-Nut Cough Drops	I–	333	.....
Plaintiff's Exhibit No. 5, Beech-Nut Strawberry Jam Label	I–	240	.....
[*No Plaintiff's Exhibits Nos. 6 and 7.*]			
Plaintiff's Exhibit No. 8, Wesling Memorandum	I–	535	.....
Plaintiff's Exhibit No. 9, Fairfield Illustrative Collection Anti-Cigarette Literature	I–	641	.....
Plaintiff's Exhibit No. 10, Fairfield Illustrative Collection of Letters Received by Anti-Cigarette League	I–	644	.....
Plaintiff's Exhibit No. 11, Allied Tobacco Industries Exposition Letter	I–	645	5
Plaintiff's Exhibit No. 12, Scrap-Book of Circulars, Letters, etc., A to A-24, Inclusive	I–659 I–860 I–876 V–165		7
Plaintiff's Exhibit No. 13, Photograph, Pennell's Cigar Store Window Display	I–	706	55
Plaintiff's Exhibit No. 14, Receipt Signed "E. L. Larson"	I–	759	57

J4 5970

	Offered Vol.	Page	Printed Vol. VI Page
Plaintiff's Exhibit No. 15, Photograph, Collection of Beech-Nut Packing Company Products, 1922	I–801		59
Plaintiff's Exhibit No. 16, Portion of Shipping Carton Used by Beech-Nut Packing Company	I–801		61
Plaintiff's Exhibit No. 17, P. Lorillard Company Beech-Nut Cigarettes Carton	I–801		61
Plaintiff's Exhibit No. 18, Publication *Bon Jour* of Dec. 4 and 5, 1891	I–801		63
Plaintiff's Exhibit No. 19, Photograph, Scrap-Books of Beech-Nut Packing Company Periodical Advertising, 1911-1915	I–802		65
Plaintiff's Exhibit No. 20, Book of Data re Plaintiff's Advertising	I–803		.....
Plaintiff's Exhibits Nos. 21-26, Scrap-Books Nos. 1-6 of Plaintiff's Advertising Material	I–812		.....
Plaintiff's Exhibit No. 27, Beech-Nut Chewing Gum Display Box	I–824		67
Plaintiff's Exhibit No. 28, Board: Beech-Nut Labels Displayed Before the Public, 1891-1921	I–857 V–165		70 .....
Plaintiff's Exhibit No. 29, Imperial Packing Company's Glass Jar	I–838		.....
Plaintiff's Exhibit No. 30, Open Neck Jar of 1900	I–838		.....
Plaintiff's Exhibit No. 31, Imperial Packing Company Box of 1891	I–858		73
Plaintiff's Exhibit No. 32, Collection of Lorillard Posters and Signs	I–862 V–165		75
Plaintiff's Exhibit No. 33, Scrap-Book, Collection of Labels Used by Defendant	I–863 V–165		.....
Plaintiff's Exhibit No. 34, Scrap-Book Collection of Specimens of Defendant's Publication Advertising	I–864 V–165		.....

	Offered Vol.	Page	Printed Vol. VI Page
Plaintiff's Exhibit No. 35, Summary of Beech-Nut Packing Company Products	V	70	77
Plaintiff's Exhibit No. 36, Advertisement of Beech-Nut Cigarettes, *New York Evening Sun*	V	83	108
Plaintiff's Exhibit No. 37, Package of Charles & Co. "Bon Voyage" Cigarettes	V	90	.....
Plaintiff's Exhibit No. 38, Berry Photograph of Auster Window Display, Baltimore	V	93	109
Plaintiff's Exhibit No. 39, P. Lorillard Company Bathing Girl Poster	V	93	.....
Plaintiff's Exhibit No. 40, *The National Financial News* of May 28, 1923	V	98	111
Plaintiff's Exhibit No. 41, Certified Copy Decision of Examiner of Interferences, Opposition No. 2805	V	166	114
Plaintiff's Exhibit No. 42, Certified Copy, Decision of Assistant Commissioner of Patents, Opposition No. 2805	V	166	123
Plaintiff's Exhibit No. 43, Box of Helmar Cigarettes	V	223	.....
Plaintiff's Exhibit No. 44, Box of Egyptian Deities Cigarettes	V	227	.....
Plaintiff's Exhibit No. 45, Collection of Beech-Nut Packing Company Products	V	256	.....

Part II.—Beech-Nut Packing Company Exhibits.

In the United States Patent Office Trade-Mark Opposition No. 2805, *P. Lorillard Company* v. *Beech-Nut Packing Company.*

	Offered Vol.	Offered Page	Printed Vol. VI Page
Beech-Nut Exhibit, Certified Copy, Certificate of Incorporation of Beech-Nut Packing Company	IV-	8	127
Beech-Nut Exhibit, Summary of Products	IV-	10	.....
Beech-Nut Exhibit, Collection of Labels	IV-	10	.....
Beech-Nut Exhibit, Stationery of 1892, Imperial Packing Company	IV-	28	131
Beech-Nut Exhibit, Correspondence	IV-	39	133
Beech-Nut Cross Exhibit No. 1, P. Lorillard Company "Polar Bear" Scrap Tobacco Bag	IV-	173	142
Beech-Nut Cross Exhibit No. 1-A, Luhrman & Wilbern "Polar Bear" Scrap Tobacco Bag	IV-	175	143
Beech-Nut Cross Exhibit No. 2, P. Lorillard Company "Scrap Iron" Scrap Tobacco Bag	IV-	174	146
Beech-Nut Cross Exhibit No. 2-A, Luhrman & Wilbern "Scrap Iron" Scrap Tobacco Bag	IV-	176	147
Beech-Nut Cross Exhibit No. 2-C, P. Lorillard Company "Scrap Iron" Scrap Tobacco Bag, Bearing Words "Stock Owned by P. Lorillard Co." in Rubber Stamp	IV-	183	150
Beech-Nut Cross Exhibit No. 2-D, P. Lorillard Company "Scrap Iron" Scrap Tobacco Bag, Bearing Words "Stock Owned by P. Lorillard Co." Printed	IV-	183	151
Beech-Nut Cross Exhibit No. 3, P. Lorillard Company "Old Nut" Scrap Tobacco Bag	IV-	175	153

	Offered Vol. Page	Printed Vol. VI Page
Beech-Nut Cross Exhibit No. 4, P. Lorillard Company "Bag Pipe" Scrap Tobacco Bag	IV–177	155
Beech-Nut Cross Exhibit, Lorillard Beech-Nut Cigarettes Wrapper	IV–235	157
Beech-Nut Cross Exhibit, Trade-Mark Registration No. 89,613 of Dec. 31, 1912	IV–235	159

Part III.—Defendant's Exhibits.

Defendant's Cross Exhibit No. 1, Package of Beech-Nut Scrap Tobacco	I–35, I–873	161
Defendant's Cross Exhibit No. 2, Package of Beech-Nut Chewing Gum	I–37, I–873	163
Defendant's Cross Exhibit No. 3, Sheet Bearing Beech-Nut Packing Company's Label (Chewing Gum Flap)	I–47, I–873	.....
Defendant's Cross Exhibit No. 4, Carton Beech-Nut Cigarettes	I–86, I–873	.....
Defendant's Cross Exhibit No. 5, Advertisement of Beech-Nut Cigarettes, *Boston Herald* of Aug. 18, 1921	I–138 I–873	165
Defendant's Cross Exhibit No. 6, Package of Beech-Nut Peppermints	I–145 I–873	167
Defendant's Cross Exhibit No. 7, Beech-Nut Peanut Butter	I–301 I–873	.....
Defendant's Cross Exhibit No. 8, Beech-Nut Bacon Label	I–430 I–874	169
Defendant's Cross Exhibit No. 9, Open Carton Beech-Nut Cigarettes	I–518 I–874	.....
Defendant's Exhibit No. 10, P. Lorillard Company Order Blanks, A, B and C	II–479	171
Defendant's Exhibit No. 11, Photograph West Haven Drug Store Display	II–1213	173

[*No Defendant's Exhibits Nos. 12, 13 and 14.*]

	Offered Vol.	Page	Printed Vol. VI Page
Defendant's Cross Exhibit No. 15, Four Advertisements of Beech-Nut Packing Company Products from *Ladies Home Journal* of Nov., 1920, Jan., March, and May, 1921	I–811 I–874		.....
Defendant's Cross Exhibit No. 16, Beech-Nut Packing Company's Erie Brand Label	I–846 I–874		175
Defendant's Cross Exhibit No. 17, Beech-Nut Packing Company's Holly Brand Label	I–847 I–874		177
Defendant's Exhibit No. 18, Pamphlet Entitled "Correspondence — Beech-Nut Packing Company and P. Lorillard Company in *re* 'Beech-Nut' Trade-Mark"	V–124		179
Defendant's Exhibits Nos. 19-29, Defendant's Exhibit Books Nos. I-XI	V–130		.....
Defendant's Exhibit No. 30, Newton's List of Trade-Mark Registrations	V–136 V–155		217
Defendant's Exhibits Nos. 31, 32, and 33, Books of Trade-Mark Registrations, Vols. I, II and III, respectively	V–136 V–155		
Defendant's Exhibit No. 34, Patent Office Pamphlet Showing Trade-Marks Classification	V–136 V–155		234
Defendant's Exhibit No. 35, List of Brands	V–147		235
Defendant's Exhibit No. 36, Assignment, American Tobacco Company to P. Lorillard Company, Dec. 1, 1911	V–148		249
Defendant's Exhibit No. 37, Package of Bagley's "Hazel Nut" Tobacco	V–174		253
Defendant's Exhibit No. 38, Package of "Bag Pipe" Scrap Tobacco	V–175		.....
Defendant's Exhibit No. 39, Package of "Honest" Scrap Tobacco	V–180		
Defendant's Exhibit No. 40, Package of "Polar Bear" Scrap Tobacco	V–182		.....

	Offered Vol.	Page	Printed Vol. VI Page
Defendant's Exhibit No. 41, Package of "Murad" Cigarettes	V–217		.....
Defendant's Exhibit No. 42, Package of "Turkish Trophies" Cigarettes	V–218		.....
Defendant's Exhibit No. 43, Package of "London Life" Cigarettes	V–218		.....
Defendant's Exhibit No. 44, Package of "Windsor Castle Fags" Cigarettes	V–218		.....
Defendant's Exhibit No. 45, Lorillard Specimen Wrapper Design for Beech-Nut Cigarettes	V–222		255
Defendant's Exhibit No. 46, Package of "Zubelda" Cigarettes	V–222		.....
Defendant's Exhibit No. 47, Package of "Sweet Caporal" Cigarettes	V–222		.....
Defendant's Exhibit No. 48, Collection of P. Lorillard Company Products	V–255		.....
Defendant's Exhibit No. 49, Collection of Mogul, Omar, and Camel Products	V–256		.....
Defendant's Exhibit No. 50, Lorillard Window Display Advertising	V–257		.....

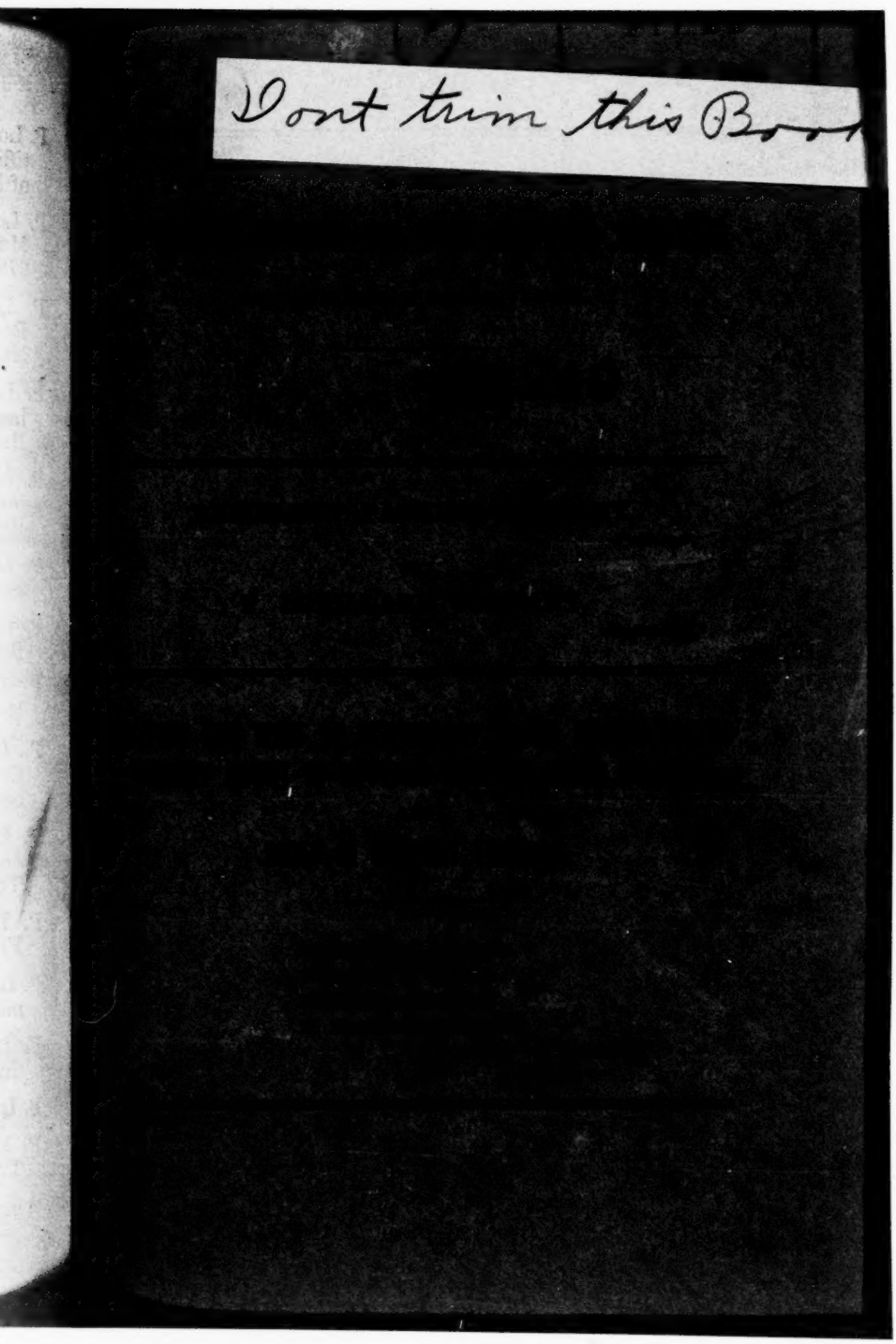
Part IV—P. Lorillard Company Exhibits.

In the United States Patent Office Trade-Mark Opposition No. 2805, *P. Lorillard Company* v. *Beech-Nut Packing Company.*

P. Lorillard Co. Exhibit No. 1, Statement of Sales of Beech Nut Tobacco Products by Luhrman & Wilbern Tobacco Co. and P. Lorillard Co. from 1904 to 1919	IV–107		257
P. Lorillard Co. Exhibit No. 2, Package of Lorillard's Beech-Nut Scrap Tobacco	IV–107		262
P. Lorillard Co. Exhibit No. 3, Carton for Lorillard's Beech-Nut Scrap Tobacco	IV–108		.....

	Offered Vol.	Page	Printed Vol. VI Page
P. Lorillard Co. Exhibit No. 4, Posters Advertising Lorillard's Beech-Nut Scrap Tobacco	IV–108		.....
P. Lorillard Co. Exhibit No. 5, Luhrman & Wilbern "Beechnut" Tobacco Bag	IV–110		263
P. Lorillard Co. Exhibit No. 6, Package of Lorillard's Beech-Nut Cigarettes	IV–114		265
P. Lorillard Co. Exhibit No. 7, Letter, Aug. 25, 1916, from Walcutt Brothers Co. to P. Lorillard Co.	IV–114		267
P. Lorillard Co. Exhibit No. 8, Order for Beech Nut Cigarette Shells	IV–114		268
P. Lorillard Co. Exhibit No. 9, "Broecker" Correspondence	IV–116		269
P. Lorillard Exhibit No. 10, "Schutz" Correspondence	IV–166		272
P. Lorillard Co. Exhibit No. 11, Weissinger "Beechnut" Invoices	IV–123		.....
P. Lorillard Co. Exhibit No. 12, Continental Tobacco Co. "Beechnut" Invoices	IV–124		.....
P. Lorillard Co. Exhibit No. 13, Luhrmann & Wilbern Tobacco Co. "Beechnut" Invoices	IV–124		.....
P. Lorillard Co. Exhibit No. 14, Harry Weissinger Tobacco Co. "Beechnut" Tobacco Bag	IV–136		273
[*No P. Lorillard Co. Exhibit No. 15.*]			
P. Lorillard Co. Exhibit No. 16, Package of Lorillard's Beech-Nut Scrap Tobacco	IV–149		275
P. Lorillard Co. Exhibit No. 17, Package of Luhrmann & Wilbern Tobacco Co.'s "Beechnut" Tobacco	IV–137		275
[*No P. Lorillard Co. Exhibits Nos. 18 and 19.*]			

	Offered Vol.	Page	Printed Vol. VI Page
P. Lorillard Co. Cross Exhibit No. 20, Certified Copy, Certificate of Incorporation of Imperial Packing Company	IV-	14	275
P. Lorillard Cross Exhibit No. 21, Trade-Mark Registrations No. 19,838; No. 24,978; No. 35,371; and No. 36,444	IV-	26	279
P. Lorillard Co. Cross Exhibit No. 22, Beech-Nut Packing Company's "Beech-Nut Cigarettes" Label	IV-	26	291
P. Lorillard Co. Exhibit A, Book Showing Revenue Stamps Used on Tobacco Brands, 1904-1906	IV-	171	293
P. Lorillard Co. Exhibit B, Book Showing Revenue Stamps Used on Tobacco Brands, 1906-1910	IV-	171	301
P. Lorillard Co. Exhibit C, Sales Sheets Showing Shipments Beechnut, 1904-1910	IV-	171	311
P. Lorillard Co. Exhibit D, Memorandum Book of Shipments	IV-	171	315
P. Lorillard Co. Exhibit E, Copies of Beech-Nut Invoices, P. Lorillard Co	IV-	171	323
P. Lorillard Co. Exhibit F, Portion of the Original Weissinger "Beechnut" Tobacco Wrapper	IV-	210	340*a*
P. Lorillard Co. Exhibit G, Package of John Finzer & Brothers "Five Bros." Tobacco	IV-	203	.....
P. Lorillard Co. Exhibit H, Weissinger Formula Book	IV-	212	341
P. Lorillard Co. Exhibit I, Orders to Summers from Weissinger	IV-	213	341
P. Lorillard Co. Exhibit J, Letters Produced by Summers	IV-	213	342
P. Lorillard Co. Exhibit K, Box List	IV-	214	345
P. Lorillard Co. Exhibit L, Connorton's Tobacco Directory, 1903	IV-	225	.....


Dont trim this Book

INDEX.

	Page
PETITION:	1
Reasons for petition	2
Questions involved	3
This case	4
Conflicting decisions	5
The English cases	6
The rule of law established by the Court of Appeals in this case	7
The conflict	9
Conclusion	9
BRIEF IN SUPPORT OF PETITION:	
Reference to opinions below	13
The facts	14
The decision	19
Conflicting cases in the Sixth and Second Circuits	19
The Vogue case in the Sixth Circuit	20
The Penslar case in the Sixth Circuit	24
The Aunt Jemima case in the Second Circuit	26
The law in England	28
Previous decisions of the Third Circuit Court of Appeals	30
Conclusion	32
Appendix: Specimens of labels	34-37

Table of Cases Cited.

AMERICAN CASES.

Akron Overland Tire Co. *v.* Willys-Overland Co., 273 Fed. 674 30

Aunt Jemima Mills Co. *v.* Rigney & Co., 247 Fed. 407 ..... 6, 26

Peninsular Chemical Co. *v.* Levinson, 247 Fed. 658 ..... 5, 24

Rosenberg Bros. & Co. *v.* John F. Elliott, — Fed. — 31
Vogue Co. *v.* Thomson-Hudson Co., 300 Fed. 509; 6 Fed. (2nd) 875 ..... 5, 20
Wall *v.* Rolls-Royce of America, Inc., 4 Fed. (2nd) 333 30

ENGLISH CASES.

Dunlop Pneumatic Tyre Co. *v.* Dunlop Lubricant Co., 16 Reports Patent Cases, 12 ..... 6, 28
Dunlop Pneumatic Tyre Co. *v.* Dunlop-Truffault Cycle & Tube Mfg. Co., 12 Times Law Reports, 434 ..... 7, 29
Eastman Co. *v.* Kodak Cycle Co., 15 Reports Patent Cases, 105 ..... 6, 28
Premier Cycle Co. *v.* Premier Tube Co., 12 Times Law Reports, 481 ..... 7, 29
Valentine Meat Juice Co. *v.* Valentine Extract Co., 17 Reports Patent Cases, 673 ..... 6, 29
Walter *v.* Ashton, [1902] 2 Chancery, 282 ..... 6, 29

Statute Cited.

Judicial Code, Section 240(a), as amended by Section 1 of the Act of Feb. 13, 1925 11

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. .

BEECH-NUT PACKING COMPANY,

Petitioner,

vs.

P. LORILLARD COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Petitioner, the Beech-Nut Packing Company, prays for a writ of certiorari requiring that the above-entitled cause be certified to this Court for determination.[1]

---

[1] The opinions delivered in the courts below appear:

Circuit Court of Appeals, 3rd Circuit: —— Fed. ——; Transcript of Record, Vol. V, pp. 308-319.

District Court of the United States, District of New Jersey: 299 Fed. 834; Transcript, Vol. V, pp. 259-291.

The case is a suit in equity brought by the Beech-Nut Packing Company, a New York corporation, against the P. Lorillard Company, a New Jersey corporation. The bill charged that the P. Lorillard Company was infringing the trade-mark rights of the Beech-Nut Packing Company and was also violating rights secured to the Beech-Nut Packing Company by the principles of law known as the law of unfair competition, and asked for an injunction and other relief. The bill was filed June 17, 1921, in the United States District Court for New Jersey. Relief was denied and the bill dismissed June 17, 1924, by the District Court without costs to either party. Upon appeal the decree of the District Court was affirmed September 11, 1925, by the Circuit Court of Appeals for the Third Judicial Circuit.

Reasons for Petition.

The grounds upon which this petition is based are the importance of the principle of law established in the Third Judicial Circuit by the decision of the court below, and the fact that that principle of law is in direct conflict with the law established by prior decisions of the Circuit Courts of Appeals of the Sixth and Second Judicial Circuits.

The case at bar was decided by the court below upon a question of law. The ruling of the court below upon this question of law affects the business interests of the country generally and the interests of the purchasing public as vitally as it affects the interests of the parties brought before this Court by this petition. Twice in the Sixth Judicial Circuit and once in the Second Judicial Circuit the same question has been adjudicated, and in each of these three prior cases the decision of the Court of Appeals has been in direct conflict with the decision

of the Circuit Court of Appeals for the Third Judicial Circuit in the case at bar. In a number of cases in the English courts also the same question has been litigated, and decided as decided here in the Sixth and Second Circuits, and contrary to the decision of the Third Circuit Court of Appeals in the case at bar.

Question Involved.

The question involved is this: Where the good-will of an established and expanding business, and its trade-mark, trade name, corporate name or label have become so widely known that the public accepts as the products of that business new commodities not previously dealt in by it, but bearing its trade-mark, trade name or label,—is it a fraud, or is it the exercise of a legal right, for a stranger to put upon the market some commodity not previously dealt in by the established business, affix thereto and make advertising use of the trade-mark, trade name or label of the established business, and by that means deceive the purchasing public, appropriate and injure the good-will of the established business, and bar the expansion of the established business to commodities upon which its trade-mark, trade name or label will signify to the public that such commodities are its product? Is relief in such situations to be limited by an artificial rule that the courts will not interfere where such a stranger selects goods that are "not of the same class" as those dealt in by such previously established business, even though the whole consuming public be deceived and the prior party's reputation and good-will be thus placed at the mercy of a person over whom it has no control?

This Case.

Upon a state of facts identical with that set forth in the preceding paragraph the Court of Appeals for the Third Circuit held in the case at bar that, because the Beech-Nut Packing Company does not deal in tobacco or cigarettes, the P. Lorillard Company was within its legal rights in applying to chewing tobacco and cigarettes the Beech-Nut Packing Company's trade-mark and trade name "Beech-Nut," and held that the act complained of violated neither the law of trade-marks nor that body of law known as the law of unfair competition.

This ruling was made in the face of undisputed evidence of universal deception of the purchasing public and of injury to petitioner's reputation and good-will. The Court based its decision upon its finding that there can be neither trade-mark infringement nor violation of the principles of law known as the law of unfair competition if the defendant does not sell goods which directly compete with or belong to "the same class" of merchandise as those sold by plaintiff.

The Beech-Nut Packing Company deals throughout the country in upwards of sixty products all bearing its Beech-Nut trade-mark, and deals to some extent in many other commodities similarly marked, most of which it manufactures in its own plants. It does not deal in tobacco products but has seriously considered doing so. In volume of business the principal product of the Beech-Nut Company is chewing gum. Other products are hard candy tablets, peanut butter, condiments, conserves, beverages, ham, bacon and a large variety of food products. Prior to the end of the year 1921, in which year the bill of complaint herein was filed, the Beech-Nut Packing Company had expended three million dollars in advertising its Beech-Nut products.

Conflicting Decisions.

In the following-named cases involving facts parallel to those in the case at bar, the Courts of Appeals of the Sixth and Second Circuits have made rulings of law in direct conflict with the law as laid down by the Third Circuit Court of Appeals in the instant case:

Vogue Company v. *Thompson-Hudson Company et al.*, 300 Fed. 509; 6 Fed. (2nd) 875; Circuit Court of Appeals for the Sixth Circuit.

Defendants were dealers in women's hats. Plaintiff was the publisher of a monthly magazine called "Vogue" and did not deal in hats. Defendants were enjoined from using upon their hats plaintiff's trade-mark, which consisted of a large capital letter "V" with a picture of a woman between the sides of the letter.

Peninsular Chemical Company v. *Levinson et al.*, 247 Fed. 658, Circuit Court of Appeals for the Sixth Circuit.

Plaintiff was a manufacturer of and dealer in drugs, medicines and drug store supplies and sundries which it sold to a chain of 3500 retail drug stores. Plaintiff used upon its goods the coined word "Penslar" as a trade-mark, and the drug stores through which the goods reached the public were known as "Penslar" drug stores. Plaintiff did not deal in cigars or other tobacco products. Defendants made and sold cigars to which they applied the word "Penslar" as a trade-mark. The Court held such use of the word "Penslar" to be a fraud and enjoined defendants therefrom.

Aunt Jemima Mills Company v. *Rigney & Company*, 247 Fed. 407, Circuit Court of Appeals for the Second Circuit.

Plaintiff manufactured and sold a self-rising flour to which it applied its trade-mark. The conspicuous elements of the trade-mark were the words "Aunt Jemima" and a picture of a colored woman. Defendant applied the same mark to syrup. Plaintiff did not make or deal in syrup. The Court enjoined further use of the Aunt Jemima trade-mark by defendant. Though the Court referred to the fact that flour and syrup are both food products the Court did not base its decision upon this classification of these commodities but upon the fact that purchasers were caused to believe that the Aunt Jemima syrup was made or sold by plaintiff.

The English Cases.

Following are references to English cases decided in harmony with the three cases above cited and involving facts parallel to the facts in those cases and in the case at bar:

Walter v. *Ashton*, [1902] 2 Chancery, 282. (High Court of Justice, Chancery Division—Byrne, J.)

Eastman Company v. *Kodak Cycle Co.*, 15 Reports Patent Cases, 105. (High Court of Justice, Chancery Division—Romer, J., 1898.)

Dunlop Pneumatic Tyre Co. v *Dunlop Lubricant Co.*, 16 Reports Patent Cases, 12. (High Court of Justice, Chancery Division—Romer, J., 1898.)

Valentine Meat Juice Co. v. *Valentine Extract Co.*, 17 Reports Patent Cases, 673. (Court of Appeal: Lords Alverstone, Rigby, and Collins.)

Dunlop Pneumatic Tyre Co. v. *Dunlop-Truffault*

Cycle & Tube Manufacturing Co., 12 Times Law Reports, 434. (High Court of Justice, Chancery Division—Chitty, J., 1896.)

Premier Cycle Company v. *Premier Tube Company*, 12 Times Law Reports, 481. (High Court of Justice, Chancery Division—Chitty, J., 1896.)

These cases will be considered in the adjoined brief.

The Rule of Law Established by the Court of Appeals in This Case.

The court below summed up its conclusion on the trade-mark branch of the case at bar in the following passage quoted from its opinion (—— Fed. ——; Transcript, Vol. V., pp. 314-315):

> "The merchandise of the plaintiff and defendant belonged, therefore, to different classes. As the owner of a trade-mark, both on authority and reason, may not be restrained from its use on goods of one class, notwithstanding the identical trade-mark is used on goods of another class, we conclude that the defendant did not infringe plaintiff's trade-mark and so may not be restrained from using its trade-mark on tobacco products."

In discussing the unfair competition aspect of the case, the Court said (—— Fed. ——; Transcript, Vol. V., p. 315):

> "Generically, the term 'unfair competition,' presupposes competition of some kind. *Borden Ice Cream Company* v. *Borden's Condensed Milk Co.*, 201 Fed. 510, 514. And so courts have held that there must be a real, present or prospective competition; that is, an endeavor to get the same trade from the same people at the same time; and that endeavor must on the defendant's part be unfair. *National Picture Theatres* v. *Foundation Film Corporation*, 266 Fed. 208, 211."

> "There is no evidence that the defendant ever intended presently or prospectively to compete for the trade of the plaintiff. It could not have done so as long as they continued their distinct and unrelated lines of business and there is no evidence that a change was ever contemplated by either. There was, therefore, no competition between them unfair or otherwise."

After referring, in its discussion of the question of unfair competition, to the injury suffered by plaintiff, the Court announced the following conclusion (—— Fed. ——; Transcript, Vol. V., p. 317):

> "This [the injury] resulted from the similarity of trade-marks on distinct and unrelated classes of merchandise. But from confusion and injury caused by similarity of names, courts will not relieve."

Inasmuch as the Court decided the instant case upon its interpretation of the law applicable to the same state of facts in all cases, the following proposition is now a principle of law in the Third Judicial Circuit:

> The good-will of an established and expanding business may be legally appropriated and injured, and the purchasing public may be deceived with impunity by anyone who sees advantage in using the trade-mark, trade name, corporate name or label of such established business in connection with the sale of goods, provided only that the goods so sold are not of the same class as those dealt in in the operation of the previously established business.

The Conflict.

The accompanying brief (bound herewith) contains an analysis of the opinions of the Courts of Appeals of the Sixth and Second Circuits in the three cases hereinbefore referred to in which those courts made rulings in conflict with the decision of the Court of Appeals in the case at bar.

That the Court of Appeals for the Third Circuit based its denial of relief in the instant case upon its dissent from the law as established in the Sixth and Second Circuits appears not only from the parallelism of the facts, but from the circumstance that the injury to the plaintiff and the deception of the public were of greater extent and much more clearly apparent in the case at bar than in the cases in the Sixth and Second Circuits, and from the further fact that the Court of Appeals for the Third Circuit made its decision in the instant case after full presentation in brief and argument of the cases in the Sixth and Second Circuits, and held, contrary to the Sixth and Second Circuit Courts, that the difference between the goods dealt in by the parties precluded the grant of relief.

Conclusion.

The decision of the Court of Appeals for the Third Circuit gives the sanction of legality to the P. Lorillard Company's use of the Beech-Nut Packing Company's name and identity as a disguise whereby Lorillard products are passed off on the public as Beech-Nut Packing Company products, and whereby the business good-will and the millions of dollars of advertising prestige of the Beech-Nut Packing Company are converted to the uses of the P. Lorillard Company. The exclusion of the

Beech-Nut Packing Company from the protection of those principles of equity which forbid and enjoin fraud is based upon the Court's reasoning that the Beech-Nut Packing Company's right to protection is limited to fraud and injury resulting from the unauthorized use of its trade-mark, trade name or label upon goods either identical with or belonging to the same class as the goods in which it deals. The reasoning of the court below substitutes a survey of the artificial boundary lines of an arbitrary system of classification of merchandise for an inquiry into the presence or absence of actual fraud and injury. The conflict between the mode of reasoning of the Third Circuit Court of Appeals and that of the Courts of Appeals of the Sixth and Second Circuits is as marked as the conflict between their conclusions.

A reason for review of the instant case additional to the conflicting rules of law in the different judicial circuits lies in the importance of the issue to the business interests of the country, and the interests of the consuming public.

The far-reaching effect of the ruling of the Third Circuit Court of Appeals, and the obvious fact that unscrupulous dealers in all lines of trade will be alert to invoke its protection for their fraudulent business practices, make the case at bar one that should not stand as an authoritative statement of the law in the absence of some absolutely compelling reason. The court below has found no such compelling reason for its conclusion that a fraud of this character is beyond the reach of a court of equity, and the reasoning in all other cases involving parallel states of fact leads infallibly to the opposite conclusion.

It is of vital importance to American business that the development of the law of unfair competition, which is protective of honest business, should not be checked

by the decision of the court below, a decision in violation of the principles of equity which have underlain the entire development of the law in this field.

Wherefore petitioner prays that a writ of certiorari be issued under the seal of this Court directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record including all proceedings in said Circuit Court of Appeals in the case entitled: Beech-Nut Packing Company, Appellant, *versus* P. Lorillard Company, Appellee, No. 3282, to the end that this cause may be reviewed and determined by this Court, as provided by Section 240 (*a*) of the Judicial Code as amended by Section 1 of the Act of Congress of February 13, 1925, "To amend the Judicial Code, and to further define the jurisdiction of the Circuit Courts of Appeals and of the Supreme Court"; that the decree of said Circuit Court of Appeals in this cause be reversed by this Court, and that petitioner have such other and further relief as this Court may deem appropriate;

And your petitioner will ever pray.

BEECH-NUT PACKING COMPANY,
By BARTLETT ARKELL,
President.

CHARLES E. HUGHES,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. MCCLURE JOHNSON,
Counsel for Petitioner.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK. } ss:

BARTLETT ARKELL, being duly sworn, says that he is president of Beech-Nut Packing Company, petitioner; that he has read the foregoing petition by him subscribed and knows the contents thereof, and that the facts therein stated are true to the best of his knowledge, information and belief.

BARTLETT ARKELL.

Sworn to and subscribed before me this 8th day of December, 1925.

ELEANOR F. CASEY,
[SEAL.] *Notary Public.*

We hereby certify that we have examined the foregoing petition, and that in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

CHARLES E. HUGHES,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. MCCLURE JOHNSON.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. .

BEECH-NUT PACKING COMPANY,

Petitioner,

vs.

P. LORILLARD COMPANY,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

The facts relied upon in the foregoing petition are here stated more in detail and with foot-note references to the testimony of the witnesses, following which is an analysis of the conflicting cases in the Sixth and Second Circuits and the English cases mentioned in the petition.

Reference to Opinions Below.

The opinions delivered in the courts below appear:

Circuit Court of Appeals, 3rd Circuit: —— Fed. ——; Transcript of Record, Vol. V, pp. 308-319.
(Opinion and Decree Affirming filed September 11, 1925,—see Transcript, Vol. V, p. 318.)

District Court of the United States, District of New Jersey; 299 Fed. 834; Transcript, Vol. V, pp. 259-291.

The Facts.

Following is a statement of the facts in the case at bar. Although the opinion of the Court of Appeals does not contain a full statement of the facts, no issue of fact has arisen, and it is manifest from the Court's opinion that its decision turned upon the point of law upon which its ruling conflicts with the rulings of the Courts of Appeals of the Sixth and Second Circuits; namely, its ruling that in a trade-mark or unfair competition case a plaintiff has no legal remedy against a defendant who has appropriated the plaintiff's trade-mark, trade name, corporate name or label unless the defendant has used such mark, name or label in connection with commodities of the same class as those dealt in by the plaintiff.[1]

---

[1] The District Court found that the P. Lorillard Company was justified in its use of the word "Beech-Nut" by reason of the fact that the word "Beechnut" had once been used on tobacco (but beginning years later than the adoption by Beech-Nut Packing Company's predecessor of its trade-mark "Beech-Nut") by the Weissinger Company and its successor, the Luhrman & Wilbern Company, the ownership of which the P. Lorillard Company had acquired in 1911. The Luhrman & Wilbern Company had ceased using the word "Beechnut" in 1910 owing to the absolute termination of any demand for the tobacco to which it had previously applied that word. This old brand had been completely forgotten in 1915 as shown by the fact that no ultimate consumer was found who even remembered that there ever had been such a brand in existence and only three or four dealers retained any memory of it. The Beech-Nut tobacco put out by the P. Lorillard Company in 1915 was in no sense a continuance of the discontinued Luhrman & Wilbern brand. The Lorillard Beech-Nut tobacco was a new mixture having a new flavor especially designed to meet the demand of the public for a flavor different from that of the old mixtures which no longer suited tobacco users, and the Lorillard Beech-Nut

The Beech-Nut Packing Company is well known throughout the United States as the producer of an extensive and constantly expanding line of commodities of the best quality obtainable.[1] It sells these commodities in packages, bottles or wrappers bearing the word "Beech-Nut" framed generally by a blue oval which also incloses a picture of a beech-nut cluster, and is itself surrounded by a red oval border.[2] The business was started in a small way in 1891 at Canajoharie, New York, and developed into a nation-wide industry. In 1912 the number of products extensively dealt in was forty-one and in the same year the company registered its Beech-Nut trade-mark for sixty-seven products which it had sold to a greater or less extent. Prior to the end of the year 1921, in which year the bill of complaint herein was filed, it had expended three million dollars in advertising its name "Beech-Nut," its vari-

---

label is essentially a reproduction of the Beech-Nut Packing Company's trade-mark and bears no resemblance to the long disused and forgotten Luhrman & Wilbern Beechnut label. The Court of Appeals ignored the Lorillard Company's claim of right based on the Luhrman & Wilbern label and decided the case solely upon the point of law discussed in this petition and brief.

[1] Barbour, Transcript, Vol. I, p. 781 *et seq.* A summary of products prepared from price lists of goods extensively sold since 1902 appears in Vol. VI of the Transcript, pp. 77 to 107. The testimony of all of the hundreds of witnesses for both parties shows the familiarity of the Beech-Nut Company's products to ultimate consumers throughout the country.

[2] Specimens of the Beech-Nut Packing Company's trade-mark and labels are presented on pages 163, 167 and 169 of Vol. VI of the transcript. Duplicates of these exhibits and of the Lorillard Beech-Nut scrap chewing tobacco and cigarette labels are attached to the last pages of this brief.

ety of goods, and the high quality of all its goods. In 1923 the number of products extensively sold was sixty. The principal product in volume of business is chewing gum; among the other products are hard candy, mints and fruit tablets put up in small packages sold largely on tobacco stands, peanut butter, condiments, conserves, beverages, ham, bacon and a large variety of food products. The Beech-Nut Packing Company does not deal in cigarettes or tobacco, though it has seriously considered doing so.[1]

In the year 1915, at which time the Beech-Nut goods and trade-mark were known throughout the entire country as an expanding line of products of the highest quality, the P. Lorillard Company put upon the market a

---

[1] Following are references to the testimony of some of the witnesses who testify regarding the founding and early history of the Beech-Nut Packing Company: Vol. I, p. 827; Vol. IV, pp. 6 to 8.

The number and variety of products is shown in the summary of products at pp. 77 to 107 of Vol. VI.

At page 159 of Vol. VI there is a reproduction of the Patent Office certificate of registration in 1912 by the Beech-Nut Packing Company of its trade-mark for use on sixty-seven commodities.

The expenditures of the Beech-Nut Packing Company for advertising are shown by the testimony of Walter H. Lipe, who, in response to Q. 35, Vol. IV, p. 10, produced the tabulated statement appearing at page 55 of Vol. IV, and also by the testimony of Van Wie, Vol. I, p. 818, Qs. 6 to 9.

The total sales of the Beech-Nut Packing Company year by year from 1903 to 1921, and the total annual sales of Beech-Nut chewing gum from 1911 to 1921 are set forth on page 868 of Vol. 1 of the Transcript.

The Beech-Nut Packing Company's consideration of the question of including cigarettes in its line of products is described by F. E. Barbour, vice-president and manager of the company, Vol. I, pp. 785-786, Qs. 15, 16 and p. 792, X-Qs. 55 to 59.

brand of chewing tobacco of the kind known as "scrap tobacco," and adopted for this tobacco the name "Beech-Nut" and affixed to the packages containing it a label bearing the word "Beech-Nut" framed in a blue oval which also incloses a picture of a beech-nut cluster and is surrounded by red, all of these details corresponding closely to the label of the Beech-Nut Packing Company.[1] In 1921 the P. Lorillard Company put a new cigarette on the market upon which also it used the word "Beech-Nut" with an oval border and picture of a beech-nut cluster and the surrounding red.[2]

Petitioner's Beech-Nut chewing gum and hard candies, mints and fruit-drops are sold alongside of respondent's Beech-Nut scrap tobacco and Beech-Nut cigarettes in tobacco stores, drug stores, hotel and office-building lobbies, and wherever tobacco is sold. In groceries, delicatessens, general stores, variety stores, etc., all of petitioner's Beech-Nut products are displayed and sold alongside of respondent's tobacco products. The same wholesalers and jobbers handle and distribute the products of both. Thus there is the maximum opportunity for deception to result. Also it is apparent that merchandising tobacco products is in the direct and natural line of expansion of the Beech-Nut Packing Company's business.

The use of the Beech-Nut name and label by the P. Lorillard Company has caused the entire body of ulti-

---

[1] A photograph of the Lorillard Beech-Nut scrap tobacco package appears at page 161 of Vol. VI of the Transcript. A specimen of the wrapper is attached to the bill of complaint (Vol. I, p. 17) and a duplicate thereof is presented on page 34 of this brief.

[2] A specimen of the Lorillard Beech-Nut cigarette label with its translucent paper covering is mounted on page 1 of Vol. VI of the Transcript, and a duplicate thereof is inserted on page 36 of this brief.

mate purchasers, without a single exception so far as known or shown by the record, to believe that the Lorillard Beech-Nut tobacco and cigarettes are products of the Beech-Nut Packing Company. The cheap grade and inferior quality of the Lorillard Beech-Nut cigarettes have injured the business good-will of the Beech-Nut Packing Company, which heretofore has been universally known as a producer of commodities of the highest quality only; and the reputation and business of the Beech-Nut Packing Company have also suffered from the antagonism of that large class of people who are opposed to the use of cigarettes and tobacco and prejudiced against the Beech-Nut Packing Company by their belief that it is the producer of the Lorillard Beech-Nut cigarettes and chewing tobacco.[1]

---

[1] Though the record contains the testimony of hundreds of witnesses there is but one instance of an ultimate consumer testifying that he was not caused by the Lorillard Beech-Nut labels to believe that the tobacco and cigarettes so labeled were part of the general line of Beech-Nut products and put on the market by the same manufacturer or merchant. This one consumer who was not deceived was given a package of the Lorillard Beech-Nut cigarettes by a Lorillard salesman (Transcript, Vol. II, pp. 194-195, Qs. 5, 6 and pp. 196-197, X-Qs. 1 to 9).

Following are references to the testimony of sixty-five of the witnesses for the Beech-Nut Packing Company who, as consumers or as proprietors of or salesmen in tobacco stores, drug stores, delicatessen stores, wholesale or retail groceries, or news or tobacco stands, either purchased, used or dealt in Lorillard Beech-Nut chewing tobacco or cigarettes in the belief that they were products of the Beech-Nut Packing Company or of the party who marketed the general line of Beech-Nut goods. In many instances the deception extended over periods of many months and in other instances over periods of several years: Transcript, Volume I, pages 56, 62-63, 68, 76, 77-78, 108, 120, 127, 131, 148-149, 167, 201-203,

The Decision.

Though other issues were discussed by the District Court, the Court of Appeals based its decision squarely upon its ruling that the P. Lorillard Company has a legal right to use the Beech-Nut name and label by reason of the fact that the Beech-Nut Packing Company had not used it on goods of the class to which tobacco was considered by the Court to belong.

Conflicting Cases in the Sixth and Second Circuits.

Following is an outline of the cases in the Sixth and Second Circuits which are referred to in the petition, and a comparison of those cases with the case at bar.

210-211, 228-229, 232-233, 237, 241, 263-264, 268-269, 276-277, 285-286, 310, 316-317, 318, 329-330, 334, 335, 336-337, 339, 340, 341, 342, 343-344, 376-377, 378-379, 387, 412-414, 418, 423-424, 437, 445, 470, 474-475, 479, 485-486, 491, 502-503, 550, 555-556, 560-561, 565, 612-613, 617-618, 622-623, 625-627, 628-629, 633 to 635 (five witnesses), 755-759; Volume V, pp. 97-98, 105-106, 113-114.

Many of the witnesses whose testimony is cited in these foot-notes were retailers and salesmen for retailers, and their own erroneous belief that the Lorillard Beech-Nut tobacco products were products of the Beech-Nut Packing Company naturally had the effect of confirming the deception of the ultimate purchasers. Following are references to the testimony of dealers who, being themselves deceived, innocently deceived their customers by express statement: Vol. I, pp. 277-278, Qs. 11, 12; Vol. I, p. 330, Q. 12; Vol. I, p. 334; Vol. I, pp. 412-413, Qs. 13 to 15; Vol. I, p. 419, Qs. 13, 14; Vol. I, p. 424, Qs. 11, 12; Vol. I, p. 759, Qs. 48, 49.

Following are references to the testimony of witnesses who, thinking that the Lorillard Beech-Nut cigarettes were products belonging to the general line of commodities produced by the Beech-Nut Packing Company, state

The Vogue Case in the Sixth Circuit.

Vogue Company v. *Thompson-Hudson Co. et al.*, 300 Fed. 509; 6 Fed. (2nd) 875 (Circuit Court of Appeals for the Sixth Circuit, 1924-1925). The Vogue Company, publisher of the "Vogue" Magazine, claimed ownership of the word "Vogue" as a trade-mark, and also of a mark consisting of a large capital letter "V" having between its sides the figure of a woman, the latter mark being called by the plaintiff the "V-Girl." Both the word "Vogue" and the "V-Girl" mark were displayed on the magazine and on plaintiff's advertising literature.

---

either that they found the cigarettes inferior to the other Beech-Nut products, or that they never bought any more of the cigarettes after their first purchase: Vol. I, p. 51, Q. 11; Vol. I, p. 149, Q. 10; Vol. I, p. 202, Qs. 9 to 11; Vol. I, p. 237, Qs. 5 to 7 and p. 238, X-Qs. 12 to 14; Vol. I, p. 269, Q. 15; Vol. I, p. 339, bottom of page; Vol. I, p. 340, bottom of page; Vol. I, p. 341, bottom of page; Vol. I, p. 286, Qs. 11, 12; Vol. I, p. 479, Qs. 9 to 12; Vol. I, p. 486, Qs. 8, 9; Vol. I, pp. 555, 556, Qs. 8 to 11; Vol. V, pp. 113-114. The inferiority of the Lorillard Beech-Nut cigarettes is also shown by the testimony of J. J. Creevan, Vol. I, p. 136, Qs. 7, 8.

Following are references to the testimony of witnesses who because of their opposition to the use of cigarettes or chewing tobacco became antagonistic to the Beech-Nut Company because of their belief that it was the producer of the Lorillard tobacco products: Volume I, pp. 181-185; p. 441, Qs. 3 to 9; pp. 244-245, Qs. 11 to X-Q. 17; pp. 771-774. F. M. Fairfield describes the activities of the International Anti-Cigarette League, Transcript, Vol. I, p. 636.

Following are references to the testimony of thirty-one of the witnesses called by the Lorillard Company, from each of whom the fact was elicited that he had observed instances of the deception of the purchasing public caused by the Lorillard Company's use of the Beech-Nut trade-mark: Transcript, Volume II, pages 102 to 103; 134; 170 to 171; 189, 191 to 192; 205 to 207; 211;

The defendants sold women's hats, to each of which was affixed a label bearing the words "Vogue Hats" and a mark consisting of a large capital letter "V" having between its sides the representation of a woman's head. The Vogue Company did not deal in hats. The Court found that the use by defendants of the mere word "Vogue" violated no right of plaintiff for the reason that the word is descriptive, but ordered an injunction restraining the defendants from using the "V-Girl" mark, and held the use of that mark by the defendants to constitute unfair competition. Upon the subject of unfair competition the Court said that the term "unfair competition" was merely a convenient name for the doctrine that no one should be permitted to sell his goods as those of another, but that "there is no fetish in the word 'competition'." The Court found that "the invocation of equity rests more vitally upon the unfair-

---

215 to 216; 241, 244 to 245; 254, 255; 318; 374 to 375; 560; 578 to 580; 621 to 622; 641 to 642; 723, 738; 767 to 768; 774 to 775; Volume III, pages 838 to 839, 842 to 843; 902 to 903; 993; 1024 to 1025; 1042; 1073; 1094 to 1095; 1179; 1227; 1259. All of these Lorillard witnesses referred to in the preceding list of page numbers, with the exception of five who were Lorillard salesmen, were either owners of or employees in tobacco stores, drug stores or other stores selling tobacco. One of the Lorillard salesmen, Burgeson, not only admitted his knowledge of the deception caused by the Lorillard Company's use of the Beech-Nut name, but said that was natural on account of the similarity of name, but that the confusion was "not as much as we did expect" (Transcript, Vol. II, p. 775, X-Q. 25). Along the same line is the testimony of Bieringer, another Lorillard witness (Vol. II, pp. 45 to 50, X-Qs. 13, 23 to 26, 32, 36 to 42).

The name "Lorillard" is almost unknown to the consuming public as an identification of particular tobacco products. Cigarettes, cigars and tobacco are known to

ness," and illustrated its meaning by stating that "If B. represents that his goods are made by A., and damage therefrom to A. is to be seen, we are aware of no consideration which makes it controlling whether this damage to A. will come from market competition with some article which A. is then manufacturing or will come in some other way" (300 Fed. 512). The articles involved in the Vogue Company case—a monthly magazine and women's hats—are as distinct and different as the goods involved in the case at bar—the Lorillard cigarettes and chewing tobacco and the Beech-Nut Packing Company's chewing gum, hard candies, peanut butter, condiments and food products. While the idea of fashion may be associated with both the "Vogue" Magazine and Vogue hats, the two articles are not dealt in by the same wholesalers or jobbers, and are not sold in the same retail

---

the public by their brand names, such as the names "Murad," "Egyptian Deities" and "Moguls" for cigarettes and "Honest," "Union Leader" and "Beech-Nut" for chewing tobacco. Ordinarily the public does not notice or identify the product by the manufacturer's name. Following are references to the testimony of fifteen Lorillard witnesses from whom evidence on this point was elicited, and to the testimony of seventeen of the witnesses for the Beech-Nut Packing Company who testified to the same effect: Lorillard witnesses—Transcript, Volume II, pages 88-89; 234-235; 263, 266; 282-284; 292-293; 490-491; 657-658; 685; Volume III, pp. 798; 809; 824-825; 843-844; 855; 863; 869, 871, 877; Beech-Nut Packing Company's witnesses—Volume I, pages 53; 69; 169; 173, 175; 443; 459; 487; 493; 497; 515; 542; 552; 669; 689; 698; 726; 763.

The P. Lorillard Company does not even put its own name or even the word "Lorillard" on many of its leading brands (Transcript, Vol. V, pp. 190-192; pp. 197-198; pp. 223-224; pp. 226-227).

Following are references to the testimony of retail dealers in tobacco and salesmen for the Beech-Nut Packing Company who in the course of their business ob-

stores unless it be in a few large department stores where practically everything is sold. In the case at bar the goods of the two parties are handled by the same jobbers and wholesalers, and are displayed and sold alongside of each other in retail grocery stores, delicatessen stores, tobacco stands of all kinds, drug stores, news stands, etc. The controlling fact, however, is that in both cases the purchasing public was deceived with resulting diversion of and injury to plaintiff's business good-will. Furthermore, in the case at bar the word "Beech-Nut" is an arbitrary word, and the Court's ruling in the Vogue Company case exempted the mere word "Vogue" from its injunction only because the word "Vogue" is descriptive instead of being arbitrary. The Court's reasoning in the Vogue Company case would have led to an injunction forbidding the use of the mere

---

served wide-spread deception of the purchasing public caused by the Lorillard Company's use of the Beech-Nut trade-mark: Vol. I, p. 32, Q. 9 and p. 33, Q. 17; p. 81, Qs. 12 to 14; p. 90, Q. 10; p. 99, Qs. 12, 13; p. 108, Q. 7; p. 120, Q. 10; p. 136, Qs. 8, 9; pp. 159, 160, Qs. 5 to 8; pp. 251, 252, Qs. 18 to 20; pp. 277, 278, Qs. 11, 12; p. 311, Qs. 15 to 18; pp. 323, 324, Qs. 9 to 11; p. 330, Q. 12; p. 334; pp. 345 to 349; pp. 360 to 363; p. 370; pp. 374 to 375, Qs. 4 to 8; pp. 380 to 382, Qs. 8 to 19; pp. 391 to 394, Qs. 4 to 16; pp. 399, 400, Qs. 3 to 13; p. 419, Qs. 13, 14; pp. 528, 529, Qs. 29 to 35; pp. 570, 571, Qs. 5 to 8; pp. 612, 613, Qs. 8 to 10; p. 618, Qs. 12 to 15; pp. 731 to 733, Qs. 20 to 30.

The deception caused by the Lorillard Company's use of the Beech-Nut trade-mark extended to the editors of prominent city newspapers, the Quarter Master Department of the United States Army and the promoters of public exhibitions and conventions of the tobacco industry. Beech-Nut Exhibit 12 (Transcript, Vol. VI, pages 7 to 53) consists of correspondence showing the deceit referred to and letters from dealers in tobacco to the Beech-Nut Packing Company ordering shipments of Beech-Nut cigarettes and chewing tobacco.

word "Beech-Nut" as well as the use of that word when printed in the distinctive manner and with the distinctive surroundings employed by the Beech-Nut Packing Company.

The Penslar Case in the Sixth Circuit.

Peninsular Chemical Company v. *Levinson et al.*, 247 Fed. 658 (Circuit Court of Appeals, Sixth Circuit—1917). The Peninsular Chemical Company dealt in medicines, drugs, and drug store supplies and sundries, under the trade-mark "Penslar," a contraction of the word "Peninsular." It conducted its business through a chain of 3500 drug stores which were known as Penslar Drug Stores. The Peninsular Chemical Company did not deal in cigars or tobacco. Defendant, Samuel Levinson, manufactured and sold cigars which he marked with the word "Penslar" and "Made by the Penslar Co.", thus conveying to the purchasing public the erroneous belief that the cigars were made by the Peninsular Chemical Company and that they were a part of the line of goods sold by the Penslar Drug Stores. The evidence showed that one of the defendants, S. W. Levinson, had expressly represented that the cigars were made by the Peninsular Chemical Company, but it did not appear that the other defendant, Samuel Levinson, had made such express misrepresentations. The Court held that the fact of misrepresentation was fully established by the mere marking of the cigars with the word "Penslar" even though unaccompanied by express misrepresentation. The Court ordered an injunction restraining defendants from representing that their cigars were plaintiff's product and from using in connection with such cigars the word "Penslar" as previously used by them. *The Court expressly refrained from considering the*

argument that since the Peninsular Chemical Company did not deal in cigars there was no competition at all between the parties and hence no unfair competition, and based its decision upon the proposition that "the good-will of a business and the good reputation of an output, when considered in connection with the business itself, are a species of property which may not be destroyed with impunity," and the Court added that it knew "of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger" (247 Fed. 661).

The Court of Appeals for the Sixth Circuit finds appropriation of and injury to business good-will a sufficient reason for the intervention of equity. The Court of Appeals for the Third Circuit in the case at bar finds no illegality in or remedy for such fraud unless it is effected by the sale of a commodity of a particular class, the bounds of the class being dependent solely upon the arbitrary selection of some particular system of classification and totally unrelated to the possibility or fact of fraud.

The identity of all of the essential facts in the Peninsular Chemical Company case and the case at bar is complete. The word "Penslar" and the word "Beech-Nut" are arbitrary words; each was used as a trade-mark; each is a trade name, the former denoting the Penslar goods and the Penslar Drug Stores and the latter the Beech-Nut Packing Company's business and line of goods; the use of each by a stranger caused deception of the purchasing public and diversion of and injury to the good-will of the business in connection with which the word was originally used. No distinction between the Peninsular Chemical Company case and the case at bar is found in a comparison of the goods dealt in by the parties to the two suits. The relation between the Levinsons' cigars and the medicines and drug store supplies

dealt in by the chemical company is no closer than or different from the relation between the Lorillard cigarettes and tobacco and the Beech-Nut Packing Company's chewing gum, packaged hard candies, peanut butter and food products. In each case the goods of the two parties are displayed in the same retail stores, and in each case the plaintiff was dealing in an extensive line of products which the purchasing public knew was being extended from time to time to include new products. There is no distinction between the Peninsular Chemical Company case and the case at bar other than in the conflicting principles of law applied to essentially identical facts.

The Aunt Jemima Case in the Second Circuit.

Aunt Jemima Mills Co. v. *Rigney & Co.*, 247 Fed. 407 (Circuit Court of Appeals for the Second Circuit—1917). In this case the plaintiff, Aunt Jemima Mills Co., had used and registered in the Patent Office a trade-mark for use on packages of self-rising flour. The most conspicuous features of the trade-mark were the words "Aunt Jemima" and a picture of a colored woman. At a later date the defendant, Rigney & Co., started to use and registered in the Patent Office the same trade-mark for syrups and sugar creams. The Aunt Jemima Company asked that Rigney & Co. be enjoined from using the Aunt Jemima trade-mark. While self-rising flour and syrup are both food products, and belong to the same class, if the use to which articles are put be made the basis of classification, the two commodities are not competitive; one cannot be substituted for the other and neither can be palmed off as the other.

The Court enjoined Rigney & Co. from using the Aunt Jemima trade-mark for syrup. This ruling conflicts with the decision of the Third Circuit Court of Appeals in the

instant case not only in its adoption of the principle that the law forbids deceptive use of a trade-mark or label upon a non-competing commodity, but there is a conflict between the underlying principles upon which the two Courts based their conclusions. The Court of Appeals for the Third Circuit ruled that the Lorillard Company was within its rights in using the Beech-Nut trade-mark for cigarettes and tobacco because cigarettes and tobacco belong to a different class of merchandise from the goods dealt in by the Beech-Nut Packing Company. While the Court of Appeals for the Second Circuit referred to the fact that "syrup and flour are both food products," it did not base its injunction upon that fact, but upon the fact that "obviously the public, or a large part of it, seeing this trade-mark on a syrup would conclude that it was made by the complainant" (247 Fed. 410). The Court said that perhaps the public might not have thought that flatirons bearing the Aunt Jemima trade-mark were products of the Aunt Jemima Company, thus clearly showing that the Court considered deception of the public the ruling fact regardless of whether the deception took place in connection with syrup, or flatirons, or any other article or commodity. This involves the basic difference and conflict between the Second and Third Circuit Courts of Appeals. The Second Circuit Court of Appeals finds and enjoins fraud in deception of the public accompanied by diversion of and injury to the plaintiff's business good-will, regardless of the nature of the commodity through the deceptive sale of which the fraud is accomplished. Under precisely the same circumstances the Third Circuit Court of Appeals finds no remediable fraud unless the plaintiff and defendant deal in goods *of the same class.* In the Second Circuit the bounds of the remediable wrong are the bounds of the actual fraud. In the Third Circuit the

bounds of the remediable wrong are the bounds of a vaguely and artificially defined "class" which may or may not be coincident with the bounds of the actual fraud and injury.

The Law in England.

The English cases which we have referred to as in harmony with the law in the Sixth and Second Circuits were discussed by the Court of Appeals for the Second Circuit in the opinion in the Aunt Jemima case (247 Fed. at pages 410 to 412), and reference to them is also found in the opinion of the Court of Appeals for the Sixth Circuit in the Peninsular Chemical Company case (247 Fed. at page 662). Following is a brief statement of the facts and of the relief granted by the court in each of the English cases:

In *Eastman Company* v. *Kodak Cycle Co.* (15 Reports Patent Cases, 105), the plaintiff manufactured cameras and the defendant made bicycles. The plaintiff did not make or deal in bicycles. The Court enjoined the defendant from carrying on business under the name "Kodak Cycle Company, Limited," or any name comprising the word "Kodak" that would be likely to mislead the public into the belief that defendant company was the same as or connected with the plaintiff company, and also enjoined the defendant from selling its cycles as Kodak cycles or selling other goods designated by the word "Kodak."

Dunlop Pneumatic Tyre Co. v. *Dunlop Lubricant Co.* (16 Reports Patent Cases, 12), involved the right of the plaintiff, a manufacturer of bicycle tires, rims, pumps, etc., to an injunction restraining the defendant, who dealt in oils and lubricants for bicycles, from using the word "Dunlop." Plaintiff had never dealt in oils or lubri-

cants. The use of the word "Dunlop" by defendant was held to be deceptive and was enjoined.

In *Valentine Meat Juice Co.* v. *Valentine Extract Co.* (17 Reports Patent Cases, 673—Court of Appeal) plaintiff used the word "Valentine" upon liquid meat juice for medicine, and defendant used the same word on beef extract in capsule form used for more general food purposes. An injunction was granted.

Dunlop Pneumatic Tyre Co. v. *Dunlop-Truffault Cycle & Tube Manufacturing Company* (12 Times Law Reports, 434). In this case a preliminary injunction was asked to restrain the defendant from using the name "Dunlop" as a part of its corporate style. Plaintiff manufactured pneumatic tires known as "Dunlop tyres" and defendant was a manufacturer of bicycles and steel tubes used in the manufacture of bicycles. Plaintiff did not make or deal in bicycles or steel tubes. An injunction was granted, Mr. Justice Chitty holding that the name "Dunlop" had been chosen by defendant to confuse the public and to make the public think that the defendant company was connected with the plaintiff company.

In *Premier Cycle Company* v. *Premier Tube Company* (12 Times Law Reports, 481) plaintiff made and sold bicycles, and incidentally made and used in its bicycles a special type of tubing formed of metal wound round helically. Defendant was a manufacturer of cold-drawn weldless tubes and stated that it had no intention of competing with the plaintiff in the manufacture of bicycles. An injunction was granted.

In *Walter* v. *Ashton* ([1902] 2 Chancery, 282) the defendant was enjoined from calling its bicycle "The Times" bicycle and leading the public to believe that it was made by or for or had any connection with the newspaper of that name.

Previous Decisions of Third Circuit Court of Appeals.

In each of two earlier cases the Third Circuit Court of Appeals has enjoined the defendant from conducting its business under a name closely resembling the plaintiff's corporate name notwithstanding that the parties dealt in goods of different classes. Following are the cases referred to:

Akron-Overland Tire Co. v. *Willys-Overland Co.*, 273 Fed. 674 (June 13, 1921);

The Akron-Overland Tire Company, defendant, was engaged in the business of retreading and selling tires. The Willys-Overland Company makes and sells complete automobiles but has never made or dealt in tires, and equips its automobiles with tires made by others. The court enjoined the Akron-Overland Tire Company from using the word "Overland" in its name, in the transaction of its business and in the threatened sale of its stock and securities.

Howard Wall, doing business under the name Rolls-Royce Tube Co. v. *Rolls-Royce of America, Inc.*, 4 Fed. (2nd) 333. (March 5, 1925.)

Howard Wall, defendant, dealt in radio tubes under the name "Rolls-Royce Tube Co." Rolls-Royce of America, Inc., makes and sells automobiles and does not make or deal in radio tubes. The court enjoined Wall from using the name "Rolls-Royce."

There was no competition between the goods dealt in by plaintiff and defendant in either the Overland or the Rolls-Royce case; and upon plain reasoning these cases, decided by the Third Circuit Court of Appeals, appear to be complete authority for the relief asked of the same court in the instant case.

In its opinion in the case at bar the Court of Appeals

makes no mention of either the Overland or the Rolls-Royce case; and the court in no way distinguishes the instant case from those cases. It refers in its opinion to *Rosenberg Bros. & Co.* v. *John F. Elliott* (—— Fed. ——; not yet reported), a trade-mark and unfair competition case, in which the opinion was handed down by the Third Circuit Court of Appeals on September 11, 1925, the same day as the opinion in the instant case. That court in the instant case quotes a definition of trade-mark property from the *Rosenberg* v. *Elliott* case. In the same opinion in the Rosenberg case appears the following passage:

> "We pause to note that these cases [Overland and Rolls-Royce cases] are not authority on the law of trade-mark infringement at all, for each was tried and decided on the single issue of unfair competition, and then not unfair competition in the sale of goods but in the unfair appropriation and use of a competitor's trade-name with the intention, of course, thereby to profit in the sale of goods of a related character. Such an act is not infringement of a trade-mark but is a trespass of the same nature as is committed by one who applies another man's name to his own goods. It is a wrong which equity will enjoin even when the goods of the two men do not strictly enter into competition."

From the foregoing quotation it appears that the court found the vice in the Overland and Rolls-Royce cases to lie in the defendants' appropriation of the plaintiffs' names as their own corporate or firm names, and intended to exclude from the doctrine of the Overland and Rolls-Royce cases any case in which the defendant had not appropriated the plaintiff's name as a part of its corporate or firm name.

If the denial of relief in the instant case was predicated upon the fact that the Lorillard Company did not adopt the word "Beech-Nut" as a part of its corporate name,

then the denial of relief in the instant case rests upon the proposition that the corporate and trade name of any established business may be put to deceptive use upon non-competing commodities by any stranger who does not use that name as his own corporate or firm name, however extensively he may make deceptive use of it upon his goods or in his advertising. Such a distinction ignores the fraud, and rests the judicial reasoning entirely upon a refined distinction regarding the manner of use of the word by which the fraud is effected. This distinction would accentuate the conflict between the Third Circuit Court of Appeals and the decisions in the Sixth and Second Circuits. In neither the Penslar nor Vogue case nor the Aunt Jemima case was the injunction restricted to the defendant's use of the plaintiff's trade-mark word or trade name as a part of the defendant's corporate or firm name.

Conclusion.

Although the court below in its opinion in the case at bar refers (Transcript, Vol. V, p. 315) to *Vogue Company* v. *Thompson-Hudson Company* and *Aunt Jemima Mills Co.* v. *Rigney,* and states that there are cases in which redress may be granted in the absence of direct competition between the goods dealt in by the plaintiff and defendant, this statement is followed by and applied in a paragraph (Transcript, Vol. V, p. 316) in which the Court reasoned that the case at bar does not present facts establishing a right to relief because there is no direct competition between the goods dealt in by the P. Lorillard Company under the Beech-Nut trade-mark and the goods dealt in by the Beech-Nut Packing Company. *The court below made no mention of the Penslar case.* The conflict of law involved in the decisions in the case at bar and the

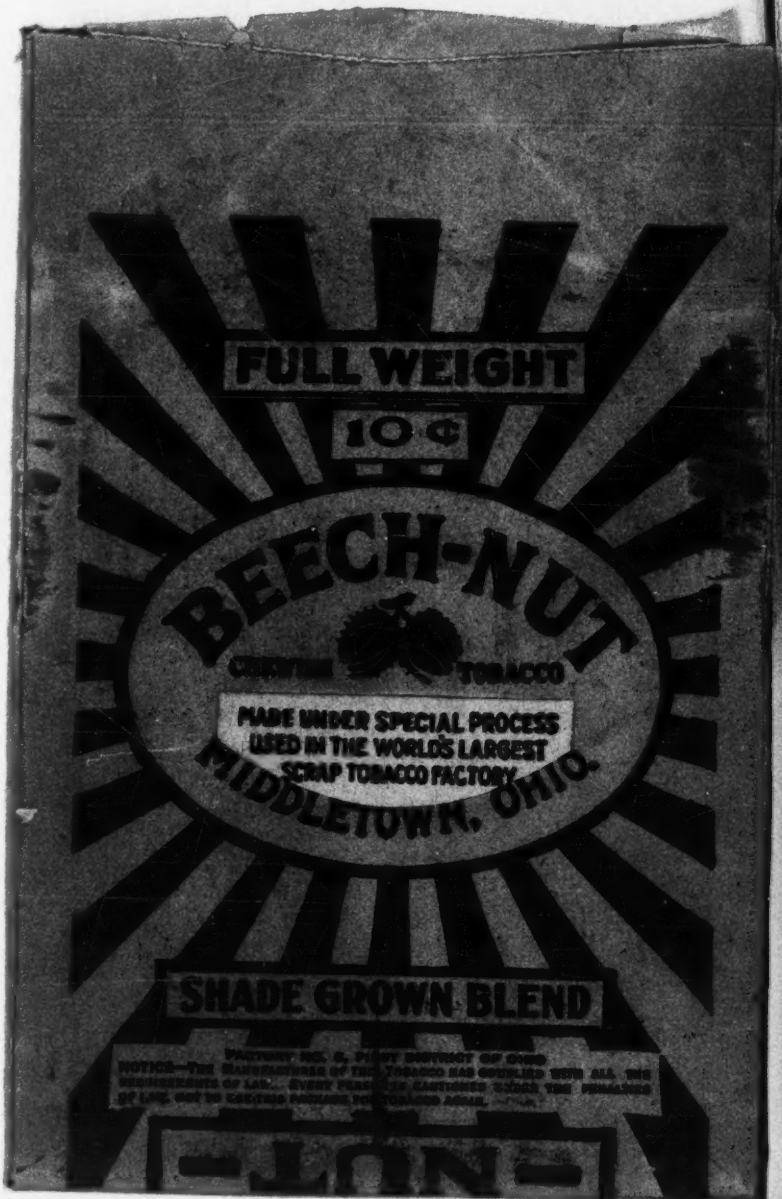
cases in the Sixth and Second Circuits is conclusively shown by the Court's failure to distinguish the case at bar from the Sixth and Second Circuit cases other than by assigning a legal effect to the absence of direct competition directly opposite to the effect given to that fact in the Sixth and Second Circuits. In both the case at bar and the Second and Sixth Circuit cases there was deception of the purchasing public and resulting diversion of and injury to good-will and reputation. In the case at bar the absence of direct competition was held to bar the grant of relief. In the Sixth and Second Circuits the absence of direct competition was held to be no reason for refusing relief for the diversion of and injury to good-will and reputation. The Court makes no explanation of its conclusion that facts which constitute an infraction of law in other circuits do not violate the law in the Third Circuit. The conclusion is irresistible that the law as established in the Third Circuit in the case at bar conflicts with the law as interpreted and applied in the Sixth and Second Circuits.

Respectfully submitted,

CHARLES E. HUGHES,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. MCCLURE JOHNSON,
Counsel for Petitioner.

December, 1925.

APPENDIX: SPECIMENS OF LABELS.



Lorillard Beech-Nut scrap tobacco label.

First used in 1915.

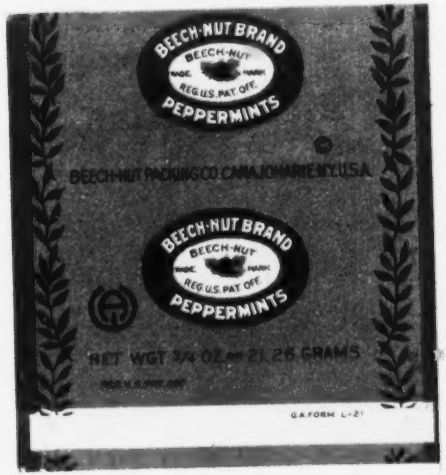
Beech-Nut Packing Company's standard Beech-Nut label.

Used on great variety of products.

Essential features used since about 1891.

Lorillard Beech-Nut cigarettes label.

First used about 1921.



Beech-Nut Packing Company's Beech-Nut labels.
Used on goods sold largely on tobacco stands.

FEB 26 1927
WM. R. STANSBURY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 249.

BEECH-NUT PACKING COMPANY,
Petitioner,

vs.

P. LORILLARD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Petition for Certiorari Filed December 8, 1925. Certiorari Granted January 11, 1926.

BRIEF FOR PETITIONER.

(Plaintiff below.)

CHARLES E. HUGHES,
WALTER A. SCOTT,
JAMES R. OFFIELD,
E. McCLURE JOHNSON,
Counsel for Petitioner.

Rudnick Bros., Inc., Law Printers, 343 S. Dearborn St., Chicago.

TABLE OF CONTENTS.

Subject Index iii
Table of Cases Cited xxix
Text-Books Cited xxxiii
Statutes Cited xxxiii

Brief 1
Nature and history of case 1
Jurisdiction of this Court 2
Decision below and conflicting decisions in other circuits 2
Statement of the case 4
Outline 4
Part I. History of the Beech-Nut Packing Company's business and of its Beech-Nut trade-mark 16
Part II. The Lorillard Company's adoption of the Beech-Nut trade-mark, the protest made by the Beech-Nut Packing Company in 1915, the Lorillard Company's reply, and discovery in 1920 that the reply was a misrepresentation of the facts 26
Part III. History of the Weissinger Beechnut brand and business 45
Part IV. Deception of the public caused by Lorillard Company's use of Beech-Nut trade-mark 75
Part V. Damage 102
Errors of the Circuit Court of Appeals 123
Argument 124
Summary of argument 124
Decision of the court below 125
The law (discussion of the authorities) 175
Principles established by previous cases and application to the instant case 228

Use of same trade-marks upon different commodities by several persons, all strangers to this case, not relevant here. (Discussion of Defendant's Exhibits 19-24, inclusive, and 30-33, inclusive) 233
The Weissinger Beechnut trade-mark abandoned 236
Alleged acquiescence was temporary inaction of the Beech-Nut Company induced by the Lorillard Company's misrepresentation of the facts 255
Damage 262
Conclusion 279
Appendices ..... App. 1-112

SUBJECT INDEX.

Nature and history of case 1
Reference to opinions below 2
Reference to decree of Circuit Court of Appeals 2
Jurisdiction of this Court 2
Decision below and conflicting decisions in other circuits 2

Statement of the case 4

Outline 4
Outline of Part I—History of the Beech-Nut Packing Company's business and of its Beech-Nut trade-mark 4
Exhibit: Specimens of Beech-Nut Packing Company's labels 5
Outline of Part II—The Lorillard Company's adoption of the Beech-Nut trade-mark, the protest made by the Beech-Nut Packing Company in 1915; the Lorillard Company's reply; and the discovery in 1920 that the reply was a misrepresentation of the facts 7
Exhibit: Beech-Nut Scrap Tobacco label used by P. Lorillard Co. 8
Exhibit: Weissinger Beechnut Tobacco label as used by Harry Weissinger Tobacco Co. 9
Exhibit: Beech-Nut cigarettes label used by P. Lorillard Co. 12
Outline of Part III—History of the Weissinger Beechnut trade-mark and business 14
Outline of Part IV—Deception of the purchasing public and of dealers 14
Outline of Part V—Damage 15
Statement 16

Part I—History of the Beech-Nut Packing Company's business and of its Beech-Nut trade-mark.. 16
Early history—Foundation and development of company 16
Increase in number of commodities dealt in—Present magnitude of Beech-Nut Packing Company's business—Use of standard Beech-Nut trade-mark 17
Reference to yearly statements of sales and to specimens of Beech-Nut trade-marks on exhibit board, etc. 18
Exhibit: Photograph of Plaintiff's Exhibit No. 28, Label Board 18*a*
Reference to exhibits showing use of Beech-Nut trade-mark prior to 1903 19
Nellis' testimony regarding use of oval label 21
Number of products in 1912 and 1923 21
Manufacture of chewing gum begun in 1911 and now the principal product of the company in volume of business 21
Other products 21
Over seven billion labels bearing the Beech-Nut trade-mark used by the Beech-Nut Packing Company prior to the end of the year 1921 22
Three million dollars expended in advertising Beech-Nut products prior to the end of the year 1921 22
Policy of the Beech-Nut Company to sell under the Beech-Nut trade-mark only goods of the highest quality and choicest variety, and to thereby gain for new products the benefit of the high reputation of the goods previously sold.. 23
Word "Beech-Nut" in both corporate name and trade-mark 24
Mr. Barbour's testimony on policy of company 24

Other brands used to slight extent on by-products, goods of less choice variety, so as to preserve significance of the company's identifying word "Beech-Nut" as a symbol of goods of the choicest quality only 25

Part II—The Lorillard Company's adoption of the Beech-Nut trade-mark, the protest made by the Beech-Nut Packing Company in 1915, the Lorillard Company's reply, and discovery in 1920 that the reply was a misrepresentation of the facts 26

Beech-Nut scrap tobacco first put out by P. Lorillard Company in 1915 26

Immediate protest by Beech-Nut Company 26

Lorillard letter alleging continuous use of "Beech-Nut" on tobacco since 1898 27

Lorillard letter referring to price lists 28

Lorillard letter tells of assignments of Weissinger business and dissolution of American Tobacco Co. 28

Beech-Nut letter informs Lorillard Company that orders and inquiries for Beech-Nut tobacco had been received by Beech-Nut Co. 29

No conflict between Beech-Nut Company and Weissinger Company in 1898, and not until several years later could confusion have arisen 29

Lorillard misrepresentation made 1898 facts determinative instead of 1915 facts 31

Lorillard's contention that Beech-Nut Co. had acquiesced by forwarding orders. Orders referred to in detail, *post*, page 88 *et seq* 32

During years following 1915 Lorillard had knowledge that Beech-Nut Co. continued to assert its rights against all tobacco dealers other than Lorillard, which fact demonstrates

Lorillard's knowledge that its misrepresentation had been effective 33
Beech-Nut Stogie Company 34
Controversy in 1919 and 1920 regarding extension of Lorillard Company's use of Beech-Nut trademark to cigarettes leads to discovery of falsity of representation made in 1915 by the Lorillard Company 36
Mr. Lipe's testimony regarding conference with Mr. Maloney 36
"Never got to" question of word "Beech-Nut," but discussed style of label 37
Mr. Belt says P. Lorillard Company ready to market Beech-Nut cigarette in 1919 37
But did not do so until the spring of 1921 38
Reference to "old" and "new" Beech-Nut cigarette packages 38
Cost of changing package 38
Mr. Barbour's suggestion that cigarette label be made like scrap tobacco label 39
Mr. Maloney writes to Mr. Arkell saying that P. Lorillard Company was going to file an opposition to Beech-Nut Company's application for registration of "Beech-Nut" as a trade-mark for cigarettes, and stated that he had understood from interviews and correspondence prior to the filing of the application that the Beech-Nut Company would not press it 39
Circumstances of Beech-Nut Company's application for registration of "Beech-Nut" for cigarettes 40
Beech-Nut Company letter declining to reimburse Lorillard Company, and stating that regardless of Lorillard Company's rights in the name "Beech-Nut" Lorillard Company had no right to entire oval trade-mark 40

In the opposition proceeding Beech-Nut Company's general denial put in issue Lorillard's allegation of continuous use of Weissinger Beechnut trademark since 1898 42
Testimony taken in 1920 in the Patent Office opposition proceeding showed Weissinger Beechnut trade-mark not used after 1910 42
Grounds of decisions of Examiner of Interferences and Commissioner of Patents 43
Part III—History of the Weissinger Beechnut brand and business 45
History—origin of brand 45
Assignments of Weissinger business 45
Dissolution of American Tobacco Company and incorporation of new company "called P. Lorillard Company" 46
First disclosed by Patent Office opposition testimony in 1920 that manufacture of Weissinger Beechnut tobacco was discontinued prior to 1909, that last sale was in April, 1910, and that none was offered for sale after 1910 46
Statement of Weissinger Beechnut tobacco sales annually from 1904 to 1910 47
Mr. Spence's testimony as to Weissinger Beechnut brand 48
No Lorillard price list in evidence—merely referred to in letter of Sept. 15, 1915, as inclosed price lists dated January 2, 1904, May 6, 1907, July 1, 1910, and November 3, 1910 49
Boykin, factory manager, testified no Beechnut tobacco made in the years 1909 to 1914 49
Lorillard letter of July 8, 1915, misrepresenting the facts again quoted with comment 50
Reasons given by Lorillard Company for adoption of the word "Beech-Nut" as a trade-mark for

a new tobacco mixture show knowledge of disuse of Weissinger Beechnut trade-mark and of the fact that in 1915 it no longer was known to the public as a trade-mark for tobacco..... 51
Mr. Ball's testimony about unpopularity of old tobacco mixtures, decreasing sales of Honest, preparation of a new sweeter mixture, and his search of "list" for a brand that was "dormant"..... 51
Abstract of testimony showing what the "list of brands" is 52
Lorillard Company's purpose to introduce a new tobacco mixture to replace the old and unpopular brands would have been defeated by giving the new mixture a name known to the public as the name of one of the old brands; the word "Beech-Nut" had the double advantage of being unknown as a tobacco brand and of being well known as a symbol of excellence in connection with merchandise generally..... 53
In 1915 no ultimate consumer of tobacco even remembered that the Weissinger Beechnut brand of tobacco had ever existed, and hence there was no survival in 1915 of any trade-mark rights therein..... 54
No testimony of any ultimate consumer who in 1915 or thereafter even remembered the Weissinger Beechnut tobacco 54
Weissinger Beechnut tobacco remembered only by a few veterans of the tobacco trade..... 54
Decreasing sales of Weissinger Beechnut tobacco from 1905 to 1910 and cessation of sales in 1910 resulted in complete obliteration of the brand from the memory of the public..... 55

Facts showing Lorillard Company's intention to abandon, and knowledge of abandonment of the Weissinger Beechnut trade-mark 57
Discontinued so long that it was completely forgotten by consumers 57
Selection of Beech-Nut name in 1915 because, as stated by Mr. Ball, the Weissinger Beechnut brand was "dormant" 57
The necessity of introducing a tobacco having a new flavor to suit buyers who were dissatisfied with the old tobacco mixtures carried with it the necessity of giving the new tobacco a name that would by no possibility be identified by the public with any of the old and unpopular tobacco mixtures previously on the market 57
The Lorillard Company eliminated from the Weissinger Beechnut trade-mark every element except the one that could be used in constructing a copy of the Beech-Nut Company's Beech-Nut trade-mark, namely, the word "Beech-Nut" 57
The Lorillard Company continued to use the labels of the six active brands acquired from Luhrman & Wilbern without change. Of the brands previously owned by Luhrman & Wilbern the only one in which the label was not preserved precisely as previously used was the Weissinger Beechnut brand 57
Summary of facts showing abandonment of Weissinger Beechnut brand, and showing that if it had not been forgotten by the public as a tobacco trade-mark its use would have defeated Lorillard's purpose to introduce a new tobacco mixture to recapture the trade of tobacco users who would no longer buy the old mixtures 59

Exhibits: Specimens of tobacco labels as used by Luhrman & Wilbern Co. and later by P. Lorillard Co. for the same brands:
Scrap Iron labels 61
Polar Bear labels 63
Old Nut labels 65
Honest Scrap labels 67
Bag Pipe labels 69
Natural Leaf (no labels in evidence) 71
Exhibit: Specimens of labels: 73
Weissinger Beechnut tobacco label, Harry Weissinger Tobacco Co.
Weissinger Beechnut tobacco label, Luhrman & Wilbern Co.
Beech-Nut Scrap tobacco label, P. Lorillard Co.
Beech-Nut Cigarettes label, P. Lorillard Co.
Beech-Nut Packing Co.'s Beech-Nut labels
Part IV—Deception of the public caused by Lorillard Company's use of Beech-Nut trade-mark 75
Entire purchasing public deceived 75
Defendant's witnesses all connected with tobacco trade 75
Testimony of retail tobacco dealers that they were not deceived is immaterial 75
The relevant fact is that Lorillard put into the hands of the retailers the means of deceiving the ultimate purchasers 76
As a matter of fact many tobacco retailers and even wholesalers were deceived 76
Universal deception of ultimate purchasers and of many dealers shown by testimony of both plaintiff's and defendant's witnesses 77
Summary of Appendix A 77
Quotations from testimony of 35 of plaintiff's witnesses who in their capacity of whole-

saler, retailer, salesman or consumer either bought, sold or used Beech-Nut scrap tobacco or Beech-Nut cigarettes in the belief that they were products of the Beech-Nut Packing Company, and continued in this erroneous belief for periods ranging from a few days to several years.

Summary of Appendix B 78

List of 72 of plaintiff's witnesses, including most of those quoted in Appendix A, who dealt in or used Beech-Nut tobacco products in the belief that they were products of the Beech-Nut Packing Company 78

Some of these dealers and salesmen expressly stated to their customers that the Beech-Nut scrap tobacco and cigarettes were products of the Beech-Nut Company 79

Summary of Appendix C 79

Quotations from the testimony of 28 of defendant's witnesses. All of defendant's 300 witnesses were connected with the tobacco business. Most of them said their customers had not made comments to them indicating that their customers thought the Beech-Nut tobacco and cigarettes were products of the Beech-Nut Packing Company, but the 28 witnesses quoted in Appendix C admitted that they had heard such comments 79

Summary of Appendix D 80

Quotations from the testimony of 16 of defendant's witnesses showing that the ultimate purchasers identify tobacco products solely by the brand name and do not know or notice the name of the manufacturer.

Close association in trade of plaintiff's and defendant's goods—sold in same stores—window displays—defendant's advertising 95
Plaintiff's and defendant's goods flow through same channels of trade from the moment they leave the factories where they are produced—They are distributed by the same wholesalers and jobbers, and are sold by the same retailers 95
Window displays 97
They are jointly displayed in show windows.
Lorillard Company's advertising 99
All of the Lorillard advertising features the word "Beech-Nut" and subordinates and in most instances completely suppresses the name "Lorillard."
Common custom for manufacturers of and dealers in groceries, drugs, etc., to own their own exclusive tobacco trade-marks and to manufacture and have others manufacture for them tobacco products 100
Such well-known companies as Park & Tilford and Charles & Co., grocers of New York, Sprague, Warner & Co., wholesale grocers of Chicago, Stickney & Co., wholesale grocers of St. Louis, and Liggett Drug Co., of eastern cities all have or have had their own brands of tobacco products 100
Appropriation of the trade-mark of another is not justified by the addition thereto of the appropriator's name 101

Part V—Damage 102
Beech-Nut Company's business good-will at mercy of Lorillard Company 102
This section is confined to a discussion of special damage. The question of general damage is discussed in the Argument, *post*, page 262 102
Specific damage resulting from the inferior quality of the Beech-Nut cigarette 103
(Many witnesses quoted in this section.)
Designed to be cheapest cigarette on the market .. 103
Inferior quality as described by the witnesses 106
Defendant's witness testifies as to close interrelationship of Beech-Nut tobacco and other Beech-Nut products 112
Damage resulting from opposition of people who condemn use of cigarettes and chewing tobacco .. 115
Quotations of testimony showing antagonism to Beech-Nut Company of individuals, and extent of opposition to tobacco and cigarettes shown by testimony regarding the large and influential membership and widespread propaganda of the International Anti-Cigarette League 116
Considerations hitherto influencing Beech-Nut Company to postpone taking the natural step of selling tobacco products 120
The Beech-Nut Company many years ago seriously considered adding cigarettes and tobacco to its line of products, but was influenced to postpone doing so by the danger of its other business being injured by the antagonism of the large class of people who are opposed to the use of cigarettes and tobacco 120

Errors of the Circuit Court of Appeals 123

Argument 124

Summary of argument 124

Decision of the court below 125

Error in making "class" and "descriptive properties" of the goods the test of the rights of the parties 125

The court below bases its decision upon its finding that plaintiff's and defendant's goods belong to different "classes" and are of "different descriptive properties" 125

Court below finds that plaintiff deals only in food products. As a matter of fact chewing gum, plaintiff's principal product, is no more an article of food than is chewing tobacco 126

Examination of basis of reliance of court below on classification and description properties of merchandise 126

These words in the trade-mark statute—No possible effect where jurisdiction is from diversity of citizenship 126

The statutory references to classes of merchandise and descriptive properties of goods cannot apply to actions where jurisdiction does not rest exclusively on trade-mark statute 126

In equity no arbitrary rule based on character of goods 127

Statutory suits in equity are not limited to cases in which both parties deal in goods of the same class or same descriptive properties, and suits in equity where jurisdiction rests on diversity of citizenship are not controlled by the statutory limitations, but only

by the general principles of equity. In the instant case the jurisdiction rests upon both registration under the statute and diversity of citizenship 127
Court below applies conflicting rules to the trade-mark and unfair competition aspects of the same facts 129
Conflicting doctrines approved by the lower court; namely, that equity may be invoked without market competition, and that there is no remediable wrong unless there is "an endeavor to get the same trade from the same people at the same time" 129
No inconsistency possible if misappropriation of good-will be made the test 130
Lower court's emphasis of importance of classification of goods 131
Howe Scale case and Canal Co. case, cited by court below, are not authority for its decision .. 132
Howe Scale case relates to proper use of a surname 132
Canal Co. case relates to geographical terms 133
The court below in error regarding combination in same business of manufacture and sale of food and tobacco products 135
Possibility of substituting one product for another is not the legal test in the suit at bar 136
After erroneously adopting the "descriptive properties" of the goods as the test of the rights of the parties the court below applies that test in a way that would be erroneous in any case, and to assumed facts which do not exist in this case 137
Commercial custom and association in trade are the proper basis of classification for the purposes of the law of unfair competition 137

Fundamental error of fact in erroneous finding of the court below that the Beech-Nut Company deals in food products only 140
Chewing gum is the principal product of the Beech-Nut Packing Company, and the company also produces non-alcoholic beverages 140
Reference to Patent Office classification and the trade-mark statute providing therefor—fallacy of attaching any weight here to that classification 141
Irrelevant cases cited by the court below in support of its theory of classification as a test of infringement of trade-mark rights 143
It is only when deception of the public is not proved that the fact that the parties deal in different commodities is material, and then only as an evidential fact bearing upon the probability of deception resulting from use of the same mark by both parties 143
National Picture Theatres case 144
Does not support decision below .....
Borden Ice Cream case 145
Relates to narrow protection accorded to a surname, and is analogous to cases in which it is held that only narrow protection can be accorded to commonly used and suggestive words 146
Some cases showing varying extent of protection given by courts to trade-mark words of different character 147
The Pabst Blue Ribbon case 147
The Budweiser case 147
Pease *v.* Scott Milling Co. (the Noxall case) 149
The Gold Medal case 151

Testimony of defendant's witness, Mr. Newton, former Commissioner of Patents, shows that many words are commonly used as trade-marks, but that the word "Beech-Nut" is not in common use 152
Error of court below in disregarding conclusive proof of universal deception of the public by the Lorillard Company's use of the Beech-Nut trade-mark, and considering only testimony regarding matters not of determinative importance 154
Error of court below in finding that the Lorillard Company did not try "to palm off its products as those of the plaintiff" 154
Mere use of the Beech-Nut trade-mark by the Lorillard Company shows intent to deceive and palm off its products as those of the Beech-Nut Company; even instructions to salesmen against oral misrepresentation would not rebut presumption that deception was intended 155
No cautions to Lorillard salesmen 156
The testimony fairly shows express misrepresentation by Lorillard salesmen 159
Review of the testimony and reference to Appendix H 159
Erroneous finding of the court below regarding the resemblance between Beech-Nut labels used by the Lorillard Company and by the Beech-Nut Packing Co. 162
Comparison of Lorillard and Beech-Nut Packing Company labels 163
The law on the degree of resemblance between trade-marks necessary to constitute infringement 165
Quotations from cases 165–169

Error of the court below in its assumption that the Lorillard Company had no motive to appropriate the good-will of the Beech-Nut Company, and that the magnitude of the Lorillard business justified its appropriation of the Beech-Nut trade-mark and eliminated the element of damage therefrom 169

The law 175

Cases involving the use of the same trade-mark on different commodities 175

General statement as to the authorities 175

The extent to which the owner of a trade-mark may prevent its use by others on goods to which he has not applied it has never been decided by this Court or by the House of Lords in England 176

Quotation from Mr. Schechter's book 177

The Simplex case 179

Comparison of Simplex case with the instant case 182

Distinction between trade-mark use of commonly used words having a suggestive meaning and arbitrary words not in common use 183

"Beech-Nut" is an arbitrary word and has not been used by others 184

Cases in which the law as stated in the Simplex case has been applied to facts parallel to the facts in the case at bar 186

The Penslar case 186

The violation of the property right in good-will held to be sufficient ground for injunction regardless of whether the wrong can be classified as infringement of a trade-mark or as unfair competition 189

The Aunt Jemima case 192
The court discusses the English cases 194
The English cases 197
The Vogue case 201
The use of a word in a fraudulent manner may deprive a party of the right to use that word in a way that would have been innocent and harmless but for the original fraudulent use 204
Lorillard Company's fraudulent use of the word "Beech-Nut" as a part of a simulation of the Beech-Nut Company's trade-mark has worked a forfeiture of any right the Lorillard Company might ever have had in the word 205
The Overland and Rolls-Royce cases in the Third Circuit 205
The Overland case 206
The Rolls-Royce case 208
Rosenberg *v.* Elliott 210
The court discusses the Overland and Rolls-Royce cases, but its discussion does not reconcile the instant case with those cases and with the cases in other circuits, but accentuates the conflict 211-215
Collins *v.* Ames 215
Aluminum Company *v.* Sargoy 217
France Milling Co. *v.* Washburn-Crosby Co. (The Gold Medal case) 219
Decision based upon three grounds: acquiescence, character of the goods and character of the trade-mark 220
The court distinguishes between a trade-mark used on a single article and one used on a varied line of products 221

The statutory phrases "same class" and "same descriptive properties" as interpreted by the Court of Appeals of the District of Columbia.... 222
In trade-mark registration appeals from the Patent Office, the Court of Appeals of the District of Columbia works under the trade-mark statutes and necessarily reasons out such cases in the terms of the statutes, including above phrases 222
It rules that goods are of the "same class" and "same descriptive properties" in the meaning of the statute if, when sold under the same trade-mark, the public believe them to be of the same origin..... 223
Oppenheim *et al v.* President Suspender Co..... 223
Anglo Amer. Light Co. *v.* General Electric Co..... 224
Lord & Taylor *v.* Wolf..... 224
Simplex Electric Heating Co. *v.* Ramey Co..... 224
Boston Rubber Shoe Co. *v.* Abramowitz..... 226
Canton Culvert & Silo Co. *v.* Consolidated Car Heating Co. 226
Williams *v.* Kern 226
G. & J. Tire Co. *v.* G. & J. Motorcar Co. 227
Principles established by previous cases in which parties dealt in different commodities, and application to the instant case..... 228
Previous cases enjoin misappropriation of and injury to business good-will, and treat such misappropriation the same whether the instrumentality by which the good-will and business are identified is a trade-mark, trade name, or corporate or firm name..... 228
Use of same trade-marks upon different commodities by several persons all strangers to this case, not relevant here 233

Collections of labels and trade-mark registrations for many trade-marks used by other persons, put in evidence by P. Lorillard Co. (Defendant's Exhibits 19-24, inclusive, and 30-33, inclusive) are totally irrelevant and have no place in the consideration of the instant case. Nothing at all proved concerning these many other marks. Entirely irrelevant even if uses and ownerships were proved 233

The Weissinger Beechnut trade-mark was abandoned prior to 1915 when the Lorillard Company put its Beech-Nut tobacco on the market 236

Abandonment question here different from usual. The trade-mark that was discontinued (the Weissinger Beechnut trade-mark) has never been resumed 236

Neither the Lorillard Company nor its predecessors ever owned a trade-mark symbolic of its business as an entirety or of a line of products; each of their trade-marks identified merely a single product 237

The Lorillard Company acquired no title to the Weissinger Beechnut trade-mark for the reason that the good-will of the business previously symbolized thereby had passed out of existence before the date of the assignment of the Weissinger business to the Lorillard Company 238

Even if the Lorillard Company had obtained title to the Weissinger Beechnut trade-mark the Lorillard Company's failure ever to use it would have worked an abandonment 240

Mr. Ball's statement that he examined the "list of brands" for the purpose of finding a "dormant" brand and in pursuance of that purpose selected the Weissinger Beechnut brand is an

admission that the latter was abandoned and no longer represented the good-will of any going business 241
The "list of brands" was merely a memorandum list of names copied from the records of old companies 242
The record contains no testimony tending to indicate that the good-will or even the public's memory of the Weissinger Beechnut tobacco continued after 1910 when the business in that brand ceased—It was only because the Weissinger Beechnut brand had been forgotten that the word "Beech-Nut" was suitable as the name of a new tobacco mixture compounded for the express purpose of capturing the trade of customers who would not buy the old mixtures..... 243
The Lorillard Company invariably preserved the exact design and appearance of the labels of active brands that were being manufactured and sold 245
The Lorillard Company made no change in the labels of the six active brands acquired from Luhrman & Wilbern, but made a complete transformation in the label of the forgotten and abandoned Weissinger Beechnut brand..... 245
Incident of the small letter "G" on the label of the "Duke's Mixture" brand..... 246
Intent to abandon the Weissinger Beechnut mark clearly and unmistakably proved by the circumstances 246
Judge Showalter's opinion in the Royal Baking Powder case holding that a trade-mark cannot be assigned after the good-will which it had previously symbolized has expired..... 248

In the Patent Office opposition proceeding the Examiner of Interferences held that the Weissinger Beechnut trade-mark had been abandoned..... 250
The Levering Coffee Company case..... 251
The Court of Appeals in the instant case gave no weight to the Lorillard Company's contention that its present use of the Beech-Nut trade-mark is a continuation of the use of the Weissinger Beechnut trade-mark 253
Conclusions established by the history of the Weissinger Beechnut trade-mark..... 253

Alleged acquiescence of the Beech-Nut Company in the Lorillard Company's use of the Beech-Nut trade-mark was temporary inaction of the Beech-Nut Company induced by the Lorillard Company's misrepresentation of the facts..... 255

The Beech-Nut Company informed the Lorillard Company in 1915 that the public was being deceived by the Lorillard Company's use of the Beech-Nut trade-mark and cited specific instances of such deception..... 255
The Lorillard Company would have had the right to make proper trade-mark use of the word "Beechnut" if the facts had been as represented by the Lorillard Company in 1915..... 257
The forwarding of orders for tobacco sent to the Beech-Nut Packing Company was not evidence of acquiescence, but of the fact that the parties sending the orders were deceived and that the Beech-Nut Company relied on the representation made by the Lorillard Company..... 259
The reliance of the Beech-Nut Company on the representation made by the Lorillard Company is shown not only by the suspension of its protest against the Lorillard Company, but also by the

fact that the Beech-Nut Company asserted its rights against another tobacco manufacturer and sought and obtained the co-operation of the Lorillard Company in so doing 260
The Beech-Nut Company learned the truth regarding the abandonment of the Weissinger Beech-nut trade-mark from the testimony in the Patent Office opposition proceeding in the year 1920 261

Damage 262

The Lorillard Company's use of the Beech-Nut trade-mark converts the Beech-Nut Company's exclusive enjoyment of its good-will and reputation into a mere occupancy in common 262
The Beech-Nut Packing Company's trade-mark and name is a symbol of its business and line of products as an entirety—not simply a symbol of origin of an individual product or of several products separately 262
Both the Hanover Star Milling case and the Simplex case recognize the principle that a trade-mark may symbolize a business generally or a line of products 263
Business good-will is property of the highest order in that it is absolutely created by the party to whose business it attaches 264
The rules that the same trade-mark may be used by different parties on different goods and that where there is no competition there can be no unfair competition were framed to meet conditions of trade that existed in former times, and not as limitations upon the just regulation of other and different conditions which have since come into existence 264
Injury to good-will may be caused otherwise than by direct competition—Where there is direct

competition there will be special damage in the loss of sales in addition to the damage to good-will and the forestalling of the expansion of the business to which the good-will properly attaches 266
Mr. Justice Pitney's opinion in the Hanover Star Milling case (240 U. S. 412) 268
The Columbia Law Review on special and general damage in trade-mark and unfair competition cases 270
Section 19 of the Trade-Mark Act of 1905 provides for injunctions and for the award of profits and damages for "the violation of *any right* of the owner of a trade-mark" without limitation to injury caused by direct competition or resulting in special as distinguished from general damage.... 273
Property right as fully involved in unfair competition cases as in trade-mark cases 274
Instances of special damage have been proved in the instant case, and this is all that is required or that it is possible to do whether the commodities sold by the parties are alike or different.... 275
No hard and fast rule for defining the range of goods included within a trade-mark right 277
Conclusion 279

Appendices.

Appendix Page

APPENDIX A.—Deception proved by plaintiff's witnesses 1
APPENDIX B.—List of plaintiff's witnesses who dealt in or used Beech-Nut scrap tobacco or Beech-Nut cigarettes in the belief that these articles were products of the Beech-Nut Packing Company 50

APPENDIX C.—Deception of public proved by defendant's witnesses 57

APPENDIX D.—Quotations from testimony of defendant's witnesses showing that the name "Lorillard" is practically unknown as an identification of tobacco products 75

APPENDIX E.—Plaintiff's witnesses showing Lorillard name unknown to many classes of people 89

APPENDIX F.—A few veteran tobacco dealers are the only witnesses who even remember that the Weissinger Beechnut tobacco brand ever existed—Not one ultimate consumer remembers 91

APPENDIX G.—United States Trade-Mark Statutes—Excerpts 95

Act of Feb. 20, 1905, ch. 592; 33 Stat. L. 724 (as amended).—Sections 5, 6, 9, 13, 16, 17, 18 19 and 23 95

Act of May 4, 1906, ch. 2081; 34 Stat. L. 168.—Section 2 100

APPENDIX H.—Deceptive practices of salesmen selling Beech-Nut tobacco and cigarettes 101

TABLE OF CASES CITED.

Akron-Overland Tire Co. *v.* Willys-Overland Co. (C. C. A., 3rd), 273 Fed. 674.....
203, 205, 206, 207, 208, 211, 212, 213, 214, 215, 227, 271
Aluminum Cooking Utensil Co. *v.* Sargoy Bros. & Co., 276 Fed. 447.....217, 218, 219, 234
American Steel Foundries *v.* Robertson, Comr. of Patents, and Simplex Electric Heating Co. (*Simplex case*), 269 U. S. 372.....
127, 146, 175, 179, 180, 181, 182, 183, 184, 185, 186, 263
Anglo-American Incandescent Light Co. *v.* General Electric Co., 43 App. D. C. 385..... 224
Anheuser-Busch, Inc. *v.* Budweiser Malt Products Corp., 295 Fed. 306 (C. C. A., 2nd—*Budweiser case*) 144, 147, 148, 149, 150, 184
Aunt Jemima Mills Co. *v.* Rigney & Co., 234 Fed. 804 (E. D., N. Y.); 247 Fed. 407 (C. C. A., 2nd).....
144, 150, 152, 169, 176, 177, 178, 192, 193, 198, 203, 228, 229, 230, 232, 271
Beech-Nut Packing Co. *v.* P. Lorillard Co., 7 F. (2d) 967 (C. C. A., 3rd).....2, 129
Beech-Nut Packing Co. *v.* P. Lorillard Co., 299 Fed. 834 (Dist. Ct. N. J.)..... 2
Battle *et al. v.* Finlay *et al.*, 50 Fed. 106..... 101
Borden Ice Cream Co. *v.* Borden's Condensed Milk Co., 201 Fed. 510.....145, 150
Boston Rubber Shoe Co. *v.* Abramowitz, 47 App. D. C. 199 226
Canal Co. *v.* Clark, 13 Wall. 311.....132, 133, 134
Canton Culvert & Silo Co. *v.* Consolidated Car Heating Co., 44 App. D. C. 491..... 226
Church & Dwight *v.* Russ, 99 Fed. 276..... 150
Collins Co., The *v.* Oliver Ames & Sons Corp., 18 Fed. 561.....193, 215, 216, 217

Coca-Cola Co. *v.* Gay-Ola Co., 200 Fed. 720..... 204
De Voe Snuff Co. *v.* Wolff, 206 Fed. 420..... 168
Dunlop Pneumatic Tyre Co. *v.* Dunlop Lubricant Co., 16 Rep. Pat Cas 12 (*English case*).....
.....152, 195, 197, 231
Dunlop Pneumatic Tyre Co. *v.* Dunlop-Truffault Cycle & Tube Mfg. Co., 12 Times Law Rep. 434 (*English case*) 196, 198, 231
Eastman Co. *v.* Kodak Cycle Co., 15 Rep. Pat. Cas. 105 (*English case*).....
.....152, 176, 177, 190, 194, 197, 198, 203, 230, 231, 271
Elgin National Watch Co. *v.* Loveland, 132 Fed. 41.. 271
Enterprise Manufacturing Co. *v.* Landers, Frary & Clark, 131 Fed. 240..... 159
Fairbank Co., N. K., *v.* R. W. Bell Mfg. Co., 77 Fed. 869 76
Fairbank Co., N. K., *v.* Central Lard Co., 64 Fed. 133 101
Florence Manufacturing Co. *v.* Dowd, 178 Fed. 73.....
.....150, 193
France Milling Co. *v.* Washburn-Crosby Co., 7 F. (2d) 304 (C. C. A., 2nd—*Gold Medal case*).....
.....138, 151, 152, 177, 178, 184, 215, 219, 220, 221
Gold Medal Case: See France Milling Co. *v.* Washburn-Crosby Co.
Globe-Wernicke Co. *v.* Brown & Besly, 121 Fed. 90.... 76
G. & J. Tire Co. *v.* G. & J. Motor Car Co., 39 App. D. C. 508..... 227
Hanover Star Milling Co. *v.* Metcalf, 240 U. S. 403....
.....197, 263, 268, 269, 274, 275, 276
Heileman Brewing Co. *v.* Independent Brewing Co., 191 Fed. 489 (quoting many Federal Court cases) 168
Hostetter Co. *v.* Conron, 111 Fed. 737..... 161
Howe Scale Co. *v.* Wyckoff, Seamans & Benedict, 198 U. S. 118.....132, 133
Kostering *v.* Seattle Brewing & Malting Co., 116 Fed. 620 167

Levering Coffee Co. *v.* Merchants Coffee Co., 39 App. D. C. 151 ..... 251, 252
Lord & Taylor *v.* Wolf & Son, 3 T. M. R. (Com'r of Pats), 41 App. D. C. 514 ..... 223, 224
McDonald & Morrison Mfg. Co. *v.* Mueller Mfg. Co., 183 Fed. 972 168
McLean *v.* Fleming, 96 U. S. 245 ..... 167, 196
Menendez *v.* Holt, 128 U. S. 514 101
Morgan's Sons *v.* Troxell, 23 Hun N. Y. 632 169
Morgan's Sons (Enoch) *v.* Wood, 152 Fed. 690 150
National Pictures Theatre *v.* Foundation Film Corp., 266 Fed. 208 144
New England Awl & Needle Co. *v.* Marlborough Awl & Needle Co., 168 Mass. 154; 46 N. E. 386 155
Oppenheim, Oberndorf & Co. *v.* President Suspender Co., 3 Fed. (2nd) 88 223
Overland Case: See Akron-Overland Tire Co. *v.* Willys-Overland Co. (C. C. A., 3rd), and Willys-Overland Co. *v.* Akron-Overland Tire Co. (Dist. Ct., Del.)
Pabst Brewing Co. *v.* Decatur Brewing Co., 284 Fed. 110 (C. C. A., 7th—*Pabst Blue Ribbon case*) 147, 148, 149, 150, 151, 184
Pease *et al. v.* Scott County Milling Co., 5. F. (2d) 524 (*Noxall case*) 149, 184
Peninsular Chemical Co. *v.* Levinson *et al.*, 6 T. M. R. (S. D. Ohio); 247 Fed. 658 (C. C. A., 6th) 150, 176, 186, 187, 188, 189, 190, 191, 192, 198, 203, 229, 232, 271
Pennsylvania Rubber Co. *v.* Dreadnaught Tire & R. Co., 225 Fed. 138 76
Pillsbury *v.* Pillsbury-Washburn Flour Mills Co., 64 Fed. 841 165
Premier Cycle Co. *v.* Premier Tube Co., 12 Times Law Rep. 481 (*English case*) 196, 198, 231
Re Dunn's Trade-Mark, 7 Rep. Pat. Cas. 311 (*English case*) 152

Rolls-Royce Case: See Wall *v.* Rolls-Royce of America, Inc.
Rosenberg *v.* Elliott, 3 F. (2d) 682 (E. D. Pa.); 7 F. (2d) 962 (C. C. A., 3rd)..... 178, 206, 210, 211, 212
Royal Baking Powder Co. *v.* Raymond, 70 Fed. 376..... 248, 249
Rushmore *v.* Badger Brass Mfg. Co., 198 Fed. 379.. 166
Saxlehner *v.* Eisner & Mendelson Co., 179 U. S. 19.... 166
Scriven *v.* North, 134 Fed. 366..... 76
Sharpless Co. *v.* Lawrence, 213 Fed. 423..... 266
Simplex Case: See American Steel Foundries *v.* Robertson, Commissioner of Patents *et al.*
Simplex Electric Heating Co. *v.* Ramey Co., 46 App. D. C. 400..... 224, 225
Stuart *v.* F. G. Stewart Co., 91 Fed. 243..... 165
United States *v.* American Tobacco Co., 191 Fed. 371 (Circ. Ct., S. D. New York)..... 14, 28, 46, 170, 242
United States *v.* American Tobacco Co., 221 U. S. 106..... 14, 28, 45, 46
Valentine Meat Juice Co. *v.* Valentine Extract Co., 17 Rep. Pat. Cas. 673 (*English case*)..... 195, 196, 198
Vogue Co. *v.* Thompson-Hudson Co. *et al.*, 300 Fed. 509; 6 F. (2d) 875 (Mandate of C. C. A., 6th)..... 150, 169, 178, 201, 202, 203, 204, 229, 230, 266, 270, 271, 272
Wall *v.* Rolls-Royce of America, Inc., 4 F. (2d) 333 (C. C. A., 3rd—*Rolls-Royce case*)..... 178, 205, 206, 208, 209, 211, 212, 213, 214, 215
Walter *v.* Ashton [1902], 2 Ch. 282 (*English case*)..... 176, 177, 190, 197, 198, 199, 200, 203, 231, 271
Williams *v.* Kern, 47 App. D. C. 441..... 223, 226
Willys-Overland Co. *v.* Akron-Overland Tire Co., (Dist. Ct., Del.), 268 Fed. 151..... 187, 205, 206
Wolf Bros. *v.* Hamilton-Brown Shoe Co., 206 Fed. 611..... 76

TEXT-BOOKS CITED.

Columbia Law Review, February 1925, page 200, *Appropriation of Trade Symbols by Non-Competitors* 270, 271, 272
Hopkins, J. L., *The Law of Trademarks, Tradenames and Unfair Competition* (3rd Ed.—1917) 101
Schechter, F. I., *Historical Foundations of the Law Relating to Trade-Marks* (1925) 176–179

STATUTES CITED.

Sec. 240(a), Judicial Code as amended by The Act of Feb. 13, 1925, ch. 229; 43 Stat. L. 938 2

Act of Feb. 20, 1905, ch. 592; 33 Stat. L. 724 (as amended) 2, 126
[See Appendix G for full text of the following sections:]
Section 5 (33 Stat. L. 725, as amended by 34 Stat. L. 1251, 36 Stat. L. 918, 37 Stat. L. 649, and 41 Stat. L. 535) ..... 179, 181, 222, App. 95
Section 6 (33 Stat. L. 726, as amended by 34 Stat. L. 1252) ..... 41, 222, App. 96
Section 9 (33 Stat. L. 727) ..... 222, App. 97
Section 13 (33 Stat. L. 728) ..... 222, 235, App. 97
Section 16 (33 Stat. L. 728) ..... 127, 189, 273, App. 98
Section 17 (33 Stat. L. 728) ..... 2, App. 98
Section 18 (33 Stat. L. 729) ..... 2, App. 99
Section 19 (33 Stat. L. 729) ..... 128, 189, 273, 281, App. 99
Section 23 (33 Stat. L. 730) ..... 126, App. 99

Act of May 4, 1906, ch. 2081, Sec. 2 (Stat. L. 169) ..... 141, App. 100
[See Appendix G for full text of Section 2.]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 249.

BEECH-NUT PACKING COMPANY,
Petitioner,

vs.

P. LORILLARD COMPANY.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Petition for Certiorari Filed December 8, 1925. Certiorari Granted January 11, 1926.

BRIEF FOR PETITIONER.

(Plaintiff below.)

Nature and History of Case.

Petitioner filed its bill of complaint herein in the United States District Court for New Jersey on June 17, 1921, charging infringement of its registered trade-mark and unfair competition and praying for an injunction and an accounting of damages and profits. The District Court dismissed the bill without costs to either party, and the Circuit Court of Appeals for the Third Circuit

affirmed the decree of the District Court. Following are references to the reports of the opinions of the courts below:

Opinion of the District Court, 299 F. 834. (The opinion appears in the Record of this case at page 2645 of Volume V.)

Opinion of the Court of Appeals, 7 F. (2nd) 967. (The opinion appears in the Record of this case at page 2694 of Volume V.)

The opinion and decree of the Court of Appeals were filed on September 11, 1925 (R., Vol. V, pp. 2694 and 2704).

Jurisdiction.

The jurisdiction of this court was invoked by petition for a writ of certiorari filed December 8, 1925, under the provisions of Section 240 (*a*) of the Judicial Code as amended by the Act of February 13, 1925, ch. 229 (43 Stat. L. 938). The petition was granted by this court on January 11, 1926. The basis of federal jurisdiction is the diversity of citizenship of the parties and the registration of petitioner's trade-mark under the provisions of the Trade-Mark Act of February 20, 1905, ch. 592 (33 Stat. L. 724). Petitioner, the Beech-Nut Packing Company, plaintiff and appellant below, is a New York corporation. Respondent, the P. Lorillard Company, is a New Jersey corporation.

Decision Below and Conflicting Decisions in Other Circuits.

The ground for the petition for a writ of certiorari was that the decree of the Court of Appeals in the instant case rests on a decision on a question of law which is in conflict with previous decisions of the Courts of

Appeals of the Sixth and Second Circuits, and also the importance of the question of law upon which the conflicting decisions had been made.

The Courts of Appeals of the Sixth and Second Circuits have decided that the appropriation by a stranger of the trade-mark or name of an established business with resulting appropriation of and injury to the good-will of that business is a fraud which equity will enjoin, even though the stranger deals in goods not identical with or of the "same descriptive properties" or "same class" as those dealt in by the party whose mark or name he has appropriated. The Court of Appeals for the Third Circuit bases its decision in the instant case upon its ruling that the P. Lorillard Company's use of the trade-mark and salient part of the trade and corporate name of the Beech-Nut Packing Company in the sale of tobacco and cigarettes, with resulting appropriation of and injury to the good-will of the business of the Beech-Nut Packing Company, is not a violation of law because the Beech-Nut Packing Company does not deal in tobacco or cigarettes or in commodities which the court considered of "the same class" or "same descriptive properties." The foregoing interpretation of the law is not only expressly stated by the Court of Appeals in its opinion, but it is implicit in its decision by reason of the undisputed and indisputable proof that the Lorillard Company's use of the Beech-Nut trade-mark and name has caused universal belief by the purchasing public that the Lorillard Beech-Nut tobacco and cigarettes are products of the Beech-Nut Packing Company, and has thereby diverted the good-will of the Beech-Nut Packing Company's business to the uses and benefit of the Lorillard Company.

STATEMENT OF THE CASE.

Outline.

Following is a brief summary of the principal facts of the case in the form of an outline of the subject-matter of each of the five parts into which the Statement of the Case is divided.

OUTLINE OF PART I. HISTORY OF THE BEECH-NUT PACKING COMPANY'S BUSINESS AND OF ITS BEECH-NUT TRADE-MARK. (POST, P. 16.)

The business was founded and the Beech-Nut trade-mark was adopted in or shortly prior to the year 1891 (*post,* p. 16). Several specimens of the Beech-Nut Company's labels used on different products are mounted on pages 5, 6, *post.* The products first produced were hams and bacon. In 1899 the original name of the company, Imperial Packing Company, was changed to Beech-Nut Packing Company in order to identify the corporate name as well as the trade-mark with the Beech-Nut products. The business grew steadily and by 1902 the company had added beef and grape jam to its products. In 1907 the number of products had grown to over forty. In 1912 the company registered its Beech-Nut trade-mark in the United States Patent Office for sixty-seven products and in that year was selling over forty products on a nation-wide scale. In 1911 the manufacture and sale of chewing gum was started (*post,* p. 22). Chewing gum is now the principal product of the company in volume of business, constituting over half of the total (*post,* p. 21). Over seven billion Beech-Nut trade-mark labels have been put before the public on goods sold, and the company had expended three million dollars for advertising prior to the end of the year 1921 (*post,* p. 22).

BEECH-NUT PACKING COMPANY LABELS.

The four labels below are similar to labels in Plaintiff's Exhibit No. 28.

A collection of the Beech-Nut Packing Company's Beech-Nut labels is in evidence as Plaintiff's Exhibit No. 28. In this collection the labels are mounted on a large board, a photograph of which on a much reduced scale appears at pages 2777 to 2778 of Volume VI of the Record and a duplicate of which is inserted on pages 18*a* and 18*b* of this brief. The details of many of the smaller labels cannot be distinguished in these photographs on account of the reduction in size, but the photographs show the larger labels in detail and the general appearance of all of them. The dates of use of the different labels are shown at the top of Exhibit 28. Owing to the destruction of the Company's files by fire in 1903 (*post*, p. 18) and the fact that only about a half-dozen different commodities were produced prior to 1900 there are but few specimens shown of labels used prior to the last mentioned year.

PLAINTIFF'S EXHIBIT NO. 27—BEECH-NUT CHEWING GUM DISPLAY BOX.

BOX INCLOSED IN OUTSIDE COVER.

BOX WITH FLAP DOWN—COVER REMOVED.

BOX WITH FLAP UP.

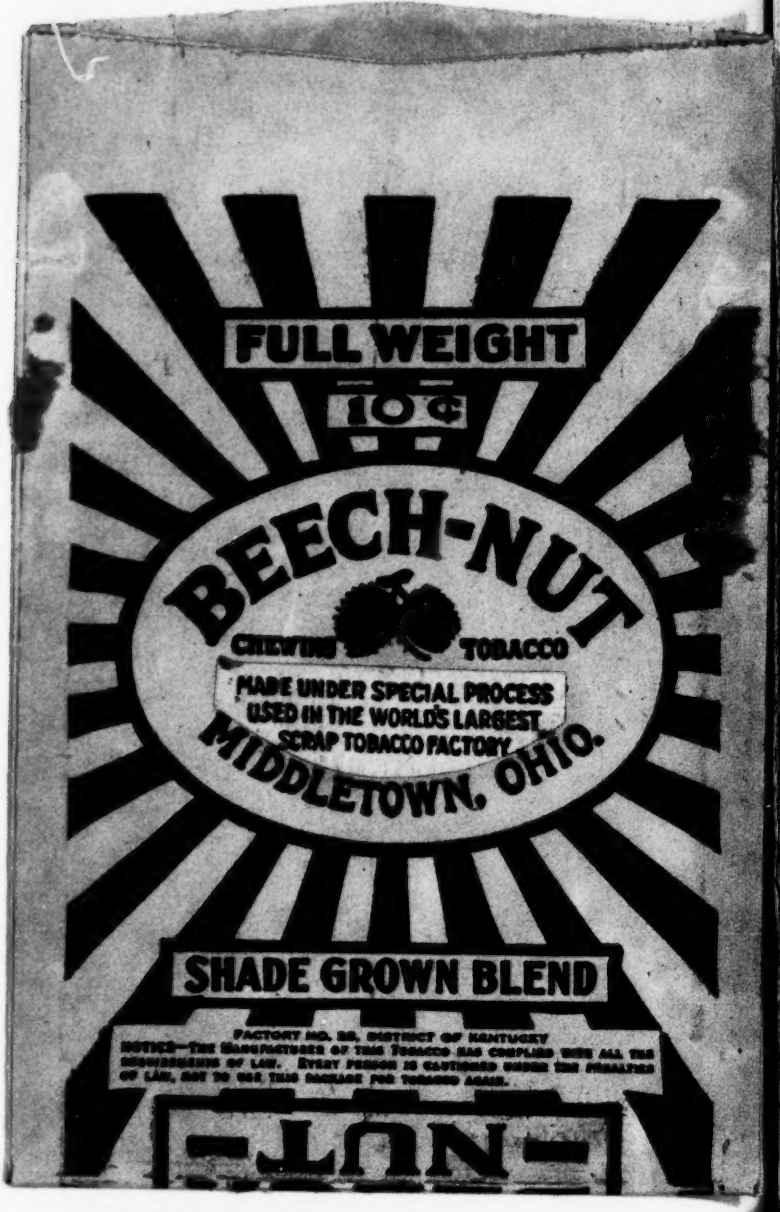
Above gum box contains twenty packages of five sticks each. Thus each box of gum, when sold, contains not only all the markings shown in above pictures but also 100 individual gum-stick wrappers and 20 package wrappers inside, all featuring the name Beech-Nut in its famous oval setting. Over ten million of these boxes of gum, over a billion sticks, were sold in 1921 (R. Vol. I, p. 850). The demand for Beech-Nut gum has been so enormous that it could not always be supplied. (Ibid. Q. 33.)

The company reserves the Beech-Nut trade-mark for goods of the highest quality and choicest variety, and uses other trade-marks upon less choice commodities incidentally produced in its business, such as the less choice but wholesome cuts of meat (*post*, p. 25). This policy has been followed for the purpose and with the effect of causing the purchasing public to buy new commodities bearing the Beech-Nut trade-mark by reason of their knowledge of the high quality of previous Beech-Nut products (*post*, p. 24).

OUTLINE OF PART II. THE LORILLARD COMPANY'S ADOPTION OF THE BEECH-NUT TRADE-MARK, THE PROTEST MADE BY THE BEECH-NUT PACKING COMPANY IN 1915, THE LORILLARD COMPANY'S REPLY, AND THE DISCOVERY IN 1920 THAT THE REPLY WAS A MISREPRESENTATION OF THE FACTS. (POST, P. 26.)

The Lorillard Company in 1915 placed a new chewing tobacco mixture on the market in a wrapper bearing an essentially exact copy of the Beech-Nut Packing Company's Beech-Nut trade-mark. A specimen of the Lorillard Company's Beech-Nut tobacco wrapper is mounted on page 8, *post*. The Beech-Nut Company immediately wrote a letter of protest to the Lorillard Company. In reply the Lorillard Company represented that it and its predecessors, the Luhrman & Wilbern Company and the Harry Weissinger Tobacco Company, as shown by their office records, had used the word "Beech-Nut" on tobacco continuously since prior to the year 1898, in which year, or prior thereto, the Harry Weissinger Tobacco Company of Louisville, Kentucy, had adopted the word "Beech-Nut" as a trade-mark for chewing and smoking tobacco. A reproduction of the Harry Weissinger Beechnut tobacco wrapper is mounted on page 9, *post*.

BEECH-NUT SCRAP TOBACCO LABEL
Used by
P. LORILLARD CO.

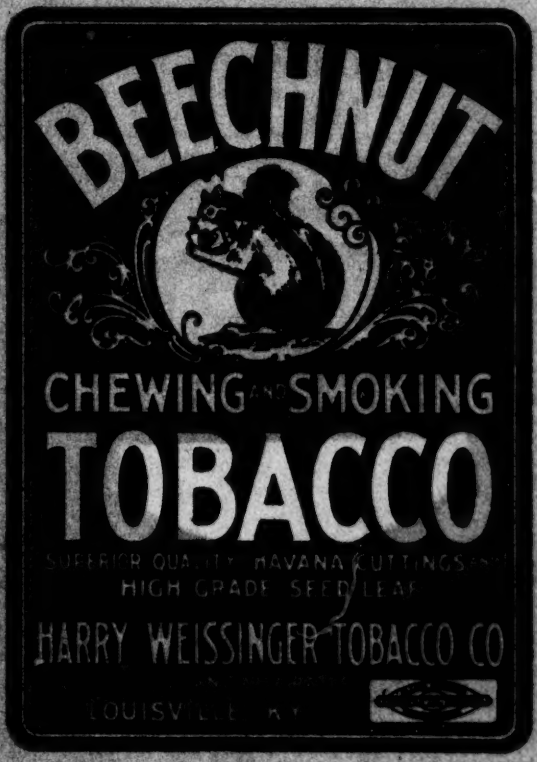


Above label appears in Bill of Complaint, Exhibit 2 (R. Vol. I, p. 17);

WEISSINGER BEECHNUT TOBACCO LABEL

As Used by

HARRY WEISSINGER TOBACCO CO.



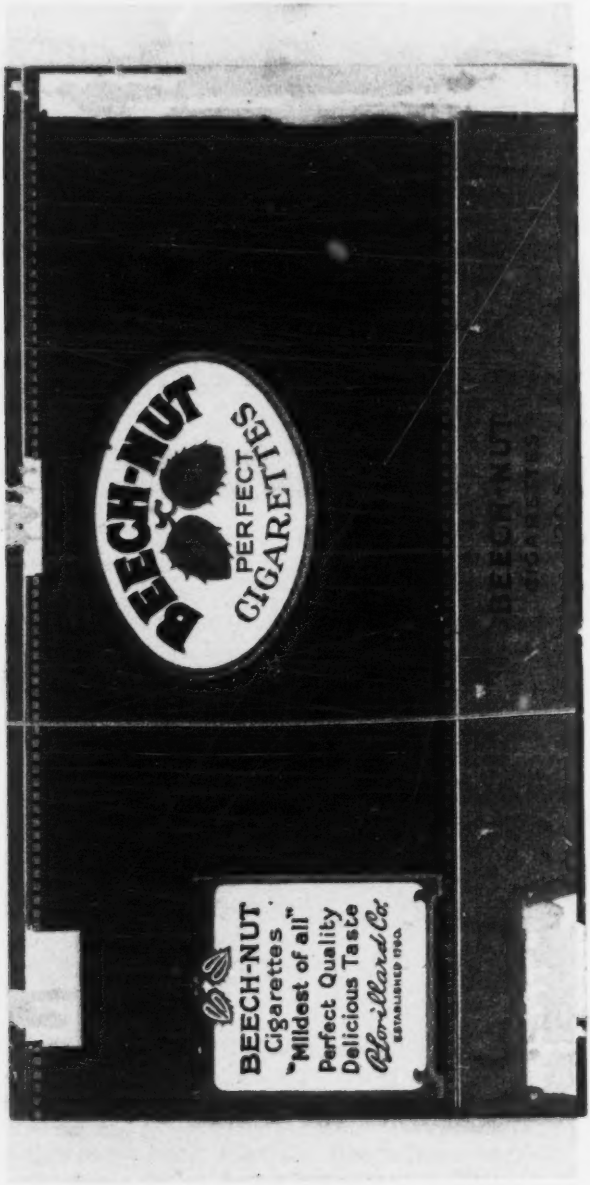
Factory No. 28, Fifth District of Kentucky.

NOTICE.—The manufacturers of this Tobacco have complied with all the requirements of law. Every person is cautioned, under the penalties of the law, not to use this package for Tobacco again

Above label is a reproduction of Lorillard Patent Office Exhibit No

There is nothing to indicate, and no likelihood, that any confusion or deception of purchasers was caused by Harry Weissinger's use of his Beechnut label on scrap tobacco in his small business at Louisville, Kentucky, in 1898 and thereafter and the Beech-Nut Packing Company's use of the word "Beech-Nut" on an entirely different label on the half-dozen food products it was then manufacturing in a small way at Canajoharie, New York. If, as represented, the Lorillard Company's use of the word "Beech-Nut" as a trade-mark for tobacco was a continuation of Harry Weissinger's use of that word, and if that use had been continued without simulation of the Beech-Nut Company's label in arrangement and form, then any confusion in trade that might subsequently have arisen would have been due to the growth of the business of one or both of the parties, and not to any flaw in the original or continued right of either of them to use its label. The Lorillard Company's representation made it appear that it had a legal right to use on tobacco products a label of which the word "Beechnut" was the dominating element, and that the Beech-Nut Company could not possibly prevent its use of that word. The most the Beech-Nut Company could have hoped to accomplish would have been to induce or compel the Lorillard Company not to accompany the word "Beech-Nut" with the oval border and other elements of the design used by the Beech-Nut Company.

Relying on the Lorillard Company's representation and seeing no possibility of preventing that company from using the word "Beech-Nut" on tobacco products, the Beech-Nut Company did not prosecute its protest further. During the years following 1915 the Lorillard Company knew that the Beech-Nut Company continued to assert its right to prevent any tobacco dealer other



Defendant's Beech-Nut cigarettes label. First used in 1921.

than the Lorillard Company from using the word "Beech-Nut" as a trade-mark for tobacco products, and accepted and followed the Beech-Nut Company's suggestion to proceed against another tobacco dealer who was using the word "Beech-Nut" as a trade-mark.

In the spring of 1921 the Lorillard Company placed on the market a cheaper cigarette than it had theretofore made and at a price lower than that charged by its competitors for their cigarettes. To this cheap cigarette the Lorillard Company applied the name "Beech-Nut," presented on the label in the familiar oval design of the Beech-Nut Packing Company's Beech-Nut trade-mark. A specimen of the Lorillard Beech-Nut cigarette label is mounted opposite this page. In 1919, when the Lorillard Company was preparing to put its Beech-Nut cigarette on the market, the Beech-Nut Company protested against this extension of the Lorillard Company's use of the Beech-Nut trade-mark, and, as a measure of defense, applied to the Patent Office for registration of the word "Beech-Nut" as a trade-mark for cigarettes (*post*, p. 39). The Lorillard Company opposed the Beech-Nut Company's application for registration. The evidence taken in the Patent Office opposition proceeding in 1920 divulged for the first time that the manufacture and sale of the old Weissinger Beechnut tobacco had been discontinued by the Luhrman & Wilbern Company, Weissinger's successor, before the Lorillard Company had acquired any interest in the Luhrman & Wilbern Company, and that the Lorillard Company itself had never made any use whatever of the Weissinger Beechnut trade-mark (*post*, pp. 46-50). Shortly after learning that the Lorillard Company had misrepresented the facts the Beech-Nut Company instituted the suit now at bar.

OUTLINE OF PART III. HISTORY OF THE WEISSINGER BEECH-NUT TRADE-MARK AND BUSINESS. (POST, P. 45.)

The last sale of the Weissinger Beechnut tobacco was in April, 1910 (*post,* p. 47). None of the Weissinger Beechnut tobacco was manufactured after some undetermined date prior to the year 1909 (*post,* p. 49). Since the year 1903 the Weissinger tobacco business had been owned by the Luhrman & Wilbern Company and all of the stock of the latter company was owned by the American Tobacco Company. In accordance with the decision of this Court (221 U. S. 106) the American Tobacco Company was dissolved by decree of the Circuit Court for the Southern District of New York (191 Fed. 371, decree at page 417). The decree of dissolution directed the organization of "a new corporation called P. Lorillard Company" (p. 423) and the conveyance to the new company of all of the stock of the Luhrman & Wilbern Company (p. 424). The decree was dated November 16, 1911 (p. 431). On September 1, 1913, the Lorillard Company as sole stockholder of the Luhrman & Wilbern Company assigned all of the assets of that company to itself. The Lorillard Company never used the Weissinger Beechnut trade-mark, nor was it ever used by anyone subsequent to 1910 when its use was discontinued by the Luhrman & Wilbern Company.

OUTLINE OF PART IV. DECEPTION OF THE PURCHASING PUBLIC AND OF DEALERS. (POST, P. 75.)

The Lorillard Company's use of the Beech-Nut trade-mark has caused the entire purchasing public to believe that the Lorillard Beech-Nut tobacco and Beech-Nut cigarettes are products of the Beech-Nut Packing Company, or of the company which produces the extensive line of Beech-Nut products, and even many of the retailers

and even wholesalers have been similarly deceived. In several instances the deception of consumers and of dealers extended over periods of several years and in most instances continued until the truth was learned from representatives of the Beech-Nut Company (*post*, p. 75, *et seq.*).

OUTLINE OF PART V. DAMAGE. (POST, P. 102.)

The use by the Lorillard Company of the trade-mark and trade-name "Beech-Nut" converts the Beech-Nut Company's right to the exclusive enjoyment of its reputation and good-will into the mere right to enjoy its reputation and good-will in common with the Lorillard Company and with anyone who desires to use the name "Beech-Nut" in connection with the sale of any commodity not previously dealt in by the Beech-Nut Company. Damage is inherent in the conversion of an exclusive title into a mere tenantry in common. Special damage, however, of a serious character and of ever widening extent is shown as the result of the cheap grade and inferior quality of the Lorillard Beech-Nut cigarette, and in the opposition to, and withdrawal of patronage from the Beech-Nut Company by people who are opposed to the use of chewing tobacco and cigarettes. The effect of the decision below legalizing the Lorillard Company's use of the Beech-Nut trade-mark will, if it stands, establish a legal principle that will authorize anyone and everyone to use the Beech-Nut Company's name and reputation in the sale of any commodities that have not theretofore been dealt in by the Beech-Nut Company.

STATEMENT.

PART I.

History of the Beech-Nut Packing Company's Business and of Its Beech-Nut Trade-Mark.

EARLY HISTORY.

The business now conducted by the Beech-Nut Packing Company was started on a very small scale at Canajoharie, New York, some two or three years prior to 1891, in which year the enterprise was incorporated as the Imperial Packing Company (R. Vol. I, pp. 800-801; 827, X-Q. 18; Vol. IV, pp. 2155-2157, 2163; Vol. VI, p. 2983). The conditions under which the business was established are described by Marshall Davis, one of the original employees who is still with the company as foreman of the meat department. The following is from his testimony:

> "X-Q. 26. When you first came with the Imperial Packing Co., how many men did they employ?
>
> "A. I was the first one. We cured our hams in a cellar and took them back of the barn and smoked them in a barrel. Then we had a smoke house a story and a half high. Before the fire we had moved into the Soles building. There was a clam stand downstairs—they sold booze, cider and had a bar. We had one room upstairs and started with three men. I was a boy cleaning out the office, carrying out the waste paper, etc., and going to school. From that time on it has grown to where it is now." (R. Vol. I, p. 828.)

Walter H. Lipe, vice president and general manager of the Beech-Nut Packing Company in 1920 when he testified in this case, and Bartlett Arkell, the present president of the Beech-Nut Packing Company, were the incorporators of the Imperial Packing Company in 1891 (R. Vol. VI, pp. 2983-2984). Since its inception the business has been managed and controlled by the men who founded it.

In 1891 the products of the company were ham and bacon (R. Vol. IV, p. 2156, Q. 4). At first these products were labeled "Imperial" ham and bacon, but after the first few months the name "Beech-Nut" was adopted (R. Vol. IV, p. 2156, Qs. 6-8), and used thereafter on all of the products of the company with the slight exception of some of the less choice cuts of meat, to which latter the names "Mohawk," "Holly," and "Erie" were applied in order to preserve the significance of the name "Beech-Nut" as a symbol of products of the highest quality and choicest variety. Testimony regarding the use of these brands will be found in the Record, Vol. I, p. 16, X-Q. 733, and pages 817 and 853, and Vol. IV, p. 2165, X-Q. 73. Specimens of the Erie and Holly trade-marks are inserted in the Record at pages 2882 and 2884 of Volume VI.

In 1899 the name of the business was changed to Beech-Nut Packing Company by incorporation of a new company under that name and transfer to it of all the assets of the Imperial Packing Company (R. Vol. IV, pp. 2156-2157). This change was made by reason of the fact that the word "Beech-Nut" had been used as a trade-mark since 1891, and the owners of the business desired to have its corporate name as well as the trade-mark identify its products as "Beech-Nut" products (R., Vol. I, p. 786, Q. 16).

INCREASE IN NUMBER OF COMMODITIES DEALT IN—PRESENT MAGNITUDE OF BEECH-NUT PACKING COMPANY'S BUSINESS —USE OF STANDARD BEECH-NUT TRADE-MARK.

In 1902 the company produced and sold under the Beech-Nut trade-mark hams, bacon and beef in bulk, beef in glass jars, bacon in glass jars and one pound boxes, and grape jam (R., Vol. VI, p. 2784). The growth and present magnitude of the business are shown by Plain-

tiff's Exhibits 35 and 28, and by the yearly sales of the company's products. Plaintiff's Exhibit 35 (R., Vol. VI, pp. 2784 to 2814) is a summary of Beech-Nut products year by year from 1902 to 1923. This summary was prepared from the Beech-Nut Packing Company's price lists by W. H. Maichle, the company's New York division manager. (R., Vol. V, p. 2457.) Plaintiff's Exhibit 28 is a collection of labels used by the Beech-Nut Packing Company between 1891 and 1923. The original of Exhibit 28 is a large board bearing specimens of the labels. On the following pages, 18*a* and 18*b*, there is a photograph of Exhibit 28. The yearly sales of the Beech-Nut Company from 1903 to 1921 are shown in the following tabulated statement which is in evidence. Owing to the burning of the plant the records of the Beech-Nut Company prior to the year 1903 are not in existence (R., Vol. IV, pp. 2157-2158, Qs. 21-22).

PLAINTIFF'S EXHIBIT NO. 28—BOARD: BEECH-NUT LABELS DISPLAYED BEFORE THE PUBLIC, 1891-1921.

PLAYED TO THE PUBLIC 1891-1921

1910-1915—

1915-1919

1919-

TABLE OF SALES STATISTICS, BEECH-NUT PACKING COMPANY, 1903-1921.

	Total Sales.	Reg. Line.	Gum.	Comp. Tab. Misc. Conf. Bev.
1903	$ 563,764.37	$ 563,764.37	$	$
1904	832,906.10	832,906.10		
1905	1,000,986.83	1,000,986.83		
1906	1,267,877.81	1,267,877.81		
1907	1,293,059.92	1,293,059.92		
1908	1,408,481.33	1,408,481.33		
1909	1,950,534.60	1,950,534.60		
1910	2,555,315.85	2,555,315.85		
1911	2,838,384.99	2,819,441.56	18,943.43	
1912	3,179,337.79	2,778,822.00	400,515.79	
1913	4,112,592.99	2,681,110.07	1,431,482.92	
1914	4,966,337.76	2,484,854.93	2,480,023.48	1,459.35
1915	5,703,945.39	2,258,356.76	3,288,521.35	157,067.28
1916	6,598,385.15	2,681,685.97	3,632,127.15	284,572.03
1917	7,363,678.56	3,407,467.30	3,594,864.53	361,346.73
1918	6,754,967.21	4,502,462.68	1,853,038.28	399,466.25
1919	8,979,586.35	5,378,607.40	2,233,860.24	1,367,118.71
1920	11,138,226.51	5,435,324.37	3,955,902.00	1,747,000.14
1921	12,109,573.68	4,618,207.28	6,281,945.41	1,209,420.99

(R. Vol. I, pp. 867, 868.)

A stipulation of facts explanatory of the foregoing tabulated statement appears at page 869 of Volume I of the Record. The figures in the first column represent the total sales, in the second column the sales of the "regular line" of goods produced by the company, the third column the sales of chewing gum, and the fourth column the sales of compound tablets (candy), miscellaneous confectionery, beverages, etc.

Owing to the fire in 1903 above referred to, but little documentary or physical evidence of any kind relating to the period prior to 1903 has survived. Following are references to a few things which have been preserved.

Plaintiff's Exhibit No. 31 is a specimen of a sample

box in which the Imperial Packing Company packed samples of Beech-Nut bacon in the year 1891. A photographic copy of this box appears at page 2780 of Volume VI of the Record, and the testimony of the witness who had preserved it is upon pages 857 and 858 of Volume I of the Record. The word "Beech Nut" is the most conspicuous feature of the label on this box.

Beech-Nut Exhibit Stationery of 1892 is one of the business letter sheets used by the Imperial Packing Company in 1892. A photographic copy of the letter-head on this sheet appears at page 2839 of Volume VI of the Record. The testimony of the witness who produced it is on page 2177 of Volume IV of the Record. The phrase "Beech-Nut Hams and Bacon" is a conspicuous part of this letter-head, and upon it appear the names of Bartlett Arkell as president of the company and Walter H. Lipe as treasurer. Mr. Arkell is still president of the company and Mr. Lipe was vice-president and general manager of the company when he testified in this case in 1920.

Upon pages 2987 to 2997 of Volume VI of the Record are copies of four certificates of registration by the Imperial Packing Company and Beech-Nut Packing Company of the word Beech-Nut as a trade-mark, as follows: No. 19,838 for hams and bacon in 1891; No. 24,978 for pork lard in 1894; No. 35,731 for cured, dried and smoked beef in 1901; and No. 36,444 for canned goods in 1901. These early registrations do not show the trade-mark in its present form, but show the word "Beech-Nut" and the picture of a beech-nut cluster with a circular or oblong border. Certain of these four trade-marks were used as brands burned into the hams and bacon (W. H. Lipe, R. Vol. IV, pp. 2163, 2164). Mr. Lipe was unable to produce specimens of the labels originally used by the Imperial Packing Company on account of the destruction of their old records by a fire in 1903 (R. Vol. IV, p. 2164,

X-Q. 70). He stated (X-Qs. 71-72, Vol. IV, pp. 2164-2165) that his memory was that the oval border had been used as part of the trade-mark since 1892. He was corroborated in this by a witness who has been continuously in the employ of the Imperial Packing Company and Beech-Nut Packing Company since 1891 (R. Vol. I, p. 826, X-Q. 15).

Earl A. Nellis, sales manager of the Beech-Nut Company since 1906, testified to his personal knowledge of the use since 1906 of all of the labels appearing on Plaintiff's Exhibit No. 28 under date of 1906 and subsequently (R. Vol. I, p. 848, Qs. 9, 10). He testified that all of the Beech-Nut goods during the time of his employment by the company had been put out under the "regular oval label" (R. Vol. I, p. 848, Qs. 6 to 10).

In the year 1912 the number of products listed by the Beech-Nut Packing Company on its price lists and being extensively made and sold was forty-one (Plaintiff's Exhibit 35, R. Vol. VI, pp. 2797-2798). In the same year, 1912, the company registered its Beech-Nut trade-mark in the Patent Office for sixty-seven products, all of which it sold to a greater or less extent. (The 1912 Patent Office certificate of registration is reproduced at page 2867 of Vol. VI of the Record). As shown by Exhibits 35 and 28 (R. Vol. VI, pp. 2784 to 2814, and pp. 2777-2778) above referred to, and by the tabulated statement reproduced above (*ante*, p. 19), the volume of business and number of products have continued to increase up to the time of the trial of this suit.

In 1923 (the latest year regarding which the record contains evidence) the number of products extensively sold was sixty. The principal product in volume of business is chewing gum as shown by the statement (*ante*, p. 19), the business in chewing gum in the last year reported, 1921, amounting to more than the combined busi-

ness in all other products. The manufacture and sale of chewing gum was commenced in 1911 as shown by the yearly price lists (R. Vol. VI, pp. 2795 to 2814) and Mr. Barbour's testimony (R. Vol. I, p. 788). The tabulated statement of sales, *ante*, p. 19, shows that the chewing gum business has increased rapidly and continuously during all of the time since 1911 with the exception of two of the war years. Among the other products are hard candy lozenges, mints and fruit tablets (put up in small packages and sold largely on tobacco stands), peanut butter, condiments, conserves, jellies, beverages, ham, bacon and a large variety of food products.

OVER SEVEN BILLION LABELS BEARING THE BEECH-NUT TRADE-MARK USED BY THE BEECH-NUT PACKING COMPANY PRIOR TO THE END OF THE YEAR 1921.

Christina Carswell, statistician of the Beech-Nut Packing Company, produced from the records of the company a statement showing the number of Beech-Nut labels used year by year from 1903 to 1921 upon packages of goods sold by the company, the total number for the period covered being over seven billion (R. Vol. I, p. 839). She testified that the statement of the number of labels produced by her included only "the Beech-Nut labels with the red band" (R. Vol. I, pp. 845-846, X-Q. 28).

THREE MILLION DOLLARS EXPENDED IN ADVERTISING BEECH-NUT PRODUCTS PRIOR TO THE END OF THE YEAR 1921.

Prior to the end of the year 1921, in which year the bill of complaint herein was filed, the Beech-Nut Packing Company had expended three million dollars in advertising its name "Beech-Nut," its variety of goods and the high quality of all of its goods. (Testimony of Walter H. Lipe, who in response to Q. 35, R. Vol. IV, p. 2159, pro-

duced the tabulated statement appearing at page 2204 of Vol. IV, and also testimony of Van Wie, R. Vol. I, p. 818, Qs. 6 to 9.)

In all of their advertising the company emphasizes the high quality and character of its products (Barbour, R. Vol. I, p. 782, Q. 5). The advertising appropriation for 1920 was $500,000, for 1921 $550,000, and a still larger expenditure was anticipated for 1922, the testimony of the witness on this point having been taken before the expiration of the last-named year (Van Wie, R. Vol. I, p. 818, Qs. 6, 7, 8). The mediums of advertising are newspapers, periodicals, billboards, posters and the distribution of samples of the various products as fully described in the testimony of officers and employees of the company. (Barbour, R. Vol. I, p. 782, Q. 3; p. 787, Q. 19; Kearns, R. Vol. I, p. 801; Plaintiff's Exhibits 21 to 26, scrap-books containing samples of advertisements; Van Wie, R. Vol. I, p. 818; Carswell, R. Vol. I, p. 838.)

POLICY OF BEECH-NUT PACKING COMPANY TO SELL UNDER THE BEECH-NUT TRADE-MARK ONLY GOODS OF THE HIGHEST QUALITY AND CHOICEST VARIETY, AND TO THEREBY GAIN FOR NEW PRODUCTS THE BENEFIT OF THE HIGH REPUTATION OF THE PRODUCTS PREVIOUSLY SOLD.

The acceptance by the public of new products bearing the word "Beech-Nut"—referred to in detail in Part IV of this statement—as of the same origin as the goods previously marketed under the Beech-Nut trade-mark was due not only to the public knowledge of the fact that new commodities had been and were being from time to time added to the line of goods bearing the Beech-Nut trade-mark, but was also due to a considerable extent to the fact that a large part of the public, especially jobbers and wholesalers, were acquainted with the fact that the Beech-Nut goods were produced and dealt in by the

Beech-Nut Packing Company. Both the corporate name and the trade-mark served to identify the company's products as "Beech-Nut" products.

The company's fixed policy of instilling in the public mind the belief that new products bearing the Beech-Nut trade-mark would be of the same high quality as the products previously marketed is described in the following passage quoted from the testimony of Francis E. Barbour, vice-president and manager of the Beech-Nut Packing Company:

> ". . . We have determined never to offer for sale any article under the Beech-Nut label until we are satisfied that it is better than any similar article." (R. Vol. I, p. 782, Q. 3.)

Mr. Barbour continues:

> ". . . We expect that our reputation of the past will help make an easy market for us in the future with whatever new lines we may bring out from time to time." (R. Vol. I, p. 782, Q. 5.) . . .
>
> "We have sold, for so many years, on our reputation; in selling the trade not only the individual articles which we make, but also the name of Beech-Nut, its reputation for character and flavor, that when we bring out any new article, the consuming public, retailers and jobbers, are willing to accept any new articles we bring out under the name 'Beech-Nut,' and give us an opportunity to demonstrate to them that it is going to satisfy them—that is, the jobbing trade. They are mighty good to us; when we bring out a new product, they give our boys an order. After they have once tried it, we have got to make it good enough so they will continue to buy it." (R. Vol. I, p. 783, Q. 6.) . . .
>
> "Well, we have spent over twenty-five years in building up the present good-will and reputation for character and high quality that it is absolutely obligatory that we make everything we bring out of a high character which will compare favorably with what people have enjoyed in the past, so that when they take any new article we bring out they will feel

full assurance that it will match up in character and quality with what has given them satisfaction under the Beech-Nut name in the past." (R. Vol. I, p. 783, Q. 7.) . . .

". . . We have been six or seven years in developing a salted peanut, and we have not mastered the production of salted peanuts to our satisfaction yet. There are a number of salted peanuts on the market, put out under some very well known brands, which have been well advertised and highly exploited, and which are enjoying a very large trade, as we understand it, but none of them, in our estimation, is good enough to bear the Beech-Nut trademark." (R. Vol. I, p. 784, Q. 9.)

In order to avoid impairing the significance of the Beech-Nut trade-mark as a symbol of goods not only of the best quality but also of the choicest variety, the Beech-Nut Company used other trade-marks—"Mohawk," "Holly" and "Erie"—on the less choice but wholesome cuts of meat, although of negligible quantity. The policy of the Beech-Nut Company in this regard is explained by Earl A. Nellis, sales manager of the company (R. Vol. I, pages 852-853, X-Qs. 50 to 53), and Walter H. Lipe, one of the founders of the company and its vice-president and general manager at the time he testified (R. Vol. IV, p. 2165, X-Q. 73).

PART II.

The Lorillard Company's Adoption of the Beech-Nut Trade-Mark, the Protest Made By the Beech-Nut Packing Company in 1915, the Lorillard Company's Reply, and Discovery in 1920 That the Reply Was a Misrepresentation of the Facts.

In the year 1915 the P. Lorillard Company commenced the manufacture of a new scrap tobacco mixture which it marketed under the trade-mark "Beech-Nut." A specimen of the package as put out for the first time in 1915 appears on page 8, *ante*, the original exhibit having been attached to the bill of complaint (R. Vol. I, p. 17). The label as used ever since by the Lorillard Company is identical with that first used in 1915 except that the word "Scrap" has been replaced by the word "Chewing."

When, in 1915, the Beech-Nut Packing Company first learned that P. Lorillard Company was marketing scrap tobacco under the Beech-Nut label, Mr. F. E. Barbour, vice-president of the Beech-Nut Packing Company, under date of June 11, 1915, wrote a letter of protest to P. Lorillard Company. This letter and the ensuing correspondence are contained in Defendant's Exhibit No. 18 (R. Vol. VI, pp. 2886 to 2923). In this letter (R. Vol. VI, pp. 2888-2890) Mr. Barbour explained the long use and widespread recognition upon products of all kinds of the Beech-Nut trade-mark. He stated that the Beech-Nut Packing Company had not yet manufactured tobacco, but that "the taking on of such manufacture in the future is by no means impossible or improbable." In this letter Mr. Barbour set forth the fact that the use of the Beech-Nut trade-mark by the Lorillard Company seemed explainable to the Beech-Nut Packing Company only on the ground of an intention on the part of the Lorillard Com-

pany that the public should be deceived. He expressed his confidence that the Lorillard Company would recognize the justice of the Beech-Nut Packing Company's position and that no necessity would arise for following any harsher course to enforce recognition of its rights. Under date of June 23, 1915 (R. Vol. VI, p. 2891), the Lorillard Company acknowledged receipt of the letter above mentioned, and asked that the Beech-Nut Packing Company state when they first began the use of the name Beech-Nut.

Under date of July 2, 1915 (R. Vol. VI, pp. 2892-2893), the Beech-Nut Packing Company wrote to the Lorillard Company informing them that the Beech-Nut trade-mark had been used by the Beech-Nut Company and its predecessors since and prior to 1891, and adding that the Beech-Nut Packing Company knew as an absolute truth that the public was in fact deceived, and that the Lorillard "salesmen and agents deliberately push your goods and trade under this identity of use of their mark and name."

On July 8, 1915, the Lorillard Company wrote a letter to the Beech-Nut Packing Company in which the following statement occurs:

> "You seem to proceed upon the assumption that we have recently begun to use the name on the tobacco. This is not the case. This Company and its predecessor in ownership of this brand have used it continuously since prior to the year 1898, as shown by records in my office." (R. Vol. VI, p. 2893.)

In his letter of July 26, 1915, addressed to the Lorillard Company, Mr. Barbour states that his company

> "will greatly appreciate it if you will send us samples of your product showing the manner of use of the word 'BEECH-NUT' since the year 1898, copies of advertisements or of letter-heads showing your use of this name." (R. Vol. VI, p. 2895.)

Under date of September 15, 1915, the Lorillard Com-

pany through its counsel, Thos. S. Fuller, wrote to the Beech-Nut Packing Company. Following is the opening paragraph of the letter:

> "I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco, and enclose them herein. I am also sending you an old package showing the use of the name 'Beech-Nut' and our present package." (R. Vol. VI, p. 2897.)

A reproduction of the "old package" referred to is mounted on page 9, *ante*. Mr. Fuller's letter continues with a statement that "Beech-Nut chewing and smoking tobacco (scrap) was made by Harry Weissinger Tobacco Company," with an explanation of the assignment of the Weissinger business to the Luhrman & Wilbern and American Tobacco Companies and the acquisition of the Luhrman & Wilbern Company by the Lorillard Company by decree of the United States Circuit Court for the Southern District of New York [in pursuance of the judgment of this Court that the American Tobacco Company was a combination in restraint of trade, 221 U. S. 106. The decree of the Circuit Court appears at the end of its opinion (191 Fed. 371, 417)]. This explanation was given in order that the Beech-Nut Packing Company might understand the bearing of the price lists in the name of Luhrman & Wilbern and the package in the name of Harry Weissinger Tobacco Company, as stated in the next paragraph of Mr. Fuller's letter.

Under date of September 20, 1915 (R. Vol. VI, p. 2901), the Beech-Nut Packing Company acknowledged receipt of the letter last mentioned, stating that the letter was a very interesting one and that before giving a definite reply they desired to review the matter, and concluding with a repetition of their statement that widespread deception of the public was taking place. In a previous letter to the Lorillard Company, dated September 2, 1915 (R. Vol. VI, p. 2896), the Beech-Nut Packing Com-

pany had informed the Lorillard Company that the Beech-Nut Packing Company had that day received an inquiry from The New River Grocery Co. at Hinton, W. Va., asking the best jobbing price on Beech-Nut scrap tobacco, and the letter of September 20, 1915, concludes with a further reference to this occurrence and with the statement that since writing their last letter the Beech-Nut Company had received another inquiry, this time from Wm. Edwards Co. of Cleveland, Ohio, asking them to ship five cases of Beech-Nut scrap tobacco.

The 1915 correspondence came to an end with this letter. The significant points of this correspondence are that the Lorillard Company definitely and distinctly stated that that company and its predecessors had used the Beech-Nut trade-mark continuously since prior to the year 1898 as shown by the records in their office, and that in response to the Beech-Nut Company's inquiry as to the "manner of use" of the word "Beech-Nut" the Lorillard Company sent the Beech-Nut Company one of the Harry Weissinger Beechnut tobacco packages. This representation made by the Lorillard Company constituted a statement of complete and perfect right to use the word BEECH-NUT in any proper way as a trade-mark for scrap tobacco unless the Beech-Nut Packing Company could show the existence of a superior right extending back to the year 1898. The Beech-Nut Packing Company could prove no such superior right in the year 1898 and, well knowing this fact, did not press its protests further and made no further communication to the Lorillard Company after Mr. Barbour's letter of September 20, 1915.

As shown by the testimony hereinbefore referred to, the Beech-Nut Packing Company was a relatively small enterprise in the year 1898. As late as the year 1903, its

total sales of the eight Beech-Nut products then produced amounted to only about half a million dollars. (R. Vol. I, p. 867; Vol. VI, p. 2784.) It was not until several years later than 1903 that the business of the Beech-Nut Packing Company and its reputation had become sufficiently widespread to lead the public to the belief that any packaged consumable product carried by retail grocers, delicatessen dealers, drug stores, cigar-stands, tobacco merchants, etc., and bearing the Beech-Nut name, was its product. In the year 1898 when the Harry Weissinger Tobacco Company in Louisville Kentucky, was putting out scrap tobacco under its BEECHNUT label, and the Beech-Nut Packing Company was dealing in a half dozen food products in a relatively small way at Canajoharie, N. Y., each of these parties in all probability, and so far as shown by the record, was unknown to the other and there was little possibility of deception of the public. Geographically they were widely separated. They were putting out different products. The labels used by them had no resemblance other than in the fact that each of the labels bore the word "beech nut," and even this word was differently represented on the two labels, the word being hyphenated upon the Beech-Nut Packing Company label and written continuously upon the Weissinger label.

It is not at all likely that in 1898 there was any confusion in the public mind between the local scrap chewing tobacco business of Harry Weissinger in Louisville Kentucky, and the relatively small packing business conducted by the Beech-Nut Packing Company at Canajoharie, New York, and in 1915 there certainly would have been no possibility of adducing evidence to prove the presence or absence of confusion in 1898. But in the year 1915, long after the Beech-Nut Packing Company's name and its

Beech-Nut trade-mark had become familiarly known throughout the entire country, confusion in business of the most widespread character was caused by the Lorillard Company's adoption of an essentially exact copy of the Beech-Nut Packing Company's Beech-Nut trade-mark. The representation made by the Lorillard Company in 1915 had the effect of making the facts that existed in 1898 determinative of the rights of the parties instead of the facts existing in 1915.

If the Lorillard Company and its predecessors in title had in fact used the original, unchanged Weissinger label continuously since 1898 as a trade-mark for tobacco, it might be that confusion still would have arisen in the minds of purchasers as to whether or not the Beechnut tobacco and the extensive line of Beech-Nut products were produced by the same company. But in that case there would have been no legal remedy for the confusion caused by the Lorillard use of the word Beech-Nut. In 1898 there was no clash of legal rights between Harry Weissinger's use of his "Beechnut" label on scrap tobacco in a small business conducted at Louisville, Kentucky, and the Beech-Nut Packing Company's use of the word "Beech-Nut" on an entirely different label and for different commodities in a small business at Canajoharie, New York. Each party in its business as conducted in 1898 would have had a perfect legal right at that time to use its label, and if confusion subsequently arose from the continued use of the Weissinger label in its original form, *i. e.*, without change to simulate the Beech-Nut Company's label, such confusion would have been by reason of the growth of the business conducted by one or both of the parties. Such confusion, arising in a perfectly innocent and legal way, though unfortunate,

could not be remedied by the law.* And the Lorillard Company represented that this was the situation which actually did exist.

In brief and argument below the Lorillard Company contended that the Beech-Nut Company had acquiesced in the Lorillard Company's use of the Beech-Nut trade-mark and in support of this contention referred to the fact that orders for Beech-Nut Scrap Chewing tobacco sent to the Beech-Nut Packing Company were forwarded by the latter to the Lorillard Company. The only significance in this circumstance is that it shows that the Beech-Nut Packing Company so completely relied upon the truthfulness of the representation made in 1915 by the Lorillard Company that it courteously forwarded to the Lorillard Company orders for Beech-Nut tobacco which were sent to the Beech-Nut Company. The orders for Beech-Nut tobacco which were sent to the Beech-Nut Packing Company are referred to more in detail in connection with the deception of the public (Part IV of this Statement of the Case, *post*, p. 88).

* Inasmuch as the law of trade-marks and unfair competition, insofar as questions of interstate commerce are not involved, is state law as distinguished from United States law the conflicting claims of different parties to the right to use a trade-mark within the limits of any state would depend upon priority of adoption in that state, and if, as between two parties, one was the first to adopt the trade-mark in one state, and the other the first to adopt it in another state, the trade-mark would belong to one of the parties in one state and to the other in the other state. If the subsequent growth of the business of either or both of the parties brought about a conflict in other states, not involving interstate commerce, the conflict in each of such other states could be resolved only by the law of such other states. A situation of this kind existed in the Hanover Star Milling Co. case, 240 U. S. 403, and the foregoing is in consonance with both the opinion of the entire court and the separate concurring opinion. The point is not involved in the case at bar, and is referred to only as indicating that situations might arise to which the statement in the text to which this note is appended would not apply without the qualification that if the confusion between the two businesses arose from their extension into states previously unoccupied by them, then the conflict, in intrastate commerce, would be governed by the law of the newly occupied states.

The Lorillard Company's statement that its office records showed that it and its predecessors had used the word Beech-Nut as a trade-mark for tobacco continuously since 1898 had its intended and perfectly natural effect, namely, the effect of silencing the protest made in 1915 by the Beech-Nut Packing Company against the Lorillard Company's use of the Beech-Nut trade-mark. The Beech-Nut Company remained silent on the subject until 1920 when the officers of the Beech-Nut Company learned that the Lorillard Company had in 1915 misrepresented the facts in stating that it and its predecessors had used the word Beech-Nut on tobacco continuously since 1898. But during all the years following 1915 the Lorillard Company had full knowledge of the fact that the Beech-Nut Packing Company claimed and asserted its right to the Beech-Nut trade-mark to the exclusion of all tobacco manufacturers and dealers other than the Lorillard Company. The Lorillard Company's knowledge of this fact carried with it knowledge of the fact that the Beech-Nut Company had suspended its opposition to the Lorillard Company's use of the Beech-Nut trade-mark solely on account of the Beech-Nut Company's belief of the Lorillard Company's statement that its rights dated continuously from the year 1898. The alleged continuous use since 1898 was the sole circumstance that differentiated the status of the Lorillard Company from that of other tobacco manufacturers and dealers, and during the years subsequent to 1915, when the Beech-Nut Company suspended its protest, the Lorillard Company knew that the Beech-Nut Company was objecting to the use of the word Beech-Nut as a trade-mark by other tobacco manufacturers and dealers, and the Lorillard Company at the suggestion of the Beech-Nut Company instituted legal proceedings to suppress the use of the Beech-Nut trade-mark by another tobacco manufacturer and dealer.

On July 7, 1919, the Beech-Nut Packing Company informed the P. Lorillard Company by letter of that date (R. Vol. VI, p. 2904) that a firm in Pittsburgh was trading under the name "Beech-Nut Stogie Co." By letter of July 9, 1919, the Lorillard Company acknowledged receipt of the information regarding the Beech-Nut Stogie Company, expressed its thanks for the information and stated that the matter would have prompt attention. Under date of July 25, 1919, Mr. B. Arkell, president of the Beech-Nut Packing Company, wrote to Mr. Thomas J. Maloney, president of the P. Lorillard Company (the letter appears at page 2910 of Vol. VI of the Record), inclosing a letter concerning the Beech-Nut Stogie Company which had been written by James R. Offield, counsel for the Beech-Nut Company, to Mr. W. C. Arkell, Mr. B. Arkell's son. (Mr. Offield's letter appears at p. 2909, R. Vol. VI.) In his letter Mr. Offield stated that the fact that the Beech-Nut Company had filled orders (for chewing gum) for the Beech-Nut Stogie Company without making any complaint would have a bearing upon the Beech-Nut Company's right to recover damages, but that he doubted if it would have any bearing upon the Beech-Nut Company's right to stop the use of the Beech-Nut trade-mark by the Beech-Nut Stogie Company. Mr. Offield concluded his letter with a recommendation that the matter be called to the attention of the Lorillard Company so that they could take action against the Beech-Nut Stogie Company, as he thought the Lorillard Company was in a better position to take such action than the Beech-Nut Company. By letter of July 28, 1919 (R. Vol. VI, p. 2911), the president of the Lorillard Company acknowledged receipt of Mr. B. Arkell's letter of July 25 inclosing Mr. Offield's letter regarding the Beech-Nut Stogie Company, and stated that the Lorillard Company

was "now opposing in Washington an attempted registration by this concern of the name 'Beech-Nut' for some tobacco products," and that this was the beginning of measures "which we hope will result in stopping the use of the name by this concern for tobacco products."

Nothing could be more clear than that at the time of this correspondence the Beech-Nut Company was asserting its right to stop the use of the Beech-Nut trade-mark by any tobacco manufacturer or dealer other than the Lorillard Company, and that the Lorillard Company was fully informed of that fact and co-operated with the Beech-Nut Company in its desire to enforce its rights against tobacco dealers other than the Lorillard Company. As above stated, the only circumstance that differentiated the Lorillard Company from the Beech-Nut Stogie Company or any other tobacco dealer was the fact that the Lorillard Company had represented to the Beech-Nut Company in 1915 that the Lorillard Company had a right in the trade-mark use of the word "Beech-Nut" based upon continuous use since 1898. The Lorillard Company necessarily knew that its representation of continuous use since 1898 was what gave it a favored position among tobacco dealers. What the Lorillard Company has urged as the Beech-Nut Company's acquiescence was inaction induced by the Lorillard Company's misrepresentation of the facts.

CONTROVERSY IN 1919 AND 1920 REGARDING EXTENSION OF LORILLARD COMPANY'S USE OF BEECH-NUT TRADE-MARK TO CIGARETTES LEADS TO DISCOVERY OF FALSITY OF REPRESENTATION MADE IN 1915 BY THE LORILLARD COMPANY.

As stated by Mr. Belt, vice-president of the Lorillard Company, the latter considered for a long time putting on the market a cigarette of the blended type, but deferred doing so on account of the difficulty of getting the necessary materials during the war "and did not actually get the cigarette in question, Beech-Nut, on the market until in the spring of 1921." (R. Vol. V, p. 2593.) The label used appears as Plaintiff's Exhibit No. 1 herein (R. Vol. VI, p. 2708) and is reproduced on page 12, *ante*. Mr. Lipe, who was then vice-president and general manager of the Beech-Nut Packing Company, testified that he knew of the intention of the Lorillard Company to put a Beech-Nut cigarette on the market, and gave the date of his learning this fact as within two years, maybe a little over a year before August 3, 1920, when he testified (R. Vol. IV, p. 2172, X-Qs. 122, 123).

In July, 1919, a conference was held between Mr. Lipe and Mr. Bartlett Arkell, representing the Beech-Nut Company, and Mr. Maloney president of the Lorillard Company (R. Vol. IV, p. 2172, X-Q. 119). Mr. Lipe gave the following account of this conference:

> "I remember Mr. Maloney said they had ordered a lot of labels. We talked about their changing the label. It was some sort of a conversation like this. We said the labels on the Beech-Nut cigarettes, for instance, looked like a Beech-Nut label, had same style of letters. There was some talk as to if or not they would change, at least the lettering, and the same color of label so that they did not copy our letters, copy our color and should change their slogan so that it did not mean 'Beech-Nut' to the average person.

"X-Q. 126. It was not a question of the word 'Beech-Nut'?

"A. We never got to that. We had doubts about it, but I do not remember there was anything said about it. We had a long talk but I do not remember every word.

"X-Q. 127. The main discussion in your interview, as you remember it, was the label?

"A. Style of letters, color, etc. When we came away we felt that we had not gained anything—that we had not found a common ground. I think my memory is pretty clear on this that Mr. Maloney inferred if we would consider reimbursing them for the amount they had paid out for the labels, they would change the label or discontinue. That is the impression he gave me. I would not say that was really spoken, but I gathered if we said to him we would make good for the money put into these labels, he would have said they would quit. Possibly he did not intend that at all.

"X-Q. 128. As you understand it, if you had reimbursed them for the labels he would have changed the style of labels?

"A. I would not say that he said that, but that was the inference—he would change it or something like that." (R. Vol. IV, pp. 2173-2174.)

Mr. Maloney in his letter of July 15, 1919, to Mr. Arkell (R. Vol. VI, p. 2907) said that "Pursuant to our interview, I am sending you by registered mail, under separate cover, a sample of the old package for Beech-Nut cigarettes, also one showing color scheme for the new package." He also stated that the cost of this change would be $10,231.36 and that he felt sure the Beech-Nut Company would not permit the Lorillard Company to suffer such a loss. At this time the Lorillard Company had not put its Beech-Nut cigarette on the market. Mr. Belt, vice-president of the Lorillard Company, said (R. Vol. IV, p. 2262) that prior to May, 1919, the Lorillard Company was "in a position of entire readiness to make this brand and place it on the market"

and that, though many of the cigarettes had been made and packed in packages, the company considered the time unfavorable for marketing this brand. He produced a specimen of the packages in which these Lorillard Beech-Nut cigarettes were inclosed in 1919, a photograph of which appears at page 2973 of Vol. VI of the Record. In his testimony appearing at page 2593 of Volume V of the Record, Mr. Belt says that the Lorillard Beech-Nut cigarette was first put on the market in the spring of 1921.

The "old package" referred to by Mr. Maloney in his letter of July 15, 1919, is that represented by the photograph on page 2973 of Volume VI of the Record. No specimen of the "new package" referred to by Mr. Maloney is in evidence and it does not appear ever to have been used. The original package shown on page 2973 of Volume VI (the "old package" referred to by Mr. Maloney) bore at the left-hand end of the wrapper, as there shown unfolded, the inscription or slogan: "Cigarettes of Beech-Nut quality have never before been offered to the public." This obvious reference to the Beech-Nut Packing Company's reputation as a producer of goods of the highest quality does not appear on the package in which the cigarette is now sold, a specimen of which is mounted on page 12, *ante*.

Mr. Arkell, under date of July 17, 1919, acknowledged receipt of Mr. Maloney's letter of July 15 and stated that payment by the Beech-Nut Company for the cost of the proposed change in the package was not in accord with his recollection of their interview. Mr. Maloney in his letter of July 28, 1919, to Mr. Arkell (R. Vol. VI, p. 2911) adhered to his position that the Beech-Nut Company should defray the cost of the proposed change in the Lorillard cigarette package.

Upon August 7, 1919, Mr. Barbour, vice-president of

the Beech-Nut Packing Company, wrote to the Lorillard Company stating that Mr. Arkell had no recollection of any mention of the advertising matter or wrappings and that Mr. Lipe, also a member of the Beech-Nut Packing Company, while remembering some mention of it, did not remember any mention of the quantity and that "neither of these gentlemen gained the inference that you would expect the Beech-Nut Packing Company to absorb the cost of these supplies." (R. Vol. VI, p. 2913.) In this letter of August 7 Mr. Barbour also suggested that the Lorillard Company use for the cigarette a wrapper like that on the Lorillard Beech-Nut Tobacco in order to "apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco." In the following paragraph of the same letter (R. Vol. VI, bottom of page 2912) Mr. Barbour states that if the Lorillard Company does not care to follow the suggestion offered above he hopes the Lorillard Company will abandon the red background and change the same to blue or some other color and will also change the style of printing.

On September 17, 1919, Mr. Maloney, president of the Lorillard Company, wrote to Mr. Arkell, president of the Beech-Nut Packing Company, stating that the Lorillard Company was about to file in the Patent Office an opposition to the registration by the Beech-Nut Packing Company of the word "Beech-Nut" as a trade-mark for cigarettes, and stating that he, Mr. Maloney, had understood from the interviews and correspondence with Mr. Arkell prior to the filing of the application for registration that the Beech-Nut Packing Company "did not intend to press this application." (R. Vol. VI, p. 2917.)

On June 25, 1919, the Beech-Nut Packing Company had filed its application in the Patent Office

for registration of the word "Beech-Nut" as a trade-mark for cigarettes (R. Vol. VI, p. 2821), having previously had the American Tobacco Company put up some cigarettes in boxes bearing the word "Beech-Nut" as a trade-mark (R. *Vol. I, p. 791, X-Qs. 49-53*).

These few boxes of cigarettes put out by the Beech-Nut Packing Company before applying for trade-mark registration bore the word "Beech-Nut" but not the oval border and picture of a beech-nut cluster (R. Vol. IV, p. 2169, X-Qs. 96-103), but later the witness, Mr. Lipe, produced two Beech-Nut cigarette labels of the same oval design as used by the Beech-Nut Company upon its other products and stated that his memory was that they "could not get those labels for ten days or two weeks." Mr. Lipe also said that if the Beech-Nut Company had sold any more cigarettes they would have sold them with the standard oval label. (Witness' statement following his answer to X-Q. 108, R. Vol. IV, p. 2170). The standard oval cigarette label was offered in evidence (R. Vol. IV, p. 2175) and appears at page 2999 of Vol. VI of the Record. These few boxes of cigarettes sold by the Beech-Nut Company as a foundation for the application for registration were the only cigarettes ever sold by the Beech-Nut Company.

After some further correspondence the Beech-Nut Packing Company informed the Lorillard Company in its letter of October 8, 1919, that the Beech-Nut Company did not feel disposed to reimburse the Lorillard Company "for losses sustained by reason of adopting trade-mark and common law property which rightfully belongs to this company." (R. Vol. VI, p. 2920.) This is followed by the statement that the position of the Beech-Nut Packing Company is "that regardless of the trade name or mark 'Beech-Nut' your company adopted our oval trade-mark and our general color scheme and

other embellishments for your cigarette package, and this your company had no right to do regardless of any rights that you may have had in so far as the name Beech-Nut is concerned." The distinction which Mr. Barbour makes, in the statement just quoted, between the Lorillard Company's use of the word "Beech-Nut" and their use of "our oval trade-mark and our general color scheme and other embellishments" clearly shows that the attitude of the Beech-Nut Packing Company was based squarely upon its belief that the Lorillard Company had a legal right to use the word "Beech-Nut," that word having formed a part of the old Weissinger Beechnut trademark which the Lorillard Company represented had been used continuously by it and its predecessors since the year 1898. Mr. Barbour's reliance on the Lorillard Company's representation is explicitly shown by his reference to the Lorillard Company's use of the Beech-Nut Packing Company's entire trade-mark and his statement that "this your company had no right to do regardless of any rights that you may have had in so far as the name Beech-Nut is concerned."

The correspondence comes to an end with the letter of October 15, 1919 (R. Vol. VI, p. 2922), written by Mr. Maloney, to the Beech-Nut Packing Company, which letter concludes with a statement to the effect that if they had failed to arrive at an amicable settlement the Lorillard Company would like the return of the sample packages which had been sent to the Beech-Nut Company.

The application of the Beech-Nut Packing Company for registration of the word Beech-Nut was published in the Patent Office Gazette of September 9, 1919, and within thirty days of that date, as required by Section 6 of the Trade-Mark Act of February 20, 1905, Ch. 592 (33 Stat. L. 724), the Lorillard Company filed in the

Patent Office a notice of opposition to the registration applied for by the Beech-Nut Packing Company. The testimony taken in the ensuing opposition proceeding has by stipulation (R. Vol. I, p. 871) been admitted as part of the evidence in the suit at bar and forms Volume IV of the Record in this case.

In the notice of opposition by which the Lorillard Company instituted the opposition proceeding in the Patent Office it was alleged, in the second and fourth paragraphs thereof (R. Vol. IV, p. 2244), that "since about 1899, or prior thereto, the word symbol Beech Nut, has been continuously used by the opposer, P. Lorillard Company, or its predecessors in business and title as a trade-mark for tobacco products." The Beech-Nut Packing Company's answer to the notice of opposition was in the usual form, admitting the truth of both formal and material allegations which it knew of its own knowledge to be true and denying all other allegations (R. Vol. IV, pp. 2150 to 2154), among the allegations denied being that of continuous use since 1899 of the word symbol Beech-Nut by the Lorillard Company and its predecessors. This question of continuous use since 1899 thus became an issue of fact in the opposition proceeding solely because counsel for the Beech-Nut Company followed the usual course of incorporating in the answer denials of all allegations lying exclusively within the knowledge of the opposing party. Thus it came that the facts were brought out in the Patent Office proceeding. The testimony revealed the fact that the use of the Weissinger Beechnut trade-mark was discontinued in April, 1910, by the Luhrman & Wilbern Company, over a year and a half before the Lorillard Company acquired any interest in the Luhrman & Wilbern business, and that the Lorillard Company itself had never manufactured the Weissinger tobacco mixture and had never used the Weis-

singer Beechnut trade-mark. These facts, with references to the record, are set out in Part III of this statement.

The Patent Office Examiner of Interferences decided (Plaintiff's Exhibit No. 41, R. Vol. VI, p. 2821) in the opposition proceeding that the statutory provision under which the Patent Office acted precluded him from taking cognizance as a basis of his decision of any question other than the question whether plaintiff or defendant had first applied the Beech-Nut trade-mark to tobacco products, and refused to grant plaintiff's application for registration of its trade-mark for cigarettes because the Lorillard Company had applied that brand to scrap tobacco before the Beech-Nut Company had applied it to cigarettes.

The Examiner held that he could not under the statute take cognizance of the question of the legality of the Lorillard Company's use of the trade-mark upon scrap tobacco, but was bound to base his decision upon the bare fact of priority of use upon a tobacco product. The Examiner referred plaintiff to the United States courts for an adjudication of the real question at issue (R. Vol. VI, p. 2827). In developing his reasoning the Examiner ruled that the old Weissinger Beechnut trade-mark had been abandoned and that the Lorillard Company had no rights extending back of the year 1915 (Plaintiff's Exhibit No. 41, R. Vol. VI, pp. 2823-2825).

The Beech-Nut Packing Company appealed from the decision of the Examiner to the Commissioner of Patents. The Assistant Commissioner of Patents held (Plaintiff's Exhibit No. 42, R. Vol. VI, p. 2830) that the sales of cigarettes made by the Beech-Nut Packing Company were merely formal, did not constitute any real business and were not sufficient to support an application for trade-mark registration. In this proceeding in the Patent Office the Beech-Nut Packing Company con-

tended, as it does here, that it had the right to extend the use of its trade-mark to cigarettes and the right to prevent others from so using it, but the Assistant Commissioner of Patents concluded his opinion as follows (Plaintiff's Exhibit No. 42, R. Vol. VI, p. 2832):

> "In the argument and in the briefs many other interesting questions are urged, but since applicant has no business on which to base its registration, the Patent Office has no jurisdiction of its case and anything we may say with respect to the other questions which might otherwise be involved would seem inappropriate."

As appears from the foregoing quotation the proceedings in the Patent Office terminated by reason of the Commissioner's ruling that because of the merely formal character of the Beech-Nut Packing Company's sales of cigarettes the Patent Office had no jurisdiction of any of the questions here in controversy.

PART III.

History of the Weissinger Beechnut Brand and Business.

HISTORY—ORIGIN AND ASSIGNMENTS.

In or about the year 1897 the Harry Weissinger Tobacco Company of Louisville, Kentucky, adopted for scrap tobacco the label offered in evidence in the Patent Office opposition proceeding as Lorillard Patent Office Exhibit No. 14, a reproduction of which appears on page 9, *ante* (R. Vol. IV, p. 2360, Qs. 32-34, R. Vol. VI, p. 2987). Following is a statement of the several assignments of the business of the Weissinger Company as shown by the substance of the assignments which is in evidence by stipulation (R. Vol. IV, pp. 2251-2252), and by the testimony of S. E. Spence and W. R. Perkins, representing the Lorillard Company (R. Vol. IV, p. 2258 and R. Vol. V, p. 2530).

In 1903 the Weissinger Company assigned its business and tobacco brands to the Continental Tobacco Company, and the latter in that year assigned the same to the Luhrman & Wilbern Tobacco Company. Both the Continental Company and the Luhrman & Wilbern Company were at the time controlled by the American Tobacco Company, as appears from the opinion of this Court in *U. S.* v. *American Tobacco Co.*, 221 U. S. 106. The American Tobacco Company owned outright all of the stock of the Luhrman & Wilbern Company (221 U. S. p. 144). In the instruments effecting the assignments above mentioned the Weissinger Beechnut brand was specifically mentioned. The Luhrman & Wilbern Company made no change in the Weissinger Beechnut label other than adding its own name as shown in the reproduction (page 73, *post*) of the label as used by Luhr-

man & Wilbern (Lorillard Patent Office Exhibit No. 5, R. Vol. VI, p. 2971).

In 1911 the American Tobacco Company was adjudged by this Court (221 U. S. 106) to be a combination in restraint of trade and all of the capital stock of the Luhrman & Wilbern Company was on November 16, 1911, conveyed by decree of the United States Circuit Court (191 Fed. 371, 417, 424) from the American Tobacco Company to the P. Lorillard Company. The P. Lorillard Company to which this transfer was decreed was a new corporation "called P. Lorillard Company" which was organized by order of the Circuit Court for the purpose of receiving part of the distributed assets (Decree, 191 Fed. p. 423). The corporate existence of the Luhrman & Wilbern Company was continued after its acquisition by the P. Lorillard Company. September 1, 1913, the P. Lorillard Company as sole stock-holder of the Luhrman & Wilbern Company assigned all of the assets of that company to itself, no specific mention being made in the assignment of the Weissinger Beechnut tobacco or trade-mark (R. Vol. IV, p. 2252).

FIRST DISCLOSED BY PATENT OFFICE OPPOSITION TESTIMONY IN 1920 THAT MANUFACTURE OF WEISSINGER BEECHNUT TOBACCO WAS DISCONTINUED PRIOR TO 1909, THAT LAST SALE WAS IN APRIL, 1910, AND THAT NONE WAS OFFERED FOR SALE AFTER 1910.

Mr. David Ball, one of the vice-presidents of the Lorillard Company, testifying as a witness in the Patent Office opposition in 1920, produced a statement of sales showing the sales of the old Weissinger Beechnut tobacco. The statement produced by Mr. Ball is in evidence as Lorillard Patent Office Exhibit No. 1. Mr. Ball's reference to this exhibit is upon page 2255 of Volume IV of the Record, and the exhibit is printed upon

pages 2965 to 2970 of Volume VI of the Record. Ralph Bowman, bookkeeper, cost clerk and assistant cashier of the Middletown, Ohio, factory where the Weissinger Beechnut tobacco was manufactured by the several successors of the Weissinger Company, produced a record book which also contains a record of the sales of the Weissinger Beechnut tobacco. Mr. Bowman's testimony on this point extends from near the bottom of page 2317 to page 2319 of Volume IV of the Record, and the pages of the book, Exhibit D, relating to the Weissinger Beechnut tobacco are reproduced at pages 2023 to 2028 of Volume VI of the Record.

The facts shown by the statement produced by Mr. Ball, Exhibit No. 1, and those shown in the book, Exhibit D, are the same though somewhat differently arranged. Exhibit D is a statement of the sales each month, and, with the exception of the first few months in 1904, there is entered opposite the name of each month the number of pounds sold in that month and also the total sales since the beginning of the calendar year. Following are the total sales of the old Weissinger Beechnut tobacco year by year as shown by the Lorillard shipment book, Exhibit D above referred to:

1904	10,776
1905	5,139
1906	3,600
1907	2,605
1908	1,025
1909	425
1910	25

The 25 pounds sold in 1910 was sold in the month of April, 1910, as shown by the two entries "25" in April of that year (R. Vol. VI, p. 2027), one entry showing the amount sold in April and the other showing the total since the first of the year 1910. In each of the succeeding

months of 1910 there is a single entry of the numeral "25" after the name of the month, this being the total since the first of the year and remaining the same as no sales were made of the Weissinger Beechnut brand after April, 1910.

Mr. S. E. Spence, secretary and auditor of the Luhrman & Wilbern Company from 1904 to 1911, and since then connected with the Lorillard Company, testified as follows in the Patent Office proceeding:

> "During the early years that Luhrman & Wilbern were putting out this Beechnut tobacco, after taking over the business of Harry Weissinger Tob. Co., it sold what was quite a quantity for those days, although the same might appear small today. The brand was sold in those days particularly through such states as Ohio, Pennsylvania and West Virginia. It was sold in Pittsburgh to such concerns as Jenkins, Ewart, Arbuckles and others, and in Cumberland, Md., to J. C. Orrick & Sons Co. I refer to the table of sales forming part of the stipulated deposition of Mr. Ball, Vice-President of the Lorillard Company, Exhibit 1, and make particular reference to that portion of the table covering the years 1904-1911 when I was Secretary and Auditor of Luhrman & Wilbern Tobacco Company. This table was made from the books forming the records of the Luhrman & Wilbern Tob. Co., and it will be noted that the sales gradually diminished until 1910 but twenty-five pounds were made and sold. Luhrman & Wilbern did not make and sell any Beechnut Tobacco during the years 1911-1914, as shown by said table, for the brand was not pushed during those years, as other brands were being actively marketed, and in the tobacco business, as in any other business it is necessary to actively push a brand and keep it before the public in order to keep up the sales." (R. Vol. IV, pp. 2258-2259.)

Mr. Spence added that the trade-mark was not abandoned "for Luhrman & Wilbern during those years had on hand the necessary materials such as the formula, to-

bacco, wrappers and packages necessary to fill any order'' and that he ''as Auditor and Credit man for this concern, would have O. K'd. any genuine order'' for this tobacco. The attaching of his ''O. K.'' to an order as auditor and credit man would have involved nothing other than his approval of the credit standing of the party giving the order, and his statement that wrappers and the formula were in existence and tobacco in stock has no force except on the untenable theory that trade-mark rights survive as long as wrappers endure and the raw material of manufacture is obtainable.

None of the Lorillard Company's price lists are in evidence. In the letter of September 15, 1915, of the Lorillard Company to the Beech-Nut Company (R. Vol. VI, p. 2897), reference is made to the inclosure of price lists containing entries of the old Beechnut tobacco, the letter containing the statement that the price lists said to be inclosed are dated January 2, 1904, May 6, 1907, July 1, 1910, and November 3, 1910. The last named date is the latest upon which there is any indication that the old Beechnut tobacco brand even appeared on a price list, and the price list is not in evidence.

Testimony regarding the manufacture of the Weissinger Beechnut scrap tobacco mixture was given by Herbert C. Boykin, general manager of the Middletown, Ohio, factory where this brand was manufactured after the Weissinger Company gave it up. Mr. Boykin has been employed at the Middletown factory since 1902 (R. Vol. IV, pp. 2303-4). He testified that no Beechnut tobacco was made in the years 1909 to 1914 (R. Vol. IV, p. 2310, X-Q. 49, and p. 2305, Qs. 8, 9). It appears, therefore, that the 25 pounds which was sold in April, 1910, was some old tobacco manufactured prior to the year 1909.

The testimony above referred to of Messrs. Ball, Spence, Bowman and Boykin, given in the Patent Office

opposition in 1920, shows that the Lorillard Company misrepresented the facts in 1915. As set forth above (*ante*, p. 27), when in 1915 the Beech-Nut Company protested against the Lorillard Company's use of the Beech-Nut trade-mark on scrap tobacco the Lorillard Company replied as follows:

> "You seem to proceed upon the assumption that we have recently begun to use the name on the tobacco. This is not the case. This Company and its predecessor in ownership of this brand have used it continuously since prior to the year 1898, as shown by the records in my office." (R. Vol. VI, p. 2893.)

The facts as revealed in the Patent Office opposition were that the manufacture of the Weissinger Beechnut tobacco was stopped prior to the year 1909, that the last sale was made in April, 1910, and that it was never offered for sale after 1910. The Lorillard Company did not acquire ownership of the capital stock of the Luhrman & Wilbern Company until November 16, 1911 (*ante*, p. 46). Therefore the manufacture of the Weissinger Beechnut tobacco had ceased at least two years and ten months, and the last sale of that tobacco was made over a year and a half before the Lorillard Company acquired the ownership of or any interest in the Luhrman & Wilbern Company, and the Lorillard Company itself never, at any time, made or sold any of the Weissinger Beechnut tobacco mixture, and never sold any tobacco of any kind under the Weissinger Beechnut trade-mark. Promptly upon learning that the Lorillard Company had misrepresented the facts in 1915 the Beech-Nut Company instituted this suit.

REASONS GIVEN BY LORILLARD COMPANY FOR ADOPTION OF THE WORD "BEECH-NUT" AS A TRADE-MARK FOR A NEW TOBACCO MIXTURE SHOW KNOWLEDGE OF DIS-USE OF WEISSINGER BEECHNUT TRADE-MARK AND OF THE FACT THAT IN 1915 IT NO LONGER WAS KNOWN TO THE PUBLIC AS A TRADE-MARK FOR TOBACCO.

Mr. David Ball, vice-president of the Lorillard Company, gave the following explanation of the reasons that impelled him, acting on behalf of the Lorillard Company, to adopt the word Beech-Nut as a trade-mark in 1915:

"A. At the time of the dissolution of the American Tobacco Company in December, 1911, the bulk of what we term the scrap business was turned over to the Lorillard Company, and their big brand was 'Honest.' The year before the dissolution, or rather the year of the dissolution, which was 1911, *the brand of 'Honest' started to decline,* and for three or four succeeding years, the decline was gradual all the time, and that also applied to some of our other brands, and I went out myself to make a personal investigation to ascertain the cause of this decline. And after looking the field over very carefully *I decided that the taste of the consumer was changing* somewhat; that brands that were somewhat sweeter than ours seemed to be growing, and our brands that were less sweet were declining, so I came back and reported it to our president and *suggested that we endeavor to get up a new formula that would be better suited to the taste that seemed to be changing* at the present time; and after experimenting quite a while he brought over a sample package of a piece of goods that struck me as being an ideal product to put out. *So we decided to put out another brand,* and in looking around for a brand, as is our usual custom, *I referred to our list of brands to see what were in a way dormant,* and that had been turned over to us as our property by the American Tobacco Company, and one of the first brands I noticed was the brand of Beech-Nut, and that seemed to me to be a very appropriate name for this article, and we

decided to use this brand for that purpose." (R. Vol. V, pp. 2557-2558.) (Italics are ours.)

. . . . . .

". . . and in this investigation that I made when I went out in the territory, I found a great many people, consumers I interviewed largely, because he is the man you have got to get in the tobacco business—I found a great many consumers that were very much dissatisfied with the brands that they were using. One of the most common expressions of a consumer who is dissatisfied with the brand that he has been using, 'Well,' he says, 'it ain't as good as it used to be.' Well, when a man gets that idea into his head that it isn't as good as it used to be, he is looking around for something else. That was one of the causes that made me so enthusiastic in getting our president to originate a little different formula, and the fact that this formula that he originated suited the taste, hit that change that so many people were seeking at that time, was one cause backed up by the manner in which the brand was marketed." (R. Vol. V, p. 2564.)

The "list of brands" (Defendant's Exhibit No. 35, R. Vol. VI, pp. 2942-2955) to which Mr. Ball referred consists of sixteen closely typewritten pages containing over a thousand names said to have been applied to tobacco products by companies the assets or stock of which were allotted to the present Lorillard Company upon the dissolution by court decree of the American Tobacco Company. Mr. William R. Perkins testified (R. Vol. V, pp. 2528-2538) that he has been one of the counsel of defendant since 1911 and of the American Tobacco Company prior to 1911, and that after the decree of dissolution had been entered in November, 1911, he made a list of all the tobacco brand names appearing on the records of the companies whose assets or stock went to the Lorillard Company under the decree. From the testimony of Mr. Perkins it appears that the list contains the name of every brand appearing on the records of these companies. The list is

simply a memorandum. Its preparation was merely a clerical act involving the listing of all brands that had ever been used regardless of whether they were dead or alive. The inclusion of the word Beechnut in this list along with over a thousand other words signifies nothing other than that the word was still legible in the old books of the Luhrman & Wilbern Company.

The necessities of the situation made it impossible for the Lorillard Company to apply to their new 1915 tobacco mixture any trade-mark that was known to the purchasing public as the symbol and identification of an old tobacco mixture. The Lorillard 1915 mixture was compounded, as stated by Mr. Ball, with a different and sweeter flavor for the sole purpose of appealing to tobacco users who had ceased to buy the old mixtures. Hence Mr. Ball's care to select what he calls a "dormant" brand. In order to eliminate any possibility of the new 1915 mixture being associated by the public with the old Weissinger brand the Lorillard Company took nothing from the Weissinger Beechnut label but the word "Beechnut," and then changed that word to "Beech-Nut" and made it a part of an essentially exact copy of the Beech-Nut Packing Company's trade-mark. The absence from the Lorillard scrap tobacco label of the picture of a squirrel, which had formed so conspicuous an element of the Weissinger label, in itself showed the intention to repudiate and abandon the Weissinger trade-mark. That Mr. Ball was correct in his conclusion that the Weissinger Beechnut brand was "dormant" is shown by the facts next reviewed, which facts show that no ultimate purchaser even remembered in 1915 that any such tobacco as the Weissinger Beechnut brand had ever existed.

IN 1915 NO ULTIMATE CONSUMER OF TOBACCO EVEN REMEMBERED THAT THE WEISSINGER BEECHNUT BRAND OF TOBACCO HAD EVER EXISTED, AND HENCE THERE WAS NO SURVIVAL IN 1915 OF ANY TRADE-MARK RIGHTS THEREIN.

The record contains no testimony that any ultimate consumer of tobacco even remembered in 1915 or at any subsequent time that the old Weissinger Beechnut brand had ever been on the market. The only witnesses who did testify regarding the previous existence of the Weissinger Beechnut brand, outside of Lorillard Company officials and men connected with its manufacture, were a few veterans of the tobacco trade who had been connected with the business for periods ranging from fifteen to forty-five years, and some of these had no independent recollection but merely produced records and read them. We outline this testimony in Appendix F, *post* (App., p. 91). Its character and weight is fairly indicated by the fact that they were veterans and experts in the tobacco business and therefore in a better position than the ultimate consumers to remember obscure historical facts of the tobacco trade.

None of these witnesses produced any record or remembered any fact indicating sales of the Weissinger Beechnut brand later than 1908. One of them, Charles C. St. Clair, thought the reason the sale of the Weissinger Beechnut brand had ceased was because it was no longer manufactured (R. Vol. IV, p. 2281, X-Q. 34). The last purchase of Weissinger Beechnut tobacco made by the firm for which Mr. St. Clair worked was in 1903 as testified to by another witness (Nichol, R. Vol. IV, p. 2276, and note following X-Q. 17 on page 2279).

The only specimen packages of the Weissinger Beechnut brand that were produced were obtained by the

witness Gormly from an old drawer of fifteen year old samples (R. Vol. IV, pp. 2285-2290), and by the witness Orrick from an eighteen or twenty year old carton (R. Vol. IV, pp. 2272-2273). The Gormly samples bore revenue stamps canceled in 1905, the latest date at which the evidence shows that Mr. Gormly's company had dealt in the Weissinger Beechnut tobacco. Mr. Gormly said they had offered several times to give away the contents of the sample drawer containing these Weissinger Beechnut packages but "no person would take it on account of its age." (R. Vol. IV, p. 2288, X-Q. 62; p. 2283, X-Q. 74.) At the time, 1915, when the Lorillard Company adopted the Beech-Nut Packing Company's Beech-Nut trade-mark these old packages produced by Gormly had lain for ten years in the sample drawer and were the last packages shown by the evidence to have been bought by the firm in whose sample drawer they were interred; while the packages described by Orrick had already lain forgotten for some thirteen to fifteen years.

As above stated, the evidence of the witnesses here briefly referred to is digested in Appendix F, *post* (App., p. 91).

The insignificant sales of the old Weissinger "Beechnut" tobacco in the years from 1905 to 1910, and the complete cessation of sales or of even any offer or efforts to sell it after 1910 resulted in the complete obliteration of the Weissinger Beechnut brand from the memory of the purchasing public. The good-will of a business is the favorable regard in which that business is held by the public. The public cannot favorably regard a thing which it does not even remember. Therefore it is an obvious fact of this case that the good-will of the Weiss-

inger Beechnut tobacco had expired prior to the year 1915. Inasmuch as no property right in a trade-mark can exist except by association of the mark with the good-will of a business, it is an equally obvious fact of this case that in the year 1915 the Lorillard Company had no property right or right of any kind or nature in the word "Beechnut." It is conceivable that the good-will of a business, and the property right in the trade-mark which symbolizes and identifies the business, may in some instances continue to exist after, and sometimes, perhaps, long after, the business itself has been discontinued. But upon no possible theory can the good-will and trade-mark rights of a business continue after the very existence of the business and of the trade-mark as an identification of the business has been forgotten.

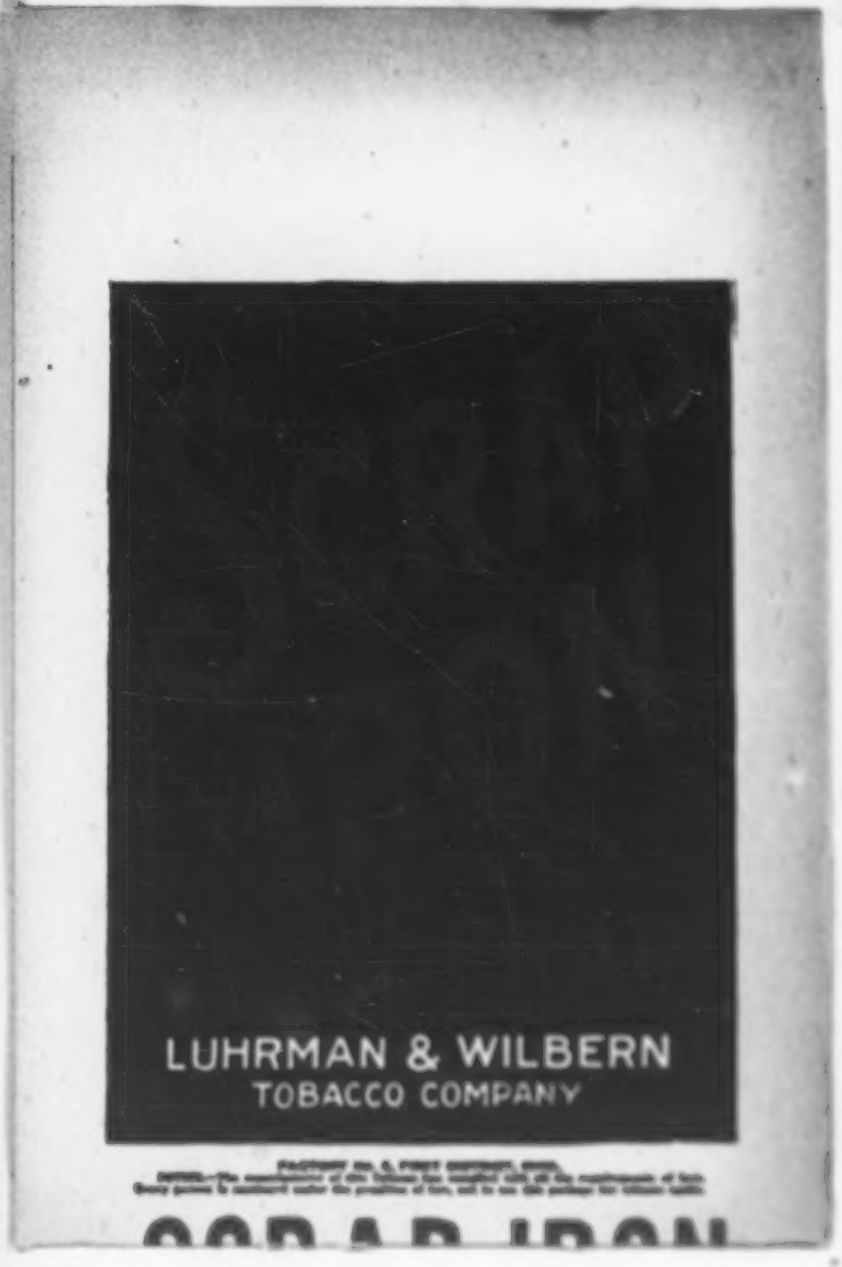
FACTS SHOWING LORILLARD COMPANY'S INTENTION TO ABANDON, AND KNOWLEDGE OF ABANDONMENT OF THE WEISSINGER BEECHNUT TRADE-MARK.

Facts already reviewed showing the Lorillard Company's intention to abandon, and knowledge of the abandonment of the Weissinger Beechnut trade-mark are: (1) the fact that the Luhrman & Wilbern Company and the Lorillard Company had discontinued the Weissinger Beechnut brand for so long a time that it was completely forgotten by the ultimate consumers; (2) Mr. Ball's selection of the Weissinger Beechnut brand because in 1915 it was "dormant"; (3) the fact that the Lorillard Company in 1915 was under the necessity of applying to the newly flavored 1915 tobacco mixture a name that would attract tobacco users who would no longer buy the old tobacco mixtures, thus making the word "Beechnut" or "Beech-Nut" unavailable except for the Lorillard Company's knowledge that this word was not known to tobacco users as a symbol or identification of any old tobacco mixture; and (4) the elimination from the Lorillard 1915 Beech-Nut scrap tobacco label of every distinguishing feature of the Weissinger Beechnut label other than the word "Beechnut," and the transformation of this word to "Beech-Nut," and its use as part of an essentially exact copy of the Beech-Nut trade-mark of the Beech-Nut Packing Company.

Further evidence of the Lorillard Company's intention to abandon, and knowledge of the abandonment of the Weissinger Beechnut trade-mark is found in the contrast between the Lorillard Company's attitude toward the Weissinger Beechnut brand and its attitude toward six other brands which were acquired by the Lorillard Company from the Luhrman & Wilbern Company by the decree of court (*ante*, p. 46) which transferred the Luhr-

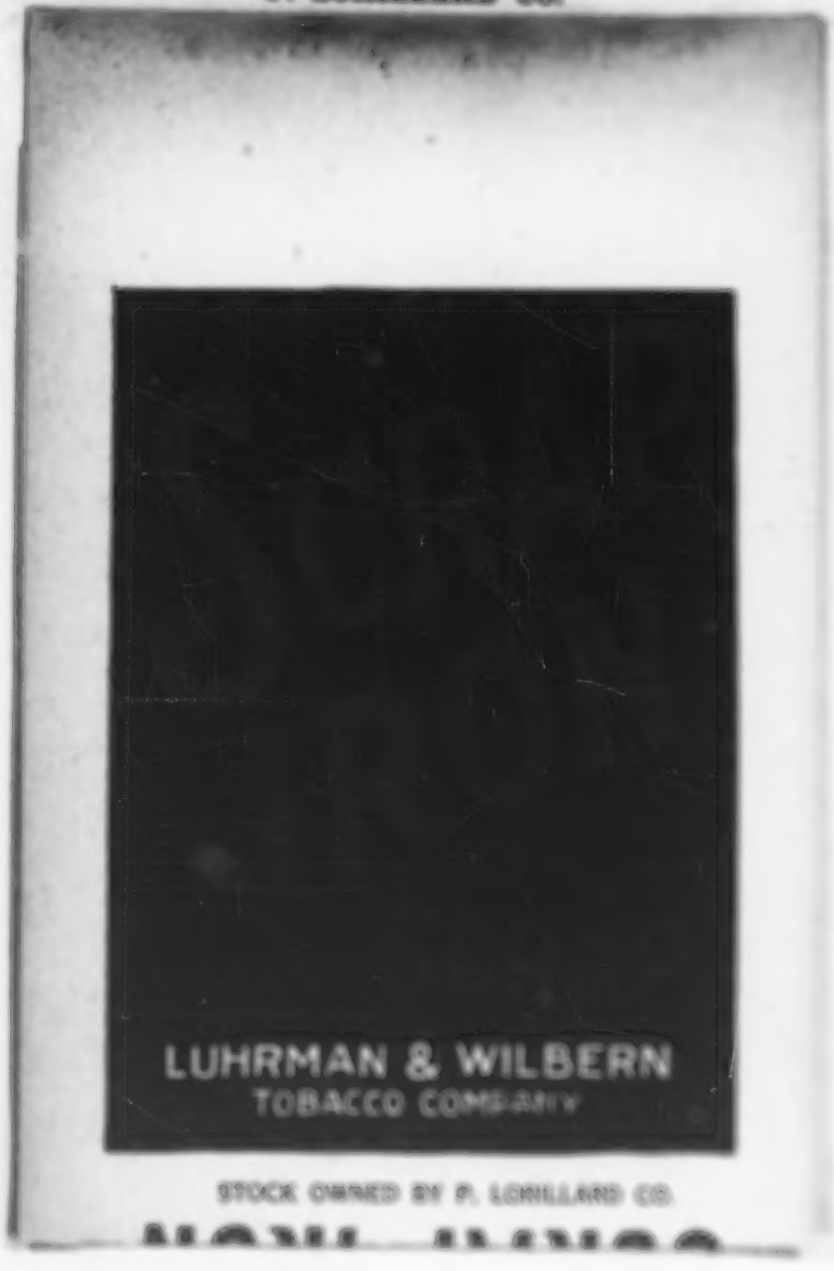
mixture that had previously been on the market would obviously have defeated the express purpose of the Lorillard Company to get the trade of consumers who were dissatisfied with and would not buy the old tobacco mixtures. The contention that the Weissinger Beechnut brand was a live brand and not abandoned involves a contradiction of Mr. Ball's testimony, is inconsistent with the elimination of every distinctive element of the Weissinger label and the substitution therefor of every distinctive element of the Beech-Nut Packing Company's Beech-Nut label, and is inconsistent with the purpose for which the Lorillard Company used the Beech-Nut trademark, namely, to designate a tobacco mixture the value and drawing power of which lay in the fact that it was a new mixture having a flavor different from the old mixtures theretofore on the market.

Screw Iron Label Used by
LUHRMAN & WILBERN.



Beech-Nut Cross-Exhibit No. 2-A.
(R. Vol. IV, p. 2324, X-Q. 33; VI, p. 2855.)

Screw Iron Label First Used by
P. LORILLARD CO.

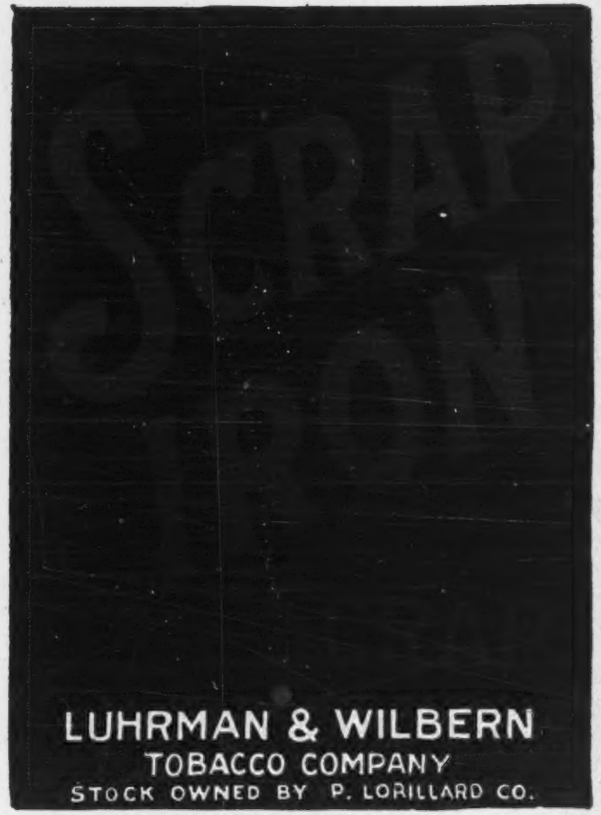


Beech-Nut Cross-Exhibit No. 2-C.

P. LORILLARD CO.

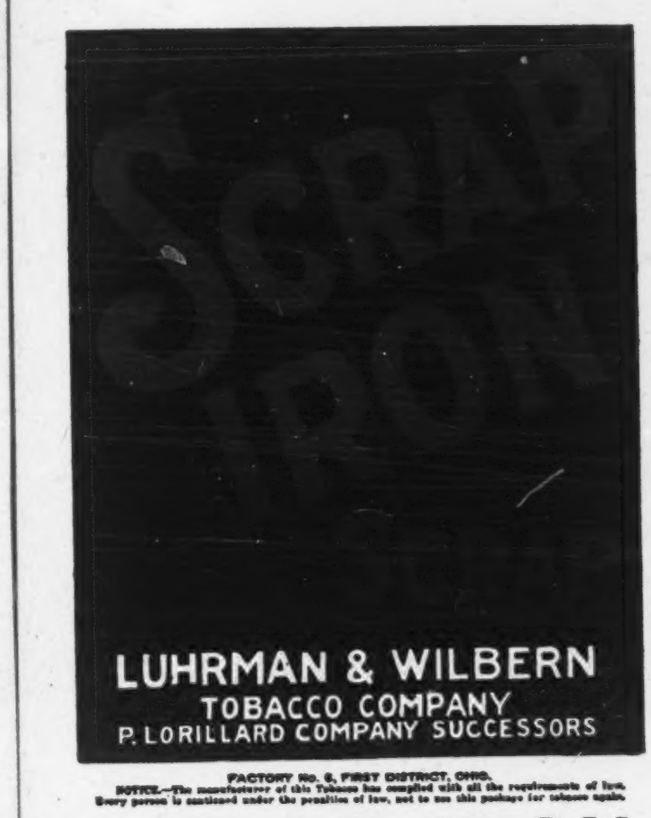
Beech-Nut Cross-Exhibit No. 2-C.
(R. Vol. IV, p. 2331, X-Qs. 71-72; VI, p. 2858.)

P. LORILLARD CO.



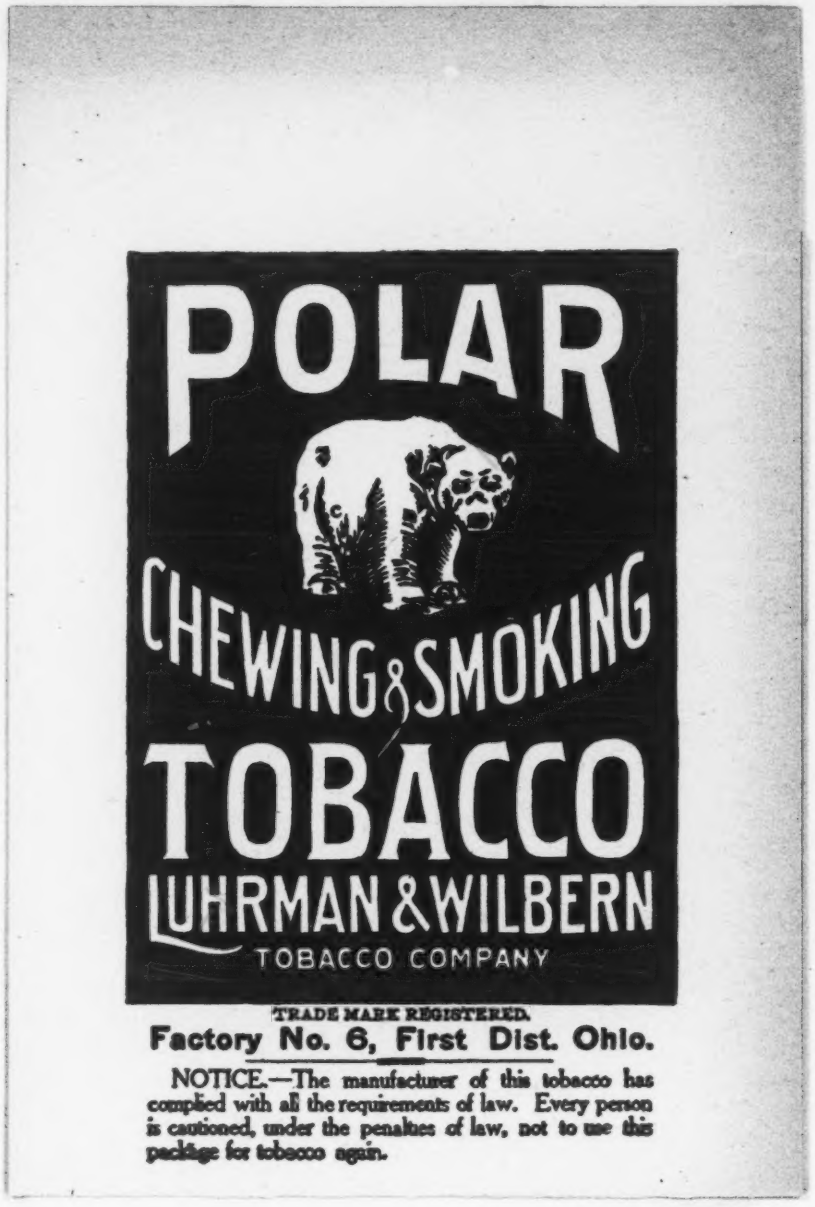
Beech-Nut Cross-Exhibit No. 2-D.
(R. Vol. IV, p. 2331, X-Q. 72; VI, p. 2859.)

Scrap Iron Label Finally Used by
P. LORILLARD CO.



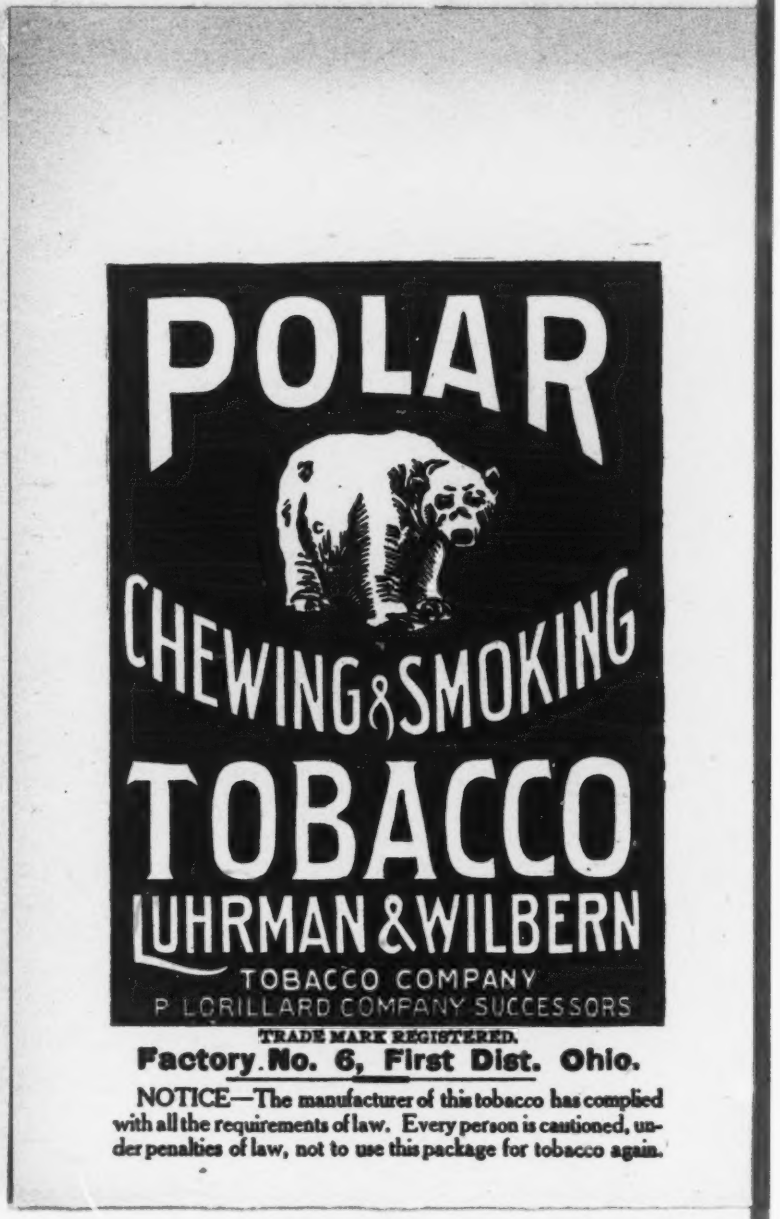
Beech-Nut Cross-Exhibit No. 2.
(R. Vol. IV, pp. 2321-2322, X-Q. 24; VI, p. 2854.)

Polar Bear Label Used by
LUHRMAN & WILBERN.



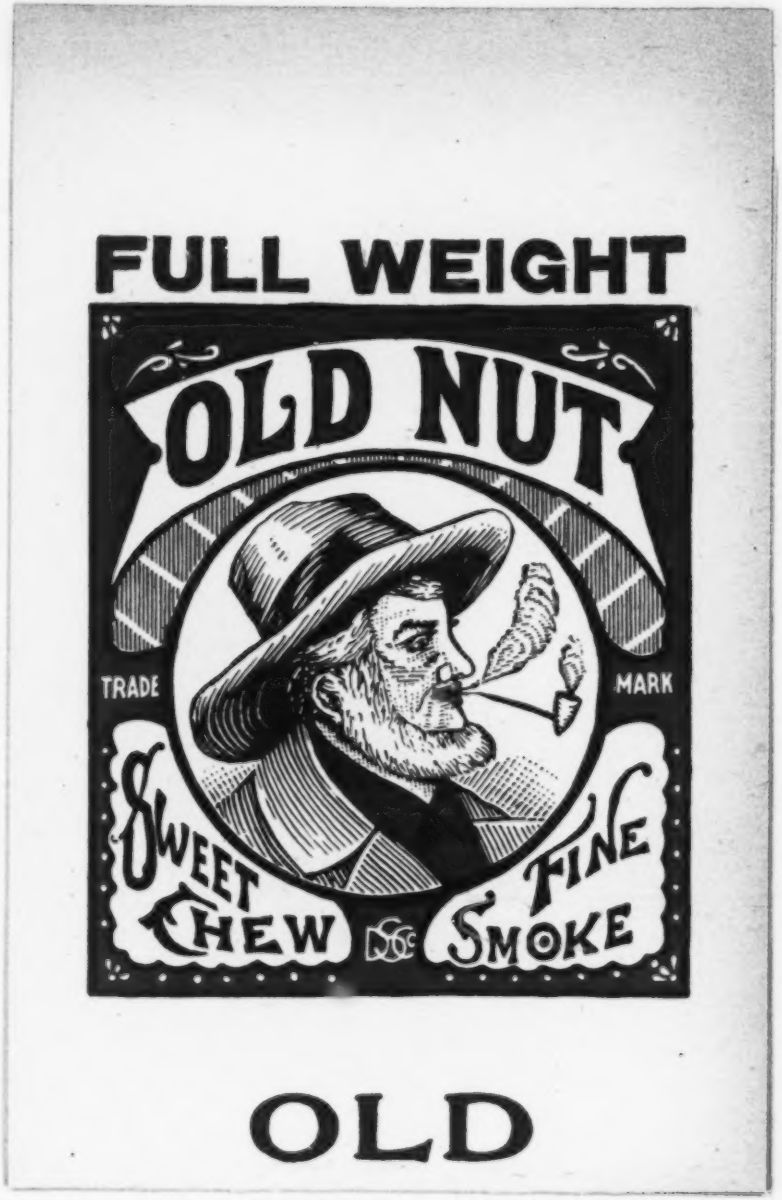
Beech-Nut Cross-Exhibit No. 1-A.
(R. Vol. IV, p. 2323, X-Q. 32*a*; VI, p. 2851.)

Polar Bear Label Used by
P. LORILLARD CO.

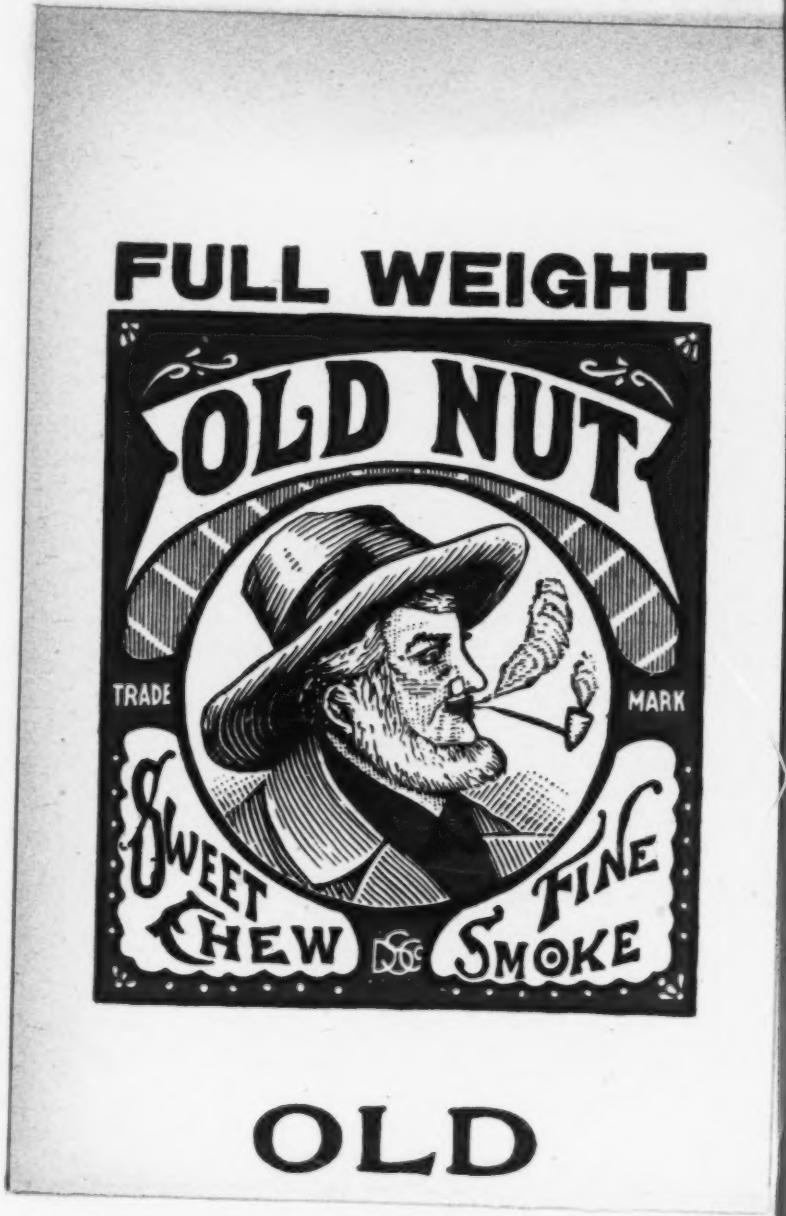


Beech-Nut Cross-Exhibit No. 1.
(R. Vol. IV, p. 2320, X-Qs. 20-22; VI, p. 2850.)

Old Nut Label Used by
LUHRMAN & WILBERN.



Old Nut Label Used by
P. LORILLARD CO.



Both of above labels are reproductions of Beech-Nut Cross-Exhibit No. 3, which appears at page 2861 of Vol. VI of the Record. Cross-Exhibit No. 3 is a specimen of the Old Nut label as used by P. Lorillard Co. and is identical with the label used by Luhrman & Wilbern (R. Vol. IV, p. 2325, X-Qs. 38-39).

Honest Scrap Label As Used by LUHRMAN & WILBERN.

Honest Scrap Label Used by P. LORILLARD CO.

Above two labels are identical and are reproductions of Defendant's Exhibit No. 39 (offered R. Vol. V, p. 2567). See Record, Vol. IV, p. 2327, X-Q. 54, and Vol. V, p. 2581, for use of same label by both companies. See Record, Vol. V, p. 2577, for the fact that P. Lorillard Company did not even place its name in the margin or elsewhere on the Honest Scrap label.

Bag Pipe Label As Used by LUHRMAN & WILBERN.

Bag Pipe Label Used by P. LORILLARD CO.

Above two labels are identical and are reproductions of Beech-Nut Cross-Exhibit No. 4, which is a specimen of the Bag Pipe scrap tobacco label used by P. Lorillard Co. and identical with the label previously used by the Luhrman & Wilbern Company (R. Vol. IV, p. 2325, X-Qs. 40-42).

NATURAL LEAF.

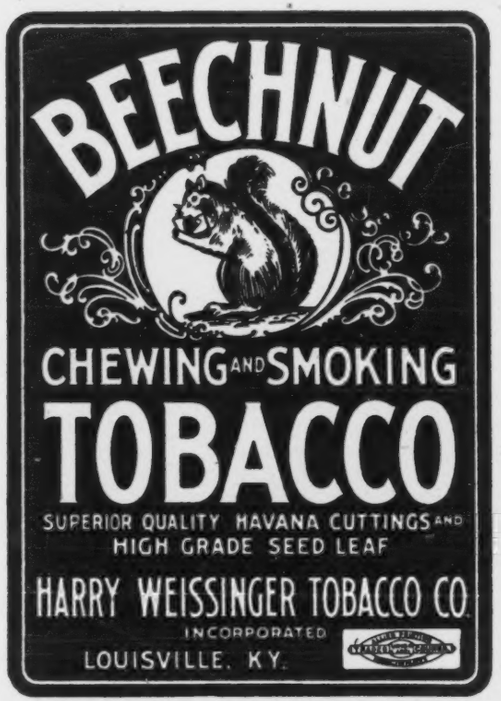
No specimen of the "Natural Leaf" scrap tobacco label is in evidence, but the testimony shows that P. Lorillard Co. used for this brand the same label that previously had been used by the Luhrman & Wilbern Company (R. Vol. IV, p. 2327, X-Qs. 54-56).

WEISSINGER BEECHNUT LABEL

As Used by Harry Weissinger Tobacco Co.

Used from 1897 to 1903.

In 1903 the Weissinger Co. business was assigned to Continental Tobacco Co. and by the latter to Luhrman & Wilbern (ante, page 45).



Factory No. 26, Fifth District of Kentucky.

NOTICE.—The manufacturers of this Tobacco have complied with all the requirements of law. Every person is cautioned, under the penalties of the law, not to use this package for Tobacco again

Above label is a reproduction of Lorillard Patent Office Exhibit No. 14 (R. Vol. VI, p. 2981; offered Vol. IV, p. 2273).

WEISSINGER BEECHNUT LABEL

As Used by Luhrman & Wilbern.

NOT USED AFTER APRIL, 1910.

None of this brand made since prior to 1909, and none sold since April, 1910 (ante, pp. 47-50).

Factory No. 6, First District, State of Ohio.

NOTICE.—The manufacturer of this Tobacco has complied with all the requirements of Law. Every person is cautioned under the penalties of the law, not to use this package for Tobacco again.

Above label is a reproduction of Lorillard Patent Office Exhibit No. 5 (R. Vol. VI, p. 2971; offered Vol. IV, p. 2258).

P. LORILLARD CO. LABEL.

Beech-Nut Cigarettes.

First Used in 1921.

Above label is a duplicate of wrapper on Plaintiff's Exhibit (R. Vol. VI, p. 2708; offered Vol. I, p. 32).

P. LORILLARD CO. LABEL.

Beech-Nut Cigarettes.

First Used in 1921.

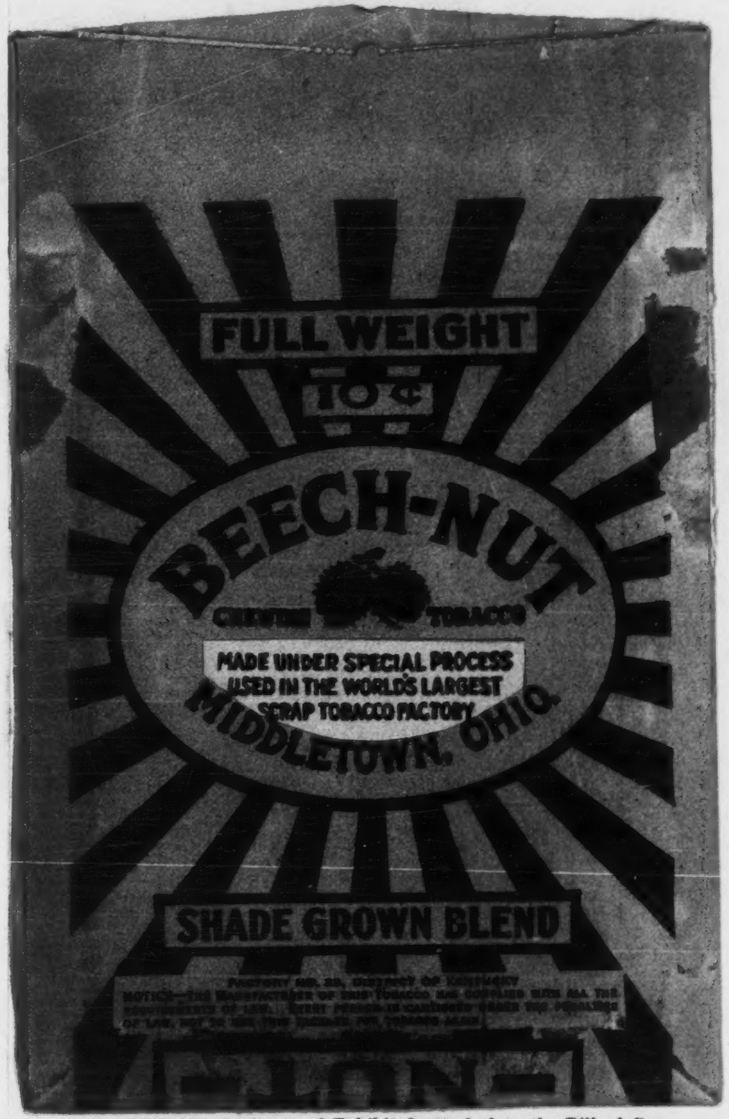
Above label is a duplicate of wrapper on Plaintiff's Exhibit No. 1 (R. Vol. VI, p. 2708; offered Vol. I, p. 32).

P. LORILLARD CO. LABEL.

Beech-Nut Scrap Tobacco.

(Chewing tobacco.)

FIRST USED IN 1915.



Above label is a duplicate of Exhibit 2 attached to the Bill of Complaint (R. Vol. I, p. 17); also of wrapper on Plaintiff's Exhibit No. 3 (Vol. VI, p. 2712) and Defendant's Cross-Exhibit No. 1 (R. Vol. VI, p. 2710; offered Vol. I, p. 32).

BEECH-NUT P

Standard Beech-Nut Labels.

Used on great variety of products.

Essential features used since about 189

Above labels are among large collection of labels in Plaintiff's Exhibit No. 28,—photograph, ante, pages 18a and 18b (R. Vol. 9777-8; offered I, p. 857; V, p. 2552).

Standard Beech-Nut Labels.

Used on great variety of products.

Essential features used since about 1891.

Above labels are among large collection of labels in Plaintiff's Exhibit No. 28,—photograph, ante, pages 18a and 18b (R. Vol. VI, pp. 2777-8; offered I, p. 857; V, p. 2552).

Beech-Nut Chewing Gum Labels.

Beech-Nut Gum, also Mints and Candies, sold largely on tobacco stands.

Over billion sticks Beech-Nut gum sold in 1921.

Upper two of above labels are similar to labels in Plaintiff's Exhibit No. 28. Lowest label is from chewing gum box, Plaintiff's Exhibit No. 27,—photograph, ante, page 6 (R. Vol. VI, p. 2774; offered I, p. 834).

PART IV.

Deception of the Public Caused by Lorillard Company's Use of Beech-Nut Trade-Mark.

ENTIRE PURCHASING PUBLIC DECEIVED.

That absolutely the entire purchasing public of the United States has been and is being deceived by the Lorillard Company's use of the Beech-Nut trade-mark and believes that the Lorillard Beech-Nut products are produced by the Beech-Nut Packing Company or by the company which produces the extensive line of Beech-Nut goods is indisputably established by the evidence. The evidence includes the testimony of over five hundred witnesses, two hundred of them plaintiff's witnesses and the remainder defendant's, residing in New England, the Eastern, Southern and Middle Western States. The witnesses are drawn from practically all levels of business and social life. Among all of these witnesses defendant was able to produce only one ultimate purchaser who was not caused by the Lorillard Beech-Nut labels to believe that the goods bearing such labels were products of the Beech-Nut Packing Company or of the company, whatever its name might be, that produces the extensive line of Beech-Nut products. This single ultimate purchaser who was not deceived was given a sample package of the Lorillard Beech-Nut cigarettes by a Lorillard salesman. (R. Vol. II, pp. 1069-1070, Qs. 5, 6, and pp. 1071-1072, X-Qs. 1 to 9.)

Defendant examined over three hundred witnesses, each of whom was connected in some capacity with the tobacco industry, either as proprietor or employee of a manufacturing, wholesale, retail or jobbing tobacco business. That many of these tobacco dealers were not deceived is immaterial. In each of the many cases in which

this point has come up the courts have ruled that the manufacturer is not relieved of liability by the fact that the retailer is not deceived, and that the liability attaches to the manufacturer if he puts into the hands of the retail dealers the means of deceiving the ultimate purchasers.* But while non-deception of the retailer does not relieve the manufacturer of liability, deception of retailers or other dealers is evidence of the highest order that possibly can be adduced to show that a trade-mark is being used deceptively. An act which is so deceptive as to mislead many retailers and wholesalers, who are in the position of experts having superior means of access to the truth and having a relatively large interest at stake, is certain to deceive the casual ultimate purchaser who has no special experience or means of information and whose interest is only that attaching to a small transaction. It is, therefore, of the utmost significance that many of the witnesses in this case were retail tobacco dealers who bought and sold the Lorillard Beech-Nut chewing tobacco and cigarettes for periods varying from a few weeks to several years in the belief that these commodities were produced by the Beech-Nut Packing Company or the company which produces the extensive line of Beech-Nut goods, and that many wholesalers have ordered Beech-Nut tobacco and cigarettes from the Beech-Nut Packing Company at Canajoharie, New York.

Because there is not and cannot be any dispute as to the sufficiency of the evidence to establish the fact that the Lorillard Company's use of the Beech-Nut trade-mark has caused universal deception of the ultimate purchasers and even of a large proportion of the to-

* *Fairbank Co.* v. *Bell*, 77 Fed. 869, 875; *Scriven* v. *North*, 134 Fed. 366, 375; *Pennsylvania Rubber Co.* v. *Dreadnaught Tire & R. Co.* 225 Fed. 138, 148, and 229 Fed. 560; *Wolf Bros.* v. *Hamilton-Brown Shoe Co.*, 206 Fed. 611, 617-618; *Globe-Wernicke Co.* v. *Brown & Besly*, 121 Fed. 90, 92.

bacco dealers, we avoid unnecessary interruption of the continuity of this narrative by presenting our references to and quotations from the testimony in five appendices, the contents of each of which is set forth below:

UNIVERSAL DECEPTION OF ULTIMATE PURCHASERS AND OF MANY DEALERS SHOWN BY TESTIMONY OF BOTH PLAINTIFF'S AND DEFENDANT'S WITNESSES.

SUMMARY OF APPENDIX A.

Appendix A (App., page 1) consists of quotations from the testimony of thirty-five of plaintiff's witnesses who in the capacity of wholesaler, retailer, salesman or consumer either bought, sold or used Beech-Nut scrap tobacco or Beech-Nut cigarettes in the belief that they were the products of the Beech-Nut Packing Company. The deception of these witnesses continued for periods varying from a few days to several years, in many cases extending to the time they testified, or until a few days before testifying when they were correctly informed by representatives of the Beech-Nut Packing Company. That they were influenced to buy and sell and use Beech-Nut scrap tobacco and Beech-Nut cigarettes by their knowledge of the high quality and popularity of the products previously put out by the Beech-Nut Packing Company is apparent from their testimony and the statements of some of them on this point are most emphatic and critical of the deception imposed upon them.

Summary of Appendix B.

Appendix B (App., page 50), is an alphabetically arranged list of seventy-two of plaintiff's witnesses, including most of those quoted from in Appendix A and others who dealt in or used Beech-Nut tobacco products in the belief that they were products of the Beech-Nut Packing Company.

The letter D in parenthesis before the names of witnesses in the list indicates that the witness is a dealer who bought and sold Beech-Nut scrap tobacco or Beech-Nut cigarettes in the regular course of his business. The letter C in parenthesis before the names of witnesses indicates that the witness bought the Beech-Nut scrap tobacco or Beech-Nut cigarettes for his own personal use, or used them, *i. e.*, was the ultimate consumer.

Following the names of many of the dealers in the list we have inserted citations by page and question number (in parentheses) to the parts of the testimony in which the witnesses refer to the relations between themselves and their customers. The testimony so referred to shows that these witnesses, either by direct statement or acquiescence by silence, confirmed their customers in the belief that Beech-Nut scrap tobacco and Beech-Nut cigarettes were products of the Beech-Nut Packing Company. The effect of the spurious Beech-Nut labels was to make these retail dealers unwitting accomplices in spreading and confirming the deception created by the label appearing upon the Lorillard products. The mere fact of a dealer or salesman hearing a customer make a statement showing that the customer believed the scrap tobacco and cigarettes to be the product of the Beech-Nut Packing Company without any denial or correction by the dealer or salesman put the latter distinctly in the position of confirming the false impression so expressed

to him. Some of the dealers and salesmen, however, directly stated to their customers that the scrap tobacco and cigarettes were the products of the Beech-Nut Packing Company. Their names are stated in the first paragraph of Appendix B.

Summary of Appendix C.

Appendix C (App., p. 57) consists of quotations from the testimony of twenty-eight of defendant's witnesses. Defendant examined over three hundred witnesses, all of them engaged in some capacity in the tobacco business and, by reason of their employment, informed of the fact that the Lorillard Beech-Nut tobacco products were made by the Lorillard Company. These witnesses were asked by defendant's counsel whether their customers had asked questions or made remarks indicating that the customers thought that the Beech-Nut chewing tobacco and cigarettes were products of the Beech-Nut Packing Company or of the company which put out Beech-Nut chewing gum and the general line of Beech-Nut products. Most of these dealers replied that they had not heard their customers make such inquiries or comments, but twenty-eight of them admitted, as shown by their testimony quoted in Appendix C, that some of their customers did make remarks indicating that they were deceived or confused regarding the origin of the Beech-Nut chewing tobacco and cigarettes. There is nothing to indicate that the customers who made no comments or inquiries were not deceived. The other evidence in the case indicates that they took it for granted that the Beech-Nut tobacco products had the same origin as the other Beech-Nut products and saw nothing to comment on or to inquire about. One of the witnesses quoted from in Appendix C (Burgeson, App., p. 69) was a Lorillard salesman who

said that deception of the public was expected and was natural on account of the identity of the name.

Summary of Appendix D.

Appendix D (App., p. 75), consists of quotations from the testimony of sixteen of defendant's witnesses. Each of these witnesses testifies that tobacco products are not sold or known to the ultimate purchasers by the name of the manufacturer. They all state that the ultimate purchasers identify the goods they want solely by the brand name, such as Camels or Chesterfields or Beech-Nut for cigarettes, or Honest, Beech-Nut, Bull Durham or Climax for tobacco. So small a part does the name "Lorillard" play in the final marketing of the products that many dealers cannot even state which brands are made by the Lorillard Company. The seven retailers, witnesses for defendant, whose testimony appears at pages 81 to 88 of Appendix D could not name the manufacturers of leading brands of cigarettes and tobacco.

Other testimony which is described and quoted upon the pages beginning at the bottom of the next page hereafter, shows that the Lorillard Company, realizing that tobacco products are sold exclusively upon the brand name or trade-mark, does not place the name of the company or even the word "Lorillard" on the label of many of its most important brands, and as to other brands the matter of putting the name "Lorillard" on the labels is of so little moment that the high officials and managers of the Lorillard Company could not remember whether or not the name "Lorillard" appears on the labels. Such testimony was given by David H. Ball, vice-president and one of the active managers of the company (R. Vol. V, p. 2577; pp. 2584-2585), and by Benjamin L. Belt, another of the vice-presidents of the Lorillard Company who also

is actively engaged in the management of the company's business (R. Vol. V, pp. 2611 to 2613). The dominant importance of the brand name or trade-mark and the style of the package was emphasized by vice-president Ball who stated that a small letter "C" surrounded by a circle not much larger than a pea had at one time been placed on some of the Duke's Mixture packages to indicate at the factory whether or not they contained coupons, and that the subsequent omission of this little symbol "caused the loss of quantities of business" by reason of the consumers thinking that the tobacco was not the same (R. Vol. V, p. 2578).

Summary of Appendix E.

Appendix E (App., p. 89) is a list of nineteen of plaintiff's witnesses whose testimony shows that the name "Lorillard" is unknown to large classes of people including many retail dealers who sell tobacco products.

EVERY LORILLARD PRODUCT IS LABELED AND KNOWN BY A BRAND NAME OR TRADE-MARK WHICH DOES NOT INCLUDE THE NAME "LORILLARD"; THE NAME "LORILLARD" DOES NOT APPEAR ANYWHERE ON THE LABELS OF MANY OF THE MOST IMPORTANT OF THE LORILLARD PRODUCTS. AND ON THE PRODUCTS WHERE THE NAME "LORILLARD" DOES APPEAR IT IS SUBORDINATED TO THE BRAND NAME OR TRADE-MARK—GENERALLY IN FINE PRINT, SOMETIMES INSIDE THE PACKAGE AND NEVER AS THE CONSPICUOUS ELEMENT OF THE LABEL.

The testimony of two of the vice-presidents of the Lorillard Company, Mr. David H. Ball and Mr. Benjamin L. Belt, demonstrates conclusively that the management of the company is fully aware of the fact that the name "Lorillard" is so little known to the general public, *i. e.*, the millions of ultimate purchasers upon whom the

business depends, that it is a matter of no moment whether the word "Lorillard" does or does not appear on the packages of the company's products. Mr. Ball testified (R. Vol. V, p. 2577) that the Lorillard Company advertised 25 or 50 of its products, and Mr. Belt stated the total number of products of the company as "50-75-80, extreme aggregate" (R. Vol. V, p. 2620). The quotations from their testimony set forth below show that with the exception of a very few of these products neither Mr. Ball nor Mr. Belt could tell without looking at the packages whether the name "Lorillard" was on them or not. Among the brands which Mr. Ball remembered do not have the name "Lorillard" on the package are "Honest" and "Union Leader." It also appears that the brands "Old Nut" and "Bag Pipe" do not bear the word "Lorillard" (Specimens of the labels of "Old Nut," "Honest" and "Bag Pipe" appears at pages 65-70, *ante*).

The record does not contain a complete enumeration of all of the Lorillard products which do and do not bear the word Lorillard, but in every instance where the record shows that the name "Lorillard" does appear on a label it appears subordinately, in relatively small type, frequently in minute type difficultly readable, and sometimes on the inside of the cigarette box where it cannot be seen at all until after the cigarettes have been bought and the box opened and the inside of the cover carefully examined. But more significant than the relative number of Lorillard products upon which the name "Lorillard" does and does not appear is the fact, shown by the testimony quoted below, that two of the managing vice-presidents of the company had regarded the use of the name "Lorillard" as of so little importance that they omitted it from the labels of some of their most important products and could not remember whether it was on the others or not.

The brand "Honest," to which Mr. Ball refers in his testimony quoted below, was what he termed the "big brand" (R. Vol. V, p. 2557) of the old American Tobacco Company, and was, upon the dissolution of that company by court order, transferred to the P. Lorillard Company. The enormous sales of "Honest" scrap tobacco are shown by Mr. Ball's testimony appearing at the bottom of page 2567 and top of page 2568 of Volume V of the Record. The predominant importance of the brand name or trademark, and the absolute lack of any significance, to the ultimate purchaser, of the name of the Lorillard Company or of the American Tobacco Company is conclusively shown by Mr. Ball's testimony, quoted below, that the name "Lorillard" does not and never did appear on the "Honest" package and that no name of the manufacturer has ever appeared on it.

Mr. David H. Ball's testimony on cross-examination:

"Q. You have referred to and read some figures, regarding the sales of Honest Scrap. This is a tobacco made by the Lorillard Company?

"A. Yes, sir.

"Q. And marketed by the Lorillard Company itself?

"A. Yes, sir.

"Q. Not supplied to some one else to market?

"A. No, sir.

"Q. Marketed by the Lorillard Company?

"A. Yes, sir.

"Q. Is the name Lorillard to be found upon that package?

"A. No, sir.

"Q. Does this occur in the name of any of your other brands, that the name 'Lorillard' is not put on?

"A. Yes, sir.

"Q. What other brands?

"A. I think the brand of Union Leader, if I recall correctly.

"Q. Do you recall any more?

"A. I don't have any at mind right now.

"Q. Do you remember about Polar Bear, whether Lorillard's name is on there or not? I ask you whether you remember or not?

"A. No, I don't remember.

"Q. You don't remember one way or the other?

"A. No, sir.

"Q. This question, then, of whether the Lorillard name is on a package is a matter with which you don't think it is worth while to charge your mind, I suppose?

"A. Well, if I had thought a question of that kind would have come up, I would have familiarized myself with it. . . . (R. Vol. V, p. 2577.)

. . . . . .

"Q. You made a statement that at the present time the name Lorillard is on all of the Lorillard brands, I think.

"A. Did I say that?

"Q. Well, I am asking you. I think you did.

"A. If I said that I was in error, because some of these brands that were taken over by the American Tobacco Company did not bear any name, and we have not put our name on—such as in the case of Honest.

"Q. That is a contemporary package right there?

"A. Yes. We haven't put our name on that.

"Q. That is Honest Scrap, the name Lorillard is not on it today (indicating)?

"A. No, sir; they never have—there never has been, to my knowledge, a name on Honest Scrap tobacco. We haven't any hard and fast rule to go by of putting the name on the package. It has been, as I say, the custom was, up to the time of the dissolution, to leave it off, but since that time it has been put on and generally on all of our brands that we have revamped or new brands that we might put out.

"Q. The name of the brand, I imagine, is the important thing about it?

"A. Yes, we put a great deal of stress on the fact that the Lorillard Company has been in business since 1760, in fact, we got out a brand called '1760'

and when we sample a man we impress that upon him in most instances.

"Q. Can you name any other brands than you have mentioned that the Lorillard Company is putting out today without the name Lorillard on the package?

"A. I believe this brand of Comet, I am not quite sure; it looks as though we didn't put in on the brand of Bag Pipe.

"Q. Can you remember any more?

"A. No, I don't know that I can.

"Q. But I suppose there are a great many of these brands that you would be unable to say one way or the other about, whether or not it was on, aren't there?

"A. There would be quite a few.

"Q. You would be unable to say?

"A. Yes, that is right.

"Q. Whether or not it was on in the case of a great many?

"A. Yes." (R. Vol. V, pp. 2584, 2585.)

Mr. B. L. Bell's testimony on cross-examination:

"Q. The place where you have read the words 'Capital stock owned by P. Lorillard Company,' being on the inside of the package of the Helmar box, inside of the cover?

"A. Yes.

"Q. That is the only place, is it not, where the name Lorillard appears upon this Helmar box, that is right?

"A. I think so.

"Q. So that from the exterior of the box when sealed according to the Government regulation with a Revenue stamp, there is no place where the name Lorillard would be visible?

"A. It is not visible as applied to the package on its exterior.

"Q. Not in any place?

"A. Not in any place.

"Mr. Scott: I would like this marked for identification, to be offered later as plaintiff's exhibit.

"Mr. Milton: Mark it in evidence, if you like.

"Mr. Scott: All right I offer that as Plaintiff's Exhibit P. 43.

"(Package marked Exhibit P. 43.)

"The Witness: I would like—am I permitted to make a statement?

"Mr. Scott: You may.

"The Witness: I don't know what the law is but the reason, Mr. Scott, that the 'Capital stock owned by P. Lorillard Company,' appears as it does, is due to the fact that those brands were gotten out under the name of S. Anargyros when S. Anargyros was a corporation owned by the American Tobacco Company before its disintegration, and it was transferred or made a part of the assets of the new Lorillard Company . . . and we did not think it would be judicious to affix P. Lorillard on the outside of those packages, because they were transferred without it, or to change the appearance of them, and we did not make an original place for it as we did not feel the necessity for doing so. It wasn't done and I think you will find that same thing applies to all the Anargyros brands owned by the Lorillard Company.

"Q. The idea, as I understand you in short, was to have this information regarding the stock ownership conveyed?

"A. As a legal proposition.

"Q. In some part of the package but without at all interfering with the appearance of the exterior of the package? Is that right?

"A. It was. The brand was in existence when that was decided to be applied. It had been on the market for some years.

"Q. And I am right in my question?

"A. Yes.

"Q. You said that you thought that also applied, Mr. Belt, to the other brands?

"A. I think it applies to all the Anargyros brands, Murad, Helmar, Deities, Moguls, Trophies —I think it is applicable to all of them." (R. Vol. V. pp. 2611, 2612, 2613.)

The foregoing testimony of Messrs. Ball and Belt and that of the witnesses quoted in Appendices D and E (App., pp. 75, 89) shows that the Lorillard Company puts each

of its products on the market as a separate and distinct line of trade, and not as a part of the general line of tobacco products of the Lorillard Company. Plaintiff's Exhibit No. 33, which is a large scrap-book containing specimens of the labels used by the Lorillard Company on its different tobacco products, shows the slight, practically negligible, extent to which the name "Lorillard" appears on the company's goods. The same thing is shown by Plaintiff's Exhibit No. 34, a scrap book containing specimens of the Lorillard Company's advertising in newspapers and periodicals. Plaintiff's Exhibit No. 32, photograph at page 2782 of Volume VI of the Record, is a collection of Lorillard Beech-Nut posters, also showing the slight use of the name "Lorillard." The reputation of the Lorillard Company is not involved in the sale of its goods to the ultimate purchasers; the good-will attaching to each of its products is independent of the good-will of the other products and of that of the company; and, so far as concerns the ultimate purchasers, the production and sale of the 50 or 75 tobacco products of the Lorillard Company is the conduct of 50 or 75 independent businesses, each with its separate reputation and good-will, and each unaffected by the success or failure of the others. The setting was perfect for the public's identification of the Lorillard Beech-Nut tobacco products with the Beech-Nut Company rather than with the Lorillard Company.

ORDERS FOR BEECH-NUT TOBACCO AND CIGARETTES AND COMPLAINTS AND CRITICISMS REGARDING THE SAME AND OTHER COMMUNICATIONS CONCERNING THE TOBACCO BUSINESS SENT TO THE BEECH-NUT PACKING COMPANY.

The Lorillard Company's use of the Beech-Nut Packing Company's trade-mark has not only caused universal deception of the ultimate purchasers and of many retail dealers but has also deceived many people who occupy responsible positions in the business world and in journalism and official life. In some instances these people, by reason of their connection or contact with the tobacco trade had every reason and facility for being correctly informed, but still without question drew the seemingly obvious inference that Beech-Nut tobacco and Beech-Nut cigarettes were products of the Beech-Nut Packing Company. Among the parties so deceived were editors and advertising managers of newspapers who wrote to the Beech-Nut Packing Company soliciting advertising of the Beech-Nut cigarettes and tobacco, and calling attention to articles and editorials in their papers opposing anti-cigarette legislation.

Plaintiff's Exhibits 12-D, 12-E, 12-F and 12-G (R. Vol. VI, pp. 2719 to 2723) are letters written in the year 1921 from the publisher and president of the Oakland Enquirer of Oakland, California, and editorials for that paper inclosed with the letters. The editorials denounce and urge the defeat of proposed anti-cigarette legislation in Utah and the writer states that he was instrumental in having similar legislation defeated in the State of Washington. The letters are addressed to "Mr. Stanton E. Van Wie, Beechnut Cigarettes, Canajoharie, N. Y" and to "Mr. Stanton E. Van Wie, Beechnut Cigarette Co. Canajoharie, N. Y." Mr. Van Wie is resident advertising manager of the Beech-Nut Packing Company (R. Vol. I, p. 818). The general offices and principal plant of the

Beech-Nut Packing Company are at Canajoharie, N. Y., and the name of this town appears conspicuously in all of the trade-mark labels of the Beech-Nut Packing Company. The Lorillard Company does not have a plant, office or branch of any kind in or near Canajoharie, N. Y., or in or near any town of similar name. While the publisher of the Oakland Enquirer offers in one of the letters referred to above to help in the defeat of anti-tobacco legislation "irrespective of any advertising" his letters are quite evidently written for the purpose of showing that his paper would be an appropriate medium of publicity for tobacco products.

Plaintiff's Exhibit 12-H (R. Vol. VI, p. 2724) is a letter written July 19, 1921, by the Pittsburgh Post and the Pittsburgh Sun to Mr. Bartlett Arkell, President Beech-Nut Packing Co., Canajoharie, N. Y., for the purpose of explaining, and soliciting the Beech-Nut Packing Company's participation in an advertising campaign. Following is the first paragraph of the letter:

> "Your many products suitable for our plan prompted me writing you. Particularly, Beech-Nut Cigarettes and Beech-Nut Gum. These two articles, if entered at once would be exclusive in their line."

Plaintiff's Exhibit 12-I (R. Vol. VI, p. 2726) is a letter written July 26, 1921, by the advertising manager of the New York Evening Journal to "Beech-Nut Cigarettes, *Canajoharie, New York,*" exploiting the virtues of a plan of advertising whereby advertisements inserted in the New York Evening Journal appear also in the Drug Trade News. The Canajoharie address of this letter shows the deception imposed upon a man whose prominent connection with the advertising department of a large metropolitan daily paper must have made him exceptionally well informed in business matters and alert against deception and error.

Plaintiff's Exhibit 12-J (R. Vol. VI, p. 2727) consists of an advertising card and the envelope in which it was mailed. Pasted to the card is a newspaper clipping of an advertisement of Beech-Nut cigarettes. The article advertised by the card is some kind of a window lock designed to bear an advertisement. The address on the envelope is "Beech Nut Co., Canajoharie, N. Y."

Plaintiff's Exhibit 12-A-13 (R. Vol. VI, p. 2751) is a letter addressed by the Quartermaster Supply Officer of the United States Army at Washington, D. C., to the "Beech-Nut Packing Co., Canajoharie, N. Y.," asking for price quotations on Beech-Nut scrap tobacco.

Plaintiff's Exhibit 12-A-16 (R. Vol. VI, p. 2754) is a letter inclosing a blank form of contract (Exhibit 12-A-17, R. Vol. VI, p. 2755) from the Allied Tobacco Industries Exposition addressed to the "Beech-Nut Packing Co., Canajoharie, N. Y.," inviting the latter to take space and make an exhibit in the exposition of tobacco products to be held in the Chicago Coliseum.

Plaintiff's Exhibit 12-A-7 (R. Vol. VI, p. 2745) is a letter from the business representative of the George M. Cohan Theater, New York, to "The Beechnut Products, New York." The Beech-Nut Packing Company has an office in New York City and received this letter. The letter contains a proposition for the naming of a cigar or cigarette after one of the Cohan attractions.

Plaintiff's Exhibit 12-A-22 (R. Vol. VI, p. 2757) is a letter to the Beech-Nut Packing Company from a firm of commercial agents of Paris, France, soliciting the business of introducing the Beech-Nut cigarettes in France.

Plaintiff's Exhibits 12-K to 12-Y inclusive (R. Vol. VI, pp. 2728 to 2738), and Exhibits 12-A-12, 12-A-20, 12-A-21, 12-A-23 and 12-A-24 (R. Vol. VI, pp. 2750, 2756-2760) are letters from twenty different dealers, mostly wholesalers, addressed to the Beech-Nut Packing Company and order-

ing shipments of Beech-Nut scrap tobacco or cigarettes. Some similar letters are printed in Vol. VI of the Record at pages 2841-2847. These are from men who are far better informed even than the retailers and are in a far better position to know who are the makers of the goods they handle. This relatively large number of orders from *wholesalers* who were deceived by the Lorillard Company's use of the Beech-Nut trade-mark shows that the name Beech-Nut, whether on chewing gum, peanut butter or tobacco means to every sort of person only one company, the Beech-Nut Packing Company. The deception of parties who are accustomed to deal directly with the manufacturer is even more significant than the deception of those who purchase farther down the line.

Plaintiff's Exhibit 12-T (R. Vol. VI, p. 2735) is interesting in that the dealer orders not only Beech-Nut Scrap tobacco from the Beech-Nut Packing Company but also orders "Honest Scrap." "Honest Scrap" was the Lorillard Company's leading brand of this kind of tobacco for many years, the sales in the year 1921 being over three million pounds (R. Vol. V, bottom of page 2567 and top half of page 2568). As shown by this letter the Lorillard Company's use of the Beech-Nut trade-mark caused the writer of the letter to believe that the Beech-Nut Packing Company made not only the Beech-Nut Scrap Tobacco but also the Lorillard Company's brand "Honest Scrap."

The writer of the letter, Plaintiff's Exhibit 12-Z (R. Vol. VI, p. 2738) a wholesale grocer asks the Beech-Nut Packing Company what he shall do about some Beech-Nut Scrap tobacco "which is in a moldy condition."

Plaintiff's Exhibit 12-A-9 (R. Vol. VI, p. 2747) is a letter from a man who appears by his letter-head to be in the automobile tire business in Milwaukee. He tells the Beech-Nut Packing Company that he has been "a real booster for 'Beech-Nut' merchandise" but that he and

his friends "after smoking three or four" of the Beech-Nut cigarettes have "reached the conclusion that the 'Beech-Nut' standard has been greatly reduced." He concludes with an expression of his belief that his criticism will be accepted from a constructive viewpoint.

Plaintiff's Exhibit 12-A-11 (R. Vol. VI, p. 2749) is a letter in which the writer, a dealer in fancy groceries on Long Island, tells the Beech-Nut Packing Company that he "cannot *believe* your *wonderful* firm has come down to the low, beggarly business of making cigarettes"; that though he has heard of Beech-Nut cigarettes he has yet "to believe that the wonderful 'Beech-Nut Packing Co.' have come down to that greasy, dirty, body killing cigarette business."

Plaintiff's Exhibit 12-A-8 (R. Vol. VI, p. 2746) is a letter from the advertising manager of the Driver-Harris Company of Harrison, N. J., which company deals in metals, alloys, electrical resistance wires, etc. He asks the Beech-Nut Packing Company "whether your company is in any way connected with Beech-Nut cigarettes." He says: "I bought one package of these cigarettes on the strength of your Beechnut trade-name, being under the impression that these cigarettes were one of your products, although, I must confess, it was surprising to me that you should add a cigarette to your products" and adds that "the cigarettes, in my mind do not come up to the high standard of your Beechnut products." He concludes with an inquiry whether the Beech-Nut Company is going to "attempt to capitalize the name which has a very high commercial value."

Plaintiff's Exhibits 12-A-1 and 12-A-2 (R. Vol. VI, p. 2739) are letters in which the writers ask the Beech-Nut Packing Company for price lists and samples of Beech-Nut cigarettes.

Plaintiff's Exhibits 12-A-3 and 12-A-4 (R. Vol. VI, pp.

2740, 2741) are letters in which business firms tell the Beech-Nut Packing Company that Beech-Nut tobacco posters have been pasted on the writers' buildings and asking that the practice be discontinued and the posters removed.

Plaintiff's Exhibit 12-A-5 (R. Vol. VI, pp. 2742 to 2744) is a series of three letters. The writer of the first letter is a representative of Arbuckle Brothers of New York, and he complains to the Beech-Nut Packing Company that Beech-Nut chewing gum signs have been pasted over the Arbuckle signs. In the second letter of the series the Beech-Nut Packing Company informs the representative of Arbuckle Brothers that the Beech-Nut Company was not aware that their representatives had any material for advertising Beech-Nut gum, and states that if the offending posters are for BeechNut Scrap Chewing Tobacco the Beech-Nut Packing Company would like to know it. In the third and concluding letter of the correspondence the representative of Arbuckle Brothers says he has discovered he was mistaken as it was Beech-Nut Chewing Tobacco signs instead of Chewing Gum signs that he had seen. This correspondence shows that the presence of the word "Beech-Nut" on a sign immediately directs the observer's mind to the Beech-Nut Packing Company regardless of the nature of the product advertised, and that this effect extends not only to the casual purchasers who constitute the class of ultimate consumers, but extends also to men whose business demands careful observation of advertisements and trade-marks.

Plaintiff's Exhibits 12-A-6 and 12-A-15 (R. Vol. VI, pp. 2744 and 2753) are requests for advertising literature addressed to the Beech-Nut Packing Company by parties who sell Beech-Nut cigarettes and tobacco.

ARTICLE IN "NATIONAL FINANCIAL NEWS."

Plaintiff's Exhibit No. 40 (R. Vol. VI, pp. 2818-2820) is an article from the issue of May 28, 1923, of "The National Financial News," a weekly financial periodical published in New York City. The article is a history and description of the Beech-Nut Packing Company's business and contains the statement that "the company has more recently added the manufacture of cigarettes and smoking tobacco and candy." The testimony of the writer of this article appears at pages 2483 to 2491 of Volume V of the Record.

EXPERIENCES OF BEECH-NUT COMPANY'S SALESMEN.

Thirteen of the salesmen and district managers of the Beech-Nut Packing Company testify to the fact that in the discharge of their duties they are subject to numerous comments and inquiries regarding the extension of the Beech-Nut Packing Company's business to include tobacco products. These witnesses state the number and frequency of such inquiries in various terms, such as "innumerable" (R. W. Blanchard, R. Vol. I, p. 90, Q. 10; O. A. Hubbard, p. 99, Q. 12); "hundreds of times" (R. H. Horne, R. Vol. I, p. 160, Q. 6; H. W. Avery, p. 346, Q. 12; E. I. Ray, p. 360, Q. 5); "five or six hundred times" (J. A. Peters, R. Vol. I, p. 252, Q. 24); "about five or six hundred and I am hearing them every day yet" (J. F. Griffin, R. Vol. I, p. 324, Q. 11); "I have been asked many times for Beech-Nut cigarettes" (H. W. Avery, R. Vol. I, p. 346, Qs. 7 to 11); "I should say a thousand times easy" (W. P. Melia, R. Vol. I, p. 381, Q. 11); "ten or fifteen times a day" (R. B. Southern, R. Vol. I, p. 393, Q. 14); "several hundred" (A. B. Lewis, R. Vol. I, p 399, Q. 4); "couldn't give you a definite

number on that. A couple of hundred times, if once" (O. M. Wesling, R. Vol. I, p. 529, Q. 35); "two or three hundred" (E. R. Lewis, R. Vol. I, p. 570, Q. 5); estimate of "five hundred times" (W. P. Jennings, R. Vol. I, p. 731, Q. 22).

Several of these salesmen were themselves deceived when they first saw the Beech-Nut cigarettes (R. W. Blanchard, R. Vol. I, p. 89, Q. 7; O. A. Hubbard, p. 98, Qs. 9 and 10; E. I. Ray, p. 362, Qs. 18, 19).

The extent to which plaintiff's business reputation throughout the country has been made dependent on defendant's conduct of its tobacco business is convincingly demonstrated by the thousands of instances of confusion which these men encountered among retail tradesmen and the consuming public.

CLOSE ASSOCIATION IN TRADE OF PLAINTIFF'S AND DEFENDANT'S GOODS—SOLD IN SAME STORES—WINDOW DISPLAYS—DEFENDANT'S ADVERTISING.

An important element of the deception caused by defendant's use of plaintiff's trade-mark lies in the close association in trade of plaintiff's products with the commodities to which defendant has wrongfully applied plaintiff's trade-mark. Plaintiff's extensive line of products and the commodities to which defendant has applied plaintiff's trade-mark flow through precisely the same channels of trade from the moment they leave the factory in which they are produced until they reach the ultimate consumer, and they are associated together by the consumers themselves in their dining rooms and in restaurants.

Testimony of every one of the many witnesses interrogated upon the subject shows that both plaintiff's products and defendant's are handled by the same jobbers and wholesalers, including whole-

sale grocers, and that plaintiff's products are sold *to precisely the same* retail dealers who handle defendant's tobacco products. The testimony shows that in many parts of the country the retail grocers handle tobacco products; that tobacco stores deal in defendant's chewing gum and packaged candies such as mints, lemon-drops, etc.; that the same is true of delicatessen stores, they handle defendant's tobacco alongside plaintiff's goods; that drug stores handle both defendant's tobacco products and plaintiff's chewing gum and packaged candies; that in general stores and the small variety stores all kinds of plaintiff's products are displayed and sold alongside of Beech-Nut tobacco and cigarettes, and that in all of these retail stores plaintiff's and defendant's goods are displayed in close proximity upon the shelves and show-cases, and in many instances are used as the material for joint displays in the show windows.

This testimony runs through the entire record, it appearing from almost every witness for both sides. Practically all the dealer witnesses, of whom several hundred have testified in this case, handled the products of both plaintiff and defendant in their stores. Instances of this are shown in the testimony of:

Charles P. Cook, grocer, Paris, Ky.—R. Vol. I, pp. 695-7, Qs. 4-7 and 10-18.

Jefferson D. Hayden, grocer, Columbia, S. C.—R. Vol. I, pp. 755-6, Qs. 6-22; p. 759, Qs. 47-49; pp. 761-2, X-Qs. 62-68, 74-76.

W. C. Pennell, news agent and tobacconist, Asheville, N. C.—R. Vol. I, p. 713, Qs. 7-12.

Joseph S. Aisenberg, wholesale grocer, Worcester, Mass.—R. Vol. I, pp. 151-5, X-Qs. 30-31 and 62-63.

George L. Carlton, grocer, Holyoke, Mass.—R. Vol. I, pp. 232-4, Qs. 3-6 and X-Qs. 24-25.

James J. Marrinan, druggist, New Haven, Conn.—R. Vol. I, pp. 282-4, Qs. 11-14, X-Qs. 29-31.

Alexander C. Gardner, confectioner and grocer, Milford, Conn.—R. Vol. I, pp. 310-13, Qs. 4-7, X-Qs. 21-25, X-Qs. 32-33 and X-Qs. 39-41.

John E. Watson, druggist, Chicago, Illinois.—R. Vol. I, pp. 412-15, Qs. 7-10, Qs. 28-30 and X-Qs. 6-8.

William C. Weigel, grocer, Milwaukee, Wis.—R. Vol. I, pp. 560-2, Qs. 4-6 and 16-17.

Window Displays.

Retailers readily perceived the opportunity of selling Beech-Nut scrap tobacco and Beech-Nut cigarettes by taking advantage of the obvious fact that customers would ascribe to these tobacco products the high quality with which they were familiar in the products of the Beech-Nut Packing Company. This obvious fact suggested the idea of displaying the Beech-Nut cigarettes and tobacco in the same window display with the products of the Beech-Nut Packing Company. Upon cross-examination it developed that such a display had been made by defendant's witness, Ferdinand Bieringer, who owns a tobacco store in Boston. He stated that he thought the Beech-Nut gum was deriving benefit from the Beech-Nut cigarette and would continue to do so as long as the cigarette continued to be a good article, but that if the cigarette was poor merchandise it would spoil the Beech-Nut name. Mr. Bieringer's deposition is at page 911 of Volume II of the Record, and is quoted from and discussed at pages 115 to 112, *post*.

In three other instances of this kind photographs were obtained of show windows containing advertisements and packages of the Lorillard Beech-Nut tobacco products and of the goods of the Beech-Nut Packing Com-

pany. Norman S. Berry, a salesman in the employ of the Beech-Nut Packing Company, testified at the trial that he dressed the show window of a Baltimore grocer with plaintiff's Beech-Nut goods and a few days later observed that the display had been changed by the removal of two large cards which he had placed in the window for a background and the substitution therefor of a Lorillard Beech-Nut cigarette poster. Mr. Berry's testimony is at page 2478 of Volume V of the Record and the photograph of the window display which he took and a Lorillard poster similar to the one in the window are in evidence as Plaintiff's Exhibits No. 38 (R. Vol. VI, p. 2816) and No. 39. A similar store window display at West Haven, Connecticut, is described by John F. Griffin, a salesman for the Beech-Nut Packing Company, and Frank Madden, the photographer (R. Vol. I, pp. 322 to 328), and by two witnesses for defendant, one of them William J. Coughlan, owner of the store (R. Vol. III, pp. 2088 to 2096), and photographs of the window display are in evidence as Plaintiff's Exhibit No. 2 (R. Vol. VI, p. 2710), and Defendant's Exhibit No. 11 (R. Vol. VI, p. 2882). Plaintiff's Exhibit No. 13 is a photograph of a show window in Pennell's Cigar Store at Asheville, North Carolina, this display also being a mixture of defendant's and plaintiff's advertising. Plaintiff's witnesses, H. W. Pelton and W. C. Pennell, testified regarding this exhibit and the photograph (R. Vol. I, pp. 704 and 712). The photograph is reproduced in Volume VI of the Record, page 2762.

The flow of these goods through the same channels of trade and their display for sale in close proximity in retail establishments has naturally resulted in the widespread deception to which the witnesses in this case testify.

LORILLARD COMPANY'S ADVERTISING.

The facility with which this deception is effected has been increased by defendant's widespread advertising of the word "Beech-Nut," and the widespread distribution of advertising signs of every conceivable size and form bearing the words "Beech-Nut Chewing Tobacco" or "Beech-Nut Cigarettes." An inspection of the large exhibit board offered in evidence by plaintiff (Plaintiff's Exhibit No. 32, photograph shown on page 2782 of the Record, Vol. VI), and the scrap-book collection of defendant's publication advertising (Plaintiff's Exhibit No. 34) shows something of the extent to which defendant has exploited plaintiff's trade-mark and corporate name.

Many of the signs contain no reference whatever to the Lorillard Company, and in those instances where the name Lorillard appears upon the signs, it appears inconspicuously and in a manner well calculated not to divert the observer's attention from the prominently displayed word Beech-Nut. The same is true of the word Lorillard as appearing in defendant's publication advertising in all of which the name Lorillard is subordinated to plaintiff's trade-mark and corporate name, Beech-Nut, in such a manner as not to be noticed by the ordinary observer.

The photographs of Plaintiff's Exhibits No. 16 and 17, reproduced in the Record, Vol. VI, page 2768, show how closely defendant approximated plaintiff's well-known shipping cartons and advertising matter thereon, the deception being increased by defendant's using the same color scheme exactly. The deception proved in this case might have been predicted from an observation of defendant's goods and advertising with the same certainty that is created by the testimony of the witnesses.

COMMON CUSTOM FOR MANUFACTURERS OF AND DEALERS IN GROCERIES, DRUGS, ETC., TO OWN THEIR OWN EXCLUSIVE TOBACCO TRADE-MARKS AND TO MANUFACTURE AND HAVE OTHERS MANUFACTURE FOR THEM TOBACCO PRODUCTS.

In the instant case there is proof of many instances in which wholesale grocers, chain drug stores and others, put out their own brands of tobacco products under their own trade-marks and have these products made for them by tobacco manufacturers. Mr. Charles, who testified at the trial, stated that Charles & Co., fancy grocers of New York City, have their own tobacco brands, and that it is a general custom for grocers to put out tobacco products under their own trade-marks without any connection with the name of the manufacturer (R. Vol. V, pp. 2465-66). Mr. Belt, vice-president of the Lorillard Company, referred to three concerns who put out their own tobacco brands (R. Vol. V, pp. 2614-2617). Among the concerns so mentioned was the Liggett Drug Company, which operates a chain of drug stores in the eastern cities, and Mr. Belt stated that the Lorillard Company manufactures for this drug company its tobacco products including the Black and White cigarettes (R. Vol. V, p. 2617). According to Mr. Belt's testimony, the Lorillard Company has no connection with this Black and White brand other than manufacturing the goods; and Mr. Belt says that the trade-mark rights belong exclusively to the Liggett Company which markets the cigarettes as its own product. Mr. Belt further stated that Park & Tilford, the well known New York grocers, have a cigar factory of their own for the manufacture of their own brands of cigars. Mr. Belt also referred to the "Richelieu" brand of tobacco products of Sprague, Warner & Co., wholesale grocers of Chicago, and to a brand of tobacco put out by

Stickney & Company, wholesale grocers of St. Louis (R. Vol. V, pp. 2615-2616).

This well established custom of grocery and drug houses putting out their own brands of tobacco products is one of the reasons why the public, as shown by the testimony in this case (see particularly Appendices D and E of this brief, App., pp. 75, 89), regards only the brand o trade-mark and pays no attention to the name of the manufacturer. It is an additional reason why the public generally was quite ready to accept the Beech-Nut tobacco and cigarettes as new products of the well-known Beech-Nut Company (see page 75 *ante et seq.*). The brand name "Beech-Nut" of itself was sufficient signature on the packages to indicate the Beech-Nut Company, no matter what else was there. The fact that commodities are identified by the brand or trade-mark and not by the name of the manufacturer is the foundation of the long established rule that appropriation of a trade-mark belonging to another is not justified by the addition thereto of the appropriator's name (*Menendez* v. *Holt,* 128 U. S. 514, 521; *Battle et al.* v. *Finlay et al.,* 50 F. 106; *N. K. Fairbank Co.* v. *Central Lard Co.,* 64 F. 133; and an unbroken line of authorities, see Hopkins, Third Edition, p. 442, Note 62).

PART V.

Damage.

BEECH-NUT COMPANY'S BUSINESS GOOD-WILL AT MERCY O LORILLARD COMPANY.

As set forth in our argument (*post*, p. 262 *et seq.*) the principal element of injury to the Beech-Nu Packing Company resides in the fact that possessio of, and control over, the business good-will that i has built up by a quarter of a century of conscientiou effort and the expenditure of millions of dollars i advertising has been wrested from it by the Lori lard Company. We contend that even if, contrar to the fact, the Lorillard Company had not dam aged the Beech-Nut Company's reputation, or eve if the Lorillard Company had added to the value of th Beech-Nut Company's business good-will, the takin from the Beech-Nut Company of possession of and co trol over its reputation and good-will would not thereb be justified either ethically or legally. The value of th Beech-Nut Company's reputation is reduced to insignif cance and will ultimately be destroyed if anyone ma legally impersonate the Beech-Nut Company and mak use of its reputation. In this statement of the cas however, we confine ourselves, in what follows, to discussion of instances in which specific damage has bee caused to the Beech-Nut Company's reputation and bus ness by the Lorillard Company's appropriation of it identity and reputation and discuss the broader aspe of the subject of damage in the argument under the tit "Damage," *post*, page 262.

SPECIFIC DAMAGE RESULTING FROM THE INFERIOR QUALITY OF THE BEECH-NUT CIGARETTE.

We have heretofore referred to the fact that throughout its existence the Beech-Nut Packing Company has consistently and persistently followed the policy of dealing only in goods of the highest grade and best quality obtainable, and to the fact that prior to the end of the year 1921 the Beech-Nut Packing Company had expended three million dollars in advertising the high grade and purity of its products (*ante*, pp. 22-25).

Designed to be Cheapest Cigarette on the Market.

Benjamin L. Belt, one of the vice-presidents of the Lorillard Company, testified that the Lorillard Company's cigarette business prior to putting out the Beech-Nut cigarette had been almost exclusively in high grade cigarettes, and that the Lorillard Company used the Beech-Nut trade-mark upon a cigarette of cheaper grade, which they offered for sale at a lower price than that charged by their competitors for their lowest priced cigarettes. Following are extracts from Mr. Belt's testimony:

> ". . . We found ourselves about in a position of no blended cigarette business of any consequence, our entire cigarette business being on the higher priced all-Turkish brands.
>
> "Q. Right there. The Lorillard Company practically controls the Turkish cigarette business, the great volume of it, doesn't it?
>
> "A. Our brands represent a majority volume, major portion of the Turkish cigarettes that are in existence.
>
> "Q. Now continue your answer.
>
> "A. But we were not satisfied to confine ourselves to all-Turkish, as we estimated a larger and more growing business on the other type of cigarette. So

we were considering for a long time putting on th
market another brand of cigarettes of a blended typ
and were about ready to do it a year or two soone
than we did, it being deferred on account of the wa
and the great inability to get tinfoil and wrappin
material and so forth. Well, we dragged it along, s
to speak, and did not actually get the cigarette i
question, Beech-Nut, on the market until in th
spring of 1921." (R. Vol. V, pp. 2592-2593.)

. . . . . .

"Q. How are Beech-Nut cigarettes selling today
"A. Very poorly indeed.
"Q. To what do you attribute the decline?
"A. Well, primarily to the fact that our competi
tors, who have enormous volume of brands were sell
ing to the consumer at the time we put Beech-Nu
on the market at 20 cents a package.
"Q. What cigarettes, for example.
"A. Camels, Chesterfields, Lucky Strikes, Pied
monts, and there was quite a business on Swee
Caporals in some sections, and we came on the mar
ket in what has previously been referred to as wha
we thought was the psychological time to offer th
public what we regarded as an equal cigarette i
quality, and certainly in physical appearance to an
cigarette on the market at 15 cents for the package
And it seemed to me to be a very happy response
in 1921, the whole country was recovering from th
deflation and so-called panic and in tobacco merchan
dise, at least, everybody seemed to be looking for
little better bargain, and that was what we though
would be the psychological time to offer 20 cigarette
for 15 cents that we believed to be for smoking pur
poses, as acceptable and as good as 20 cigarettes o
our competitors as represented by these severa
brands, Camels, Chesterfields, Piedmonts, and Luck
Strikes, which were being sold for 20 cents for 2
and we sailed along splendidly with the merit an
quality of the Beech-Nut cigarette until in the lat
fall of 1921 when they tilted the prices a little bi
and by and by those big brands that were so power
ful that they could command the situation got dow
not only to the price that we had expected to se
Beech-Nuts to the consumer, but got cheaper, and i

> was not an infrequent thing to find Camel cigarettes offered at two for a quarter, and Beech-Nut being unable to force its position by lack of its volume, 15 cents, and the big brands were really cheaper and it just took the living life out of Beech-Nut and cut them down from nine hundred million—on that basis a billion a year, and not the whole country covered at once, mind you—we begun in New England and worked across the country, and had about covered the United States at the time these other brands became cheaper." (R. Vol. V, pp. 2601-2602.)

As shown by Mr. Belt's testimony, the Lorillard Company, having no motive to maintain the Beech-Nut trade-mark as a symbol of goods of the highest quality, utilized the significance which had been created for it by the Beech-Nut Packing Company as a means of exploiting a cheap cigarette which they introduced at a price lower than that charged by their competitors for their cheapest grade of cigarettes. But though the Beech-Nut cigarettes at first sold at the rate of a billion a year, the volume of sales fell off when the competing companies cut their prices. That the Lorillard Company was unable to meet this competition is shown by this record to be because of the fact that the Beech-Nut cigarettes were inferior to other cigarettes of their class.

The injury to the Beech-Nut Packing Company's reputation was two-fold, first in that the cigarettes were a low-priced commodity; and second, in that they were inferior to other cigarettes of similar low price. As before stated in this brief, the Beech-Nut Packing Company has always reserved its Beech-Nut trade-mark for goods of the choicest grade, and upon less choice commodities, by-products such as certain cuts of meat which are incidental to its business, but which, while wholesome and pure, are not the choicest cuts, the Beech-Nut Company has used other trade-marks, including the words "Erie," "Mohawk" and "Holly" (*ante*, p. 25).

Inferior Quality.

The inferiority of the Beech-Nut cigarettes is shown b
the following extracts from the testimony of the wi
nesses, several of whom were witnesses called by th
Lorillard Company.

James J. Creevan, salesman in a grocery store at Law
rence, Massachusetts, related the incident described
the following quotation from his testimony:

> "A. A man came in and asked for a jar of Beec
> Nut marmalade; I told him it was the best marm
> lade we had in the shop, and I said, here is the Beec
> Nut man right here now, and he will tell you a
> about it. The man said, 'If it isn't any better tha
> the cigarettes, it is no good.'
>
> "Q. 9. What did the Beech-Nut man say?
>
> "A. I asked the Beech-Nut man if they didn
> make the cigarettes, and he said, 'No,' so I sold th
> marmalade to the man then." (R. Vol. I, page 136

Fred J. Hahn, manager of the cigar stand in the Law
and Title Building, Philadelphia, a witness for defendan
testified (R. Vol. II, p. 1298, X-Qs. 5 to 11) that there wa
a demand for Beech-Nut cigarettes when they first cam
out but that people did not like them and soon stopp
buying. It is a fair inference that the initial demand r
sulted from the name "Beech-Nut" and that that nam
was injured by the dissatisfaction of smokers with th
cigarettes.

Franklin P. Stern, a Philadelphia tobacco dealer, was
witness for defendant (R. Vol. II, pp. 1300-1309). He te
tified on cross-examination that his customers did not li
Beech-Nut cigarettes; that people tried them and th
did not buy any more (R. Vol. II, p. 1305, X-Qs. 18, 19
that he reduced the price from 15 cents a package to
cents to get rid of them, and that when he got rid
them he replaced them with another brand (R. Vol.

p. 1304, X-Qs. 7, 8, 9). Mr. Stern stated on redirect that there was a price war on all brands of cigarettes at the time he reduced the price of Beech-Nut cigarettes, but on recross-examination he testified as follows:

> "R-X Q. 1. As a matter of fact, in order to put an end to the discussion, you did cut the price more on your Beech-Nut cigarettes than you did on the other cigarettes?
>
> "A. Yes, because we consider that a dead brand.
>
> "R-X Q. 2. You wanted to get rid of it?
>
> "A. We wanted to clean it up.
>
> "R-X Q. 3. And you did not want to deal in it any more?
>
> "A. Not unless they came back.
>
> "R-X Q. 4. Because your customers, having tried them, did not like them?
>
> "A. They did not like the cigarettes." (R. Vol. II, p. 1308.)

Edward G. Hoch, manager of the tobacco department of the Manufacturers' Club of Philadelphia, was *a witness for defendant* and testified (R. Vol. II, p. 1291, X-Qs. 2, 3) that, "We did not sell very many of them [Beech-Nut cigarettes] because the trade for the cheap cigarette is very limited here."

That the Beech-Nut cigarette was distinctly an inferior commodity that could not be sold in competition with other cigarettes at the same price is shown by the testimony of *defendant's witness,* Daniel M. Harbot, a Philadelphia tobacco dealer located in the factory district. We quote the following:

> "X-Q. 4. How many packages of Beech-Nut cigarettes did you sell a week when they first came out; did they go pretty well for a while?
>
> "A. For the first couple of weeks they did, yes.
>
> "X-Q. 5. Then they fell off?
>
> "A. Yes.
>
> "X-Q. 6. How many are you selling now?
>
> "A. We sell a pack a week; if we sell a pack a week now we are lucky.

"X-Q. 7. What made the demand for them f
off?

"A. The other cigarettes dropped in price, t
Camels and the Piedmonts dropped down in pri
When the Beech-Nut cigarettes first came out th
were twenty for fifteen cents and we were getti
twenty cents for Camels and Piedmonts, and th
they dropped and that knocked the sale out
Beech-Nut cigarettes." (R. Vol. II, p. 1325.)

It clearly appears from the testimony of Mr. Harb
above quoted, and that of other witnesses herein quot
that the Beech-Nut cigarette was so inferior that it co
be sold only at a lower price than other cigarettes.
fact it appears from Mr. Belt's testimony, above quot
that it was originally made to sell at 15 cents a packa
when other blended cigarettes were selling at 20 cent
package.

Defendant's witness, I. J. Lindenbaum, a cigar ma
facturer and tobacco retailer at Milwaukee, Wiscons
said that Beech-Nut cigarettes sold very slowly and te
fied as follows:

"X-Q. 75. Have you heard any complaints
them?

"A. Oh, yes, complaints. They have been ma
too dry or something. There is all kinds of co
plaints about them." (R. Vol. II, p. 1545.)

William H. Getzelman, manager of eleven retail
bacco stores in the "loop" district of Chicago, was *a w*
ness for defendant. He testified (R. Vol. III, p. 17
X-Qs. 95 to 99) that when the Beech-Nut cigaret
first came out they went well, at the rate of 50,00
month, which, he said, was good for a new cigarette,
that the sales had fallen off and were now only about
thousand a month. He had complaints about the Bee
Nut cigarette. He classes them as a cheap cigare
(R. Vol. III, p. 1697, X-Q. 73). Here again is testim
to large initial sales which are fairly attributable to

reputation of the Beech-Nut Packing Company and its goods, and subsequently a falling off of sales when the inferiority of the Beech-Nut cigarette became known.

Joseph S. Aisenberg, of Worcester, Massachusetts, a wholesale grocer, testified as follows:

> "A. Well, knowing the Beech-Nut people as I knew them, and the quality they manufacture, from the line we handle in our own business, I was very much disappointed with the appearance of the package and the price of the cigarettes. I did not think that the quality and the appearance were in line with the general character of the quality of their products." (R. Vol. I, p. 149, Q. 10.)

The following is from the testimony of Edward J. Glynn of West Haven, Conn.:

> "Q. 15. Did you find out when, as you have stated, you bought these cigarettes in the spring of this year in the belief that they were a Beech-Nut product, did you find that they came up to the standard of quality which you expected of a Beech-Nut product?
>
> "A. No, I did not." (R. Vol. I, p. 269, Qs. 15-16.)

T. J. Branigan, of New Haven, Connecticut, testified as follows:

> "Q. 11. Did these Beech-Nut cigarettes that you bought in the belief that they were made by the Beech-Nut people, come up to your expectations as to quality?
>
> "A. No, they didn't.
>
> "Q. 12. Did you ever buy any more Beech-Nut cigarettes after that first package?
>
> "A. No, I didn't." (R. Vol. I, p. 286, Qs. 11-12.)

The following is from the testimony of Daniel Huttner, of Chicago, Illinois:

> "Q. 8. Why did you buy the package of cigarettes?
>
> "A. I am familiar with the goods of the Beech-Nut Packing Company and I purchased a package to try them out.

"Q. 9. Were you satisfied with the cigarettes?

"A. Well, I haven't bought any since." (R. Vol. I, p. 486, Qs. 8, 9.)

The following is a statement made by E. J. McFadzen, a grocer, of West Allis, Wisconsin:

"Q. 4. Do you smoke cigarettes?

"A. Yes, sir.

"Q. 5. What kind do you customarily smoke?

"A. Lucky Strike.

"Q. 6. Have you bought any other brand than Lucky Strike recently?

"A. A package of Beech-Nut cigarettes.

"Q. 7. Are these Beech-Nut cigarettes that you bought similar to this package I now show you, being Plaintiff's Exhibit 1 in this case?

"A. Yes, sir.

"Q. 8. Why did you buy these Beech-Nut cigarettes instead of Lucky Strike cigarettes?

"A. Why, I thought they would be good cigarettes, because I know Beech-Nut products are good, the ones I sell, anyhow.

"Q. 9. Did you believe they were a product of the Beech-Nut Packing Company?

"A. Yes, sir.

"Q. 10. Did you smoke this package of Beech-Nut cigarettes that you bought?

"A. Some of them, not all of them.

"Q. 11. Was your expectation as to the quality of the cigarettes realized?

"A. No." (R. Vol. I, pp. 555-556.)

Franklin G. Neal, of Springfield, Mass., a lawyer, testified as follows:

"Q. 9. You have stated that you seldom buy cigarettes, but that you did buy a package of these Beech-Nut cigarettes. Why did you buy these cigarettes?

"A. I expected to get a remarkable smoke.

"Q. 10. What led you to that expectation?

"A. Because I thought the cigarettes were made by the Beech-Nut Packing Company, and I am acquainted with their products.

"Q. 11. Do you know what made you think that

these cigarettes were made by the Beech-Nut Packing Company?

"A. Because the label appeared to me to be the Beech-Nut label.

. . . . . .

"Q. 15. And what has been your experience with those products?

"A. I have always found them to be of the very highest quality—exceptional in every respect.

"Q. 16. After you had bought this package of cigarettes, what did you do?

"A. I smoked one of them.

"Q. 17. Was your expectation that you would find these cigarettes remarkable fulfilled?

"A. No.

"Q. 18. What did you then do?

"A. I looked the package over and found the name P. Lorillard.

"Q. 19. What did you then conclude, Mr. Neal?

"A. That there was some connection between the Beech-Nut Company and Peter Lorillard; or I mean to say there was probably some connection between the two since the label was the same on the Beech-Nut products and on these cigarettes.

"Q. 20. Do you now believe that there is some connection between the Beech-Nut people and the Lorillard Company?

"A. No. You told me within a day or two that there was not." (R. Vol. I, pp. 202-203.)

We have heretofore (*ante*, pp. 91, 92) referred to Plaintiff's Exhibits 12-A8 and 12-A9 (R. Vol. VI, pp. 2746-2747). These are letters from business men, cigarette smokers, who took the trouble to write to the Beech-Nut Packing Company that in their opinion the Beech-Nut cigarettes did not come up to the high standard of the other Beech-Nut products.

That the criticisms of Beech-Nut cigarettes made by the witnesses above referred to showed the existence of widespread conditions is further shown by the testimony of many retailers in different parts of the country who testify to the small and decreasing sales of Beech-Nut

cigarettes. Examples of such testimony appear in the Record Vol. II, as follows: p. 1159, X-Q. 37; p. 1166, X-Qs. 28 to 32; p. 1189, X-Qs. 15 to 17; p. 1198; p. 1216, X-Qs. 1 to 8; p. 1250, direct examination of Sol Levin; pp. 1437, 1438, X-Qs. 76 to 80; pp. 1465, 1466, X-Qs. 71 to 78; Vol. III, p. 1680, R-X Qs. 77 to 81; p. 1686, X-Q. 63; p. 1710, X-Q. 58; p. 1743, R-X Q. 103.

DEFENDANT'S WITNESS TESTIFIES AS TO CLOSE INTERRELATIONSHIP OF BEECH-NUT TOBACCO AND OTHER BEECH-NUT PRODUCTS.

While the damage to the good-will of the Beech-Nut Packing Company is clearly demonstrated by the testimony above quoted and referred to, we shall refer at some length to the testimony of one more witness, Mr. Ferdinand Bieringer, a tobacconist of Boston, Massachusetts, who was called as a witness by the Lorillard Company. While friendly to the Lorillard Company Mr. Bieringer adhered to the facts conscientiously and his testimony is interesting as summing up the situation from a business man's standpoint. Mr. Bieringer has been in the tobacco business for twenty-five years (R. Vol. II, p. 920, Q. 5). He is the proprietor of a tobacco store in Boston and is also a member of the Bieringer-Hanauer Company, tobacco manufacturers' agents at Boston (R. Vol. II p. 912, Q. 6, and pp. 919-920, X-Qs. 1-4). He testified that he thought that the name "Beech-Nut" on the Lorillard Company's cigarettes benefited the Beech-Nut Packing Company's business in its Beech-Nut gum (R. Vol. II, pp. 915, 916, Q. 32, and pp. 923, 924, X-Qs. 36-37). In his answers to the following questions (X-Qs. 38-40) he enlarged upon his idea that the Lorillard business in Beech-Nut cigarettes helped the sale of Beech-Nut gum, and testified as follows in answer to the question next put to him:

"X-Q. 41. And because the cigarettes are good merchandise, as you say, it helps the gum?

"A. Yes; if it was poor merchandise I would say different. I would say it spoils their name of Beech-Nut." (R. Vol. II, pp. 924, 925.)

On redirect examination some questions were put to Mr. Bieringer, evidently in the hope that the witness might qualify the statement made in the answer above quoted, but the result was to draw out the equally true converse statement. Following are the concluding questions and answers on this point:

"A. If the gum was of a poor quality it would spoil the sale of the cigarette, you mean?

"R-D. Q. 62. Yes.

"A. Well, if it was a poor quality it might spoil the name in a way,—it might do that." (R. Vol. II, p. 936.)

Mr. Bieringer was impelled by his recognition of the fact that the name "Beech-Nut" would be associated collectively by the public with the Beech-Nut Scrap tobacco, the Beech-Nut cigarettes and the Beech-Nut chewing gum, to make a window display of all three of these products, to which the following questions and answers refer:

"X-Q. 63. When you made this display of this Beech-Nut gum and Beech-Nut cigarette and Beech-Nut scrap tobacco when you first got the Beech-Nut cigarettes, did you find that cigarette sold in your store pretty well?

"A. Well, they sold pretty fair, pretty well. I will tell you why they sold pretty good. They sold pretty good at that time because the Camel cigarettes, and all the other cigarettes were 18 and 20 cents a package, and Beech-Nuts were one of the first ones to come out with a price of 15 cents, and of course there was bound to be fair marginal profit for the retailer, and of course on account of that we pushed them. It was the man behind the counter that pushed the cigarettes, because there was a fair

marginal profit in them. That is the reason they sold very good at that time.

"X-Q. 64. Well, there were 15 cent brands of cigarettes on the market at that time, weren't there?

"A. Yes, there might have been, but they were made by small concerns; and then the friends of Lorillard—Lorillard has a lot of friends in the business, and they would do a great deal for Lorillard, while with the smaller companies they won't do it.

. . .

"X-Q. 65. And the Beech-Nut cigarette then went quite well from the very beginning?

"A. They went very well at that time, because on account of the price, that had a great deal to do with it, the new price of 15 cents. Of course since that time the price on other cigarettes has come down and of course the Beech-Nut cigarettes don't sell so well now." (R. Vol. II, pp. 929, 930.)

Mr. Bieringer's testimony shows the business man's ready recognition of the fact that the good-will of the Beech-Nut business in chewing gum is bound up with and vitally dependent upon the use that is made of the word "Beech-Nut" as a trade-mark or trade-name in the tobacco business, and of the fact that any discredit that may be brought upon the word "Beech-Nut" in the tobacco business will be carried over into the gum business, and *vice versa*. While Mr. Bieringer was very friendly to the Lorillard Company, as shown by his answers to cross-question 64 and other questions, and spoke as favorably as he could of the Beech-Nut cigarette, he had no hesitation in plainly stating that the relatively large sales of Beech-Nut cigarettes when they first came on the market were due to the fact that they sold at a lower price than other cigarettes, and that the sales dropped off when the prices of other cigarettes were reduced (X-Qs. 63 to 65 above quoted).

Mr. Bieringer's keen realization of the possibility of the value of a trade-mark and good-will being destroyed

by the sale of inferior merchandise is shown by the following questions and answers:

"X-Q. 53. The name does not make any difference?

"A. No difference. If you turn out Beech-Nut cigarettes in poor quality, you can't sell your brand, —you can kill your brand over night, just one lot of poor goods, just one little lot, that spoils the whole lot, and it will take ten years to get it back again on the market.

"X-Q. 54. In other words, if the name 'Beech-Nut' stands for quality goods in the mind of the public, and the consumer should buy just one or two items with that name on that he didn't like it would hurt the business very much?

"A. Well, the Beech-Nut, if it is very poor quality goods, it is not very good for the goods.

"X-Q. 55. It would hurt the whole thing, the gum business and all the other business?

"A. Yes; but Lorillard always produces the best, whatever they have . . ." (R. Vol. II, pp. 927, 928.)

DAMAGE RESULTING FROM OPPOSITION OF PEOPLE WHO CONDEMN USE OF CIGARETTES AND CHEWING TOBACCO.

The general belief that the Beech-Nut Packing Company is engaged in the chewing tobacco and cigarette business has caused serious injury aside from the quality of these commodities which the Lorillard Company has put on the market under the Beech-Nut trade-mark. It is a matter of general knowledge, and is shown by the evidence in this case, that the opposition to the use of tobacco, and to the use of cigarettes in particular, is so strong that anti-cigarette statutes have been enacted in several of the states. In four states the sale of cigarettes is prohibited by statute and many of the states have laws prohibiting the sale of cigarettes to minors (Fairfield, R. Vol. I, p. 646, Q. 57). The evidence shows that

those opposed to the use of cigarettes and tobacco have not only brought about the enactment of anti-cigarette laws, but that many of them have a personally unfriendly feeling for manufacturers of and dealers in cigarettes and tobacco, and will not patronize them even in lines of business not related to tobacco.

Alvah L. Conant, of Worcester, Massachusetts, withdrew his patronage from the Beech-Nut Packing Company because one of the Lorillard Beech-Nut cigarette bill-boards caused him to believe that the Beech-Nut Company was putting out cigarettes, and he advised his friends to withdraw their patronage (R. Vol. I, page 180).

Charles O. Larson, a grocer, of Chicago, said he would not deal with a company that made cigarettes (R. Vol. I, page 441, Qs. 5 to 9).

Henry Butcher, a grocer, of Holyoke, Massachusetts, said:

> "My sentiments were that the Beech-Nut Packing Company's standard was lowered by the fact that they were putting out cigarettes under their own label. I was very much surprised to think that they would do a thing of that sort. It seemed to me that the output of cigarettes and foods were decidedly at variance. One was beneficial and the other was not." (R. Vol. I, pages 244-245, Q. 11.)

Mr. Butcher said that he did not use cigarettes and was opposed to the use of tobacco. (R. Vol. I, page 245, X-Qs. 15-16.)

Albert Marks, of Green Bay, Wisconsin, a head salesman for the Lorillard Company, was asked on cross-examination why one of his salesmen had left the employ of the Lorillard Company, and replied that the salesman had resigned with the explanation "that he didn't like the idea of selling cigarettes, that his folks were objecting" (R. Vol. II, p. 1489, X-Q. 134).

Richardson S. Marks (R. Vol. I, p. 770), of Columbia,

South Carolina, stated that he had used Beech-Nut products ever since they came on the market in Columbia; that he bought them on their reputation for purity and had always found them satisfactory. He said that he first learned of the Beech-Nut cigarette when he saw the city placarded with advertisements and said: "I simply got disgusted as soon as I saw that this concern that I had a great respect for was manufacturing cigarettes." (R. Vol. I, p. 772, Q. 21.) He stated that he was led by the name and label to believe that the cigarettes were the product of the Beech-Nut Packing Company. He told Mr. Thornton, the representative of the Beech-Nut Company, that he "was very much surprised and disgusted at the Beech-Nut people for manufacturing and putting out something that would ruin people." (R. Vol. I, p. 773, Q. 26.) His wife was as much opposed to cigarettes as he was and they resolved not to buy any more Beech-Nut products but were informed by Mr. Thornton that the Beech-Nut Company did not manufacture the Beech-Nut cigarettes and did not deal at all in tobacco. He said he thought cigarettes a menace to young men and boys and would not buy from anyone who manufactures them. (R. Vol. I, p. 773, Qs. 27, 31.)

We have referred above (*ante*, p. 88) to letters to the Beech-Nut Packing Company from the Oakland (California) Enquirer enclosing editorials from that paper denouncing proposed anti-cigarette legislation in the States of Utah and Washington, and (*ante*, p. 115) to the fact that the sale of cigarettes is prohibited in four states by law and that many other states have laws prohibiting the sale of cigarettes to minors. Sentiment against a business strong enough to inspire prohibitory legislation could not fail to have an injurious effect on any business apparently associated under the same ownership with the condemned business.

The extent of the sentiment against the use of cigarettes is further shown by the testimony of Mr. Frank M. Fairfield, who for many years has been active in the anti-cigarette movement.

Frank M. Fairfield (R. Vol. I, p. 636), who has practiced law in Chicago for over twenty-five years, is chairman of the board of directors of the International Anti-Cigarette League. He had been interested in the anti-cigarette movement for six or seven years, is district commissioner of the Boy Scouts of America, chairman of the Board of Examiners of the American Red Cross Life Saving Corps, chairman of the Boy Scout committee of the Hamilton Club of Chicago, one of the officers of the American Swimming Association of Boston and was one of the organizers and has always been secretary of the Sane Fourth Association. The following are some of the officers and directors of the International Anti-Cigarette League (R. Vol. I, p. 637, Q. 8); William T. Smith, a department manager of Marshall Field & Co., treasurer; Hudson Maxim, high explosive inventor, vice-president; Mrs. L. E. Wooster, State Superintendent of Schools of Kansas, a vice-president; C. W. Barrett, M. D., head of a department of the Cook County Hospital and a professor in the University of Illinois and in the Chicago Polytechnic School, vice-president; Judge Victor P. Arnold, of the Chicago Juvenile Court, a director; Frederick L. Rossback, ex-president of the Hamilton Club of Chicago, a director; A. N. Marquis, editor of "Who's Who in America," a director Mr. Fairfield said (Q. 16) that the league has about six hundred local units in the United States; that its work is educational, curative and law enforcing (Q. 17), and is directed to boys, adults, legislators and anyone seeking its services. The league, he said, reaches boys through the Boy Scouts, Y. M. C. A., colleges, schools,

Salvation Army, Rotary Clubs, the Boys International Clean Life Army and organizations for the safeguarding of the health and morals of boys (Qs. 20 and 28), and reaches adults through the International Education Association, Parent Teacher Association, the Salvation Army, women's clubs, men's clubs and numerous other organizations (Q. 21). The league distributes information by means of printed matter, pamphlets, letters, moving picture films, lecturers and any way that is desired by those wishing the co-operation of the league (Q. 22). Up to a year ago he said the league was sending out about 17,000 pieces of printed literature a month, but since that time they have had a number of co-operating agencies which make a large demand for literature and they are now sending out 100,000 a month. In answer to question 31 Mr. Fairfield named eighteen organizations that are officially allied with the International Anti-Cigarette League, including the Boy Scouts of America, the Chicago Department of Education and Superintendent of Schools, the Salvation Army, the Federated Women's Clubs, the Women's Christian Temperance Union and the Rotary Clubs. Mr. Fairfield described the co-operation between the Anti-Cigarette League and the Rotary Clubs, and said that through the Boy Scouts the league reaches 600,000 families and that the total number of families reached would, he thinks, be a million (Q. 35). Mr. Fairfield testified that four states of the Union have laws prohibiting the sale of cigarettes, that many states have laws prohibiting the sale of cigarettes to minors and that legislation is pending in several states now (Q. 57). Mr. Fairfield (Q. 58 *et seq.*), was led by the name and label to believe that the Beech-Nut cigarettes were the product of the Beech-Nut Packing Company and continued in that belief until informed to the con-

trary by one of plaintiff's counsel a few weeks before testifying. He described his impressions as follows:

> "Well, I always had a very high regard for the Beech-Nut Packing Company. They had advocated purity in products during their entire existence. I presumed everything that they produced was pure until I saw that they were putting out a cigarette. I presumed that they were on account of their name, label on it. And I thought they were degenerating—going down hill. Trying to impose upon the people by claiming that they could produce a pure cigarette, taking advantage of the good name that they had created for a great many years for purity of product. Taking advantage of the people by getting them to accept the cigarette under the guise of purity.
>
> "Q. 63. Would you use Beech-Nut products while you were under that impression?
>
> "A. Not if I knew it." (R. Vol. I, p. 646, Q. 62.)

Upon cross-examination (R. Vol. I, p. 657, R-X Qs. 145, 146) the fact was brought out that Mr. Fairfield receives no remuneration from the Anti-Cigarette League, and that he contributes money to its support.

Considerations Hitherto Influencing Beech-Nut Company to Postpone Taking the Natural Step of Selling Tobacco Products.

To a company engaged in general merchandising and dependent for its success upon the general purchasing public the addition to its business of a commodity which is in disfavor with and severely condemned by a considerable portion of the public is a matter for the most serious consideration. The very considerable profits which the officials of the Beech-Nut Packing Company were confident they could realize from the sale of cigarettes had caused them to consider the subject at intervals for many years, but the fear of a prejudicial effect upon the other business of the company had prevented the

addition of cigarettes to the line of Beech-Nut products. Upon this point W. C. Arkell, assistant secretary of the Beech-Nut Packing Company testified as follows:

> "Q. 11. How long has the Beech-Nut Co. had under discussion the sale of cigarettes under the Beech-Nut label?
>
> "A. That matter has been considered as far back —I forget—possibly two or three years before the war, something like 1914, 1915, 1916. I went in the army in 1917 and it was way ahead of that." (R. Vol. IV, p. 2189, Q. 11.)

Mr. Barbour, vice-president and general manager of the Beech-Nut Packing Company testified as follows regarding the attitude of his company on the question of dealing in cigarettes:

> "Q. 15. Would it be within the natural and ordinary expansion of your business to add cigarettes to your line?
>
> "A. Well, in one way it would. We are now calling on the tobacco trade, the grocery trade, and drug trade—all of which handle cigarettes and tobacco, and from that standpoint it would be most consistent for us to handle cigarettes. We could merchandise them without any added expense so far as our salesmen are concerned in salaries and traveling expenses. On the other hand, there are a great many people who are buying Beech-Nut products, and women buying most of them, who are opposed to tobacco in any form, which might make us feel we might not want to handle tobacco or cigarettes." (R. Vol. I, p. 785.)

Mr. Barbour also stated (R. Vol. I, p. 792), that plaintiff had never put any cigarettes on the market except in an experimental way, but that at one time they had engaged the services of a man who was recommended as having examined and blended many tobaccos but that they never obtained any machinery or other equipment for going into the tobacco business. Mr. Barbour's testimony shows that the possibility of antagonism from

those of their customers who were opposed to tobacco and cigarettes was one of the considerations which has so far influenced plaintiff to keep out of that business. The Beech-Nut Packing Company sacrificed the profits that might have been realized from tobacco and cigarettes in order to avoid damage to the good-will of its established business. The Lorillard Company has taken the profits and left the Beech-Nut Packing Company the damage.

ERRORS OF THE CIRCUIT COURT OF APPEALS.

There was error both of fact and law in the conclusion of the court below that the Lorillard Company has not violated the law of trade-marks and unfair competition because the business of the Lorillard Company is confined to tobacco and cigarettes and that of the Beech-Nut Company to food products. The error of law lay in making the character of the goods the test of legality instead of looking to the presence or absence of unauthorized appropriation of and injury to the good-will of the Beech-Nut Company's business as the factor of determining weight upon the question of the legality of the acts complained of. The error of fact lay in the finding of the court below that the Beech-Nut Company's business is confined to food products, whereas the manufacture of chewing gum constitutes more than half of the business of the Beech-Nut Company.

In its ultimate analysis the error of the court below consisted in disregarding the real issue—the question of fraudulent appropriation of and injury to good-will; in basing its decision on the classification of the goods sold by the parties; in arbitrarily and erroneously selecting the food value of the goods as the basis of classification; in erroneously finding that there is a substantial, or any perceptible or real, difference between the food values of chewing gum and chewing tobacco; and in concluding that such erroneously assumed difference between the food values of chewing gum and chewing tobacco gave the Lorillard Company a legal right to appropriate and injure the trade-mark, name and good-will of the Beech-Nut Company's business.

ARGUMENT.

Summary of Argument.

The purpose of the law of trade-marks and unfair competition is the protection of the good-will of a trade or business. Unauthorized appropriation of and injury to the good-will of a business is a violation of the law whether the good-will so appropriated be utilized in a business of the same kind as that to which the good-will is properly appurtenant or in some other kind of business. The good-will of a business is dependent upon fair dealing, not upon fair dealing in some particular kind of merchandise only. The injury done to a person by the belief on the part of the public that a certain defective or objectionable commodity is the product of that person's business is not canceled by the fact that he does not deal in that commodity or in any commodity of the "same descriptive properties." The vital thing is what the public believes, not what the unknown truth may be. The vice lies in the misrepresentation under which the goods are sold—not in the properties of the goods. Where the goods sold by the parties are of the same kind there is additional injury in the loss of sales, but there may be, as in the instant case, misappropriation of and injury to good-will without direct competition and the loss of sales caused thereby, and it is easily to be seen that there might be cases in which there would be loss of sales without injury to good-will, as where the party who appropriates the trade-mark or name of another sells goods of the same kind but of so satisfactory a quality and price that no discredit is cast upon the business to which the trade-mark or name properly belongs. Injury to good-will and injury by loss of sales are separate and distinct wrongs. Either may exist without the other.

Whether in any particular case the owner of a trade-mark or trade name has the right to prevent a stranger from using that mark or name in connection with goods of a kind not dealt in by the original owner of the mark or name must be determined from the facts in the case in which the question arises. If the stranger's use of the mark or name has the effect of deceiving or confusing the public, thereby placing the reputation and good-will of the business at the mercy of the stranger and beyond the control of the owner of the business, then there has been an infraction of the law. The error of the court below lay in attempting to resolve this question without regard to the effect upon the good-will and reputation of the business in which the name and mark were first used, and by assuming the existence of an arbitrary general rule limiting the party's right in his trade-mark or name to goods of a particular class without regard to the possibility or fact of injury growing out of the unauthorized use of the name or mark by another in connection with other goods.

The part of the Subject Index entitled "Argument" consists of a summary of the principal topics and propositions discussed in the following pages.

Decision of the Court Below.

ERROR IN MAKING "CLASS" AND "DESCRIPTIVE PROPERTIES" OF THE GOODS THE TEST OF THE RIGHTS OF THE PARTIES.

The court below rests its decision upon its conclusion that "food products" and tobacco do not belong to the same "class," or are not of "the same descriptive properties," and are not competitive products. The court below finds that the Beech-Nut Packing Company deals only in food products. Later we shall refer

to the fact that chewing gum, the principal product of the Beech-Nut Packing Company, bears about the same relation to food products as does the chewing tobacco made and sold by the Lorillard Company. Neither the gum in chewing gum nor the tobacco in chewing tobacco is a food. Both chewing gum and chewing tobacco are sweetened with sugar (Formula of Beech-nut tobacco, R. Vol. VI, p. 3050). There seems to be no substantial distinction between the two commodities in their properties as articles of diet, but inasmuch as the court below has made this distinction the foundation of its decision, it will be interesting to ascertain the basis of the court's reference to a system of classification and to the "descriptive properties" of merchandise as determinative of the question of the right of one party to impersonate another in business by appropriating his trade-mark, trade-name or other means of identification.

These Words in the Trade-Mark Statute—No Possible Effect Where Jurisdiction is From Diversity of Citizenship.

The words "class" and "same descriptive properties" occur in several connections in the Trade-Mark Act of February 20, 1905, Ch. 592 (33 Stat. L. 724). Whatever these terms mean they can have no possible effect upon any action or suit other than one in which the court's jurisdiction rests exclusively on the statute. Where the jurisdiction rests on diversity of citizenship the law applied by the court is the common-law of unfair competition and trade-marks. Section 23 of the Trade-Mark Act of February 20, 1905 (quoted in Appendix G, App., p. 99), expressly provides that nothing in the statute shall lessen or avoid any remedy any party would have had if the Act had not been passed, and, in

any event, as stated by this Court in the Simplex case (*American Steel Foundries* v. *Commissioner of Patents and Simplex Co.*, 269 U. S. 372, 381), Congress has been given no power to legislate upon the substantive law of trade-marks.

In Equity No Arbitrary Rule Based on Character of Goods.

In the suit at bar there is jurisdiction by reason of the diversity of citizenship of the parties as well as jurisdiction based upon the fact that the Beech-Nut Packing Company has registered its trade-mark under the statute. Therefore, even if some limitation growing out of classification and descriptive properties is imposed upon purely statutory actions, such limitation has no bearing on the suit at bar where diversity of citizenship gives the court jurisdiction of the parties for the purpose of administering the common law of unfair competition and trade-marks. For this reason we believe that any reference to classification of goods and the descriptive properties of merchandise as the determinative factor in this case, is altogether irrelevant and erroneous, but we further find that by the very terms of the statute the limitation to cases in which the goods of both parties are of the "same descriptive properties" applies only to actions at law for the recovery of damages, and that no such limitation occurs in the section of the statute defining the power of the courts in suits in equity.

Section 16 of the Trade-Mark Act of February 20, 1905, Ch. 592 (33 Stat. L. 724, quoted in full in Appendix G, App., p. 98) provides that any person applying a registered trade-mark to merchandise "of substantially the same descriptive properties as those set forth in such registration . . . . shall be liable to an action for

damages." The words "action for damages" and the fact that another section of the statute, Section 19 (quoted in full in Appendix G, App., p. 99), contains express provision for suits in equity "to prevent the violation of *any right* of the owner of a trade-mark registered under this act," leads to the conclusion that it is only the remedy in an action at law that is restricted to the use of the trade-mark on goods of the same "descriptive properties," and that in suits in equity, even where the court's jurisdiction rests solely on the registration of the trade-mark under the statute, the remedy may extend to an injunction against "the violation of *any right* of the owner" of the registered trade-mark. In fact these are the express provisions of the statute and no escape from them seems possible, especially as the power of granting an injunction to restrain a wrong not remediable at law is the particular province of the court of equity.

Therefore both the jurisdiction based upon the registration of the Beech-Nut trade-mark under the statute and the jurisdiction resting upon diversity of citizenship extend to any wrongful act cognizable in equity. But, while the principles of equity in their application to trade-mark and unfair competition cases are not limited by any arbitrary rule based upon the class or descriptive properties of the goods dealt in by the parties, the character of the goods is an element of importance as an evidential fact in cases where there is no direct evidence to establish the presence or absence of deception or confusion of the public. Where the direct evidence leaves the issue untouched, or in doubt, the courts perforce resort to inference from such facts as are before them. But where the fact of deception is proved beyond a reasonable doubt, no place is left for inference as to what the fact is. In the suit at bar the fact of universal deception of the purchasing public has been proved beyond a reasonable

doubt by direct evidence, and yet the court below has disregarded that proof and based its decision upon the differences between the goods dealt in by the parties, and its ruling that purchasers "should not be mistaken and certainly not deceived" (R. Vol. V, p. 2702; 7 F. (2d) 971).

Court Below Applies Conflicting Rules to the Trade-Mark and Unfair Competition Aspect of the Same Facts.

The court below has discussed the case in two branches, treating the question of trade-mark infringement separate and apart from the question of unfair competition. Though there may be cases in which this distinction involves some question of jurisdiction or procedure, there appears to be no reason for adjudicating the instant case, considered as a trade-mark case, by the application of a principle which is inconsistent with the principle applied to it when considered as an unfair competition case. But that is precisely what the court below has done, and the inconsistency has arisen from the court's failure to apply to both aspects of the case the one common fundamental principle, namely, that the owner of a trade-mark or other identifying symbol is entitled to protection against such use thereof by others as will result in a misappropriation of his business reputation and good-will. The court below states the law of trade-marks upon which it has decided this case in the following words:

> "The general rule of law on this subject is that the owner must have used his trade-mark on the same *class* but not necessarily on the same species of goods as the alleged infringer in order to entitle him to its protection against infringement." (R. Vol. V, p. 2699.)

Treating the case as an unfair competition case the court below gives the following as the rule of law for its decision:

> "And so courts have held that there must be a real, present, or prospective competition; that is, an endeavor to get the same trade from the same people at the same time." (R. Vol. V, p. 2701.)

Now, it is quite obvious that if a party who has used his trade-mark on only one species of the goods comprised in a class is entitled to prevent others from using that trade-mark on any species of goods included within that class, as set forth in the first of the two foregoing quotations, then he is entitled to protection that is expressly excluded by the principle stated in the second quotation, where it is provided that there must be an endeavor to get the same trade from the same people at the same time. Rye bread and truffles are both foods, and belong to the class of foods. By the first principle announced by the court below the owner of a trade-mark for rye bread, who has used it on nothing but rye bread, is entitled to exclude others from using the same trade-mark in connection with truffles. But by the second principle stated by the court below the man who has used the trade-mark on rye bread only, is not entitled to prevent any other person from using the same mark on truffles, because the effort of the one to sell rye bread and of the other to sell truffles could by no stretch of imagination be construed as an effort of both to get the same trade of the same people at the same time. No such inconsistency can possibly arise if the law of trade-marks be considered merely a branch of the law of unfair competition, as this Court has more than once ruled it to be. Both classes of cases might well be considered as parts of the law of business good-will. The application of the same test to both, namely, the presence or absence of deception

of the public and appropriation of business good-will, leads to results that are always consistent and in harmony with justice and equity. Analysis based upon arbitrary rules, and upon words, such as the words "competition" and "descriptive properties," leads to inconsistency and fallacy as it has done in the instant case.

Lower Court's Emphasis of Importance of Classification of Goods.

The determinative weight given by the court below to the arbitrary rule of classification which it lays down is emphasized by its frequent comparisons of foods with tobacco. The court refers to the fact that tobacco is in Patent Office Class No. 17 and food in Class No. 46; that "the Treasury Department treats them as of different classes" and "has always taxed tobacco products just as it did liquor products, but has never taxed food products"; that food promotes the growth of animal or vegetable life and is a necessity, while tobacco contains no nutrition but is a narcotic (R. Vol. V, p. 2700).

In one paragraph of its opinion (appearing at the bottom of page 2701 of Volume V of the Record) the court states that it is aware that equity may be invoked without market competition. But in the second preceding paragraph the court gives its approval to the rule that there is no wrong unless there is "an endeavor to get the same trade from the same people at the same time," and in a later paragraph, after referring to the injury sustained by the Beech-Nut Company, the court says that "This resulted from the similarity of trade-marks on distinct and unrelated classes of merchandise. But from confusion and injury caused by similarity of names, courts will not relieve." (*Ibid*, top of page 2703.)

Howe Scale Case and Canal Co. Case, Cited by Court Below, are not Authority for its Decision.

The court below makes the statement that "It is not the use, but dishonesty in the use, that is condemned . . .," and cites *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict,* 198 U. S. 118, 140, and cites and quotes from *Canal Co.* v. *Clark,* 13 Wall. 311, 327 (R. Vol. V, p. 2703). The first of the two cases mentioned is authority for the rule that a man may use his own name in business provided the use be not accompanied with circumstances that make it fraudulent and deceptive, and the second of the cited cases is authority for the rule that the use of geographic words in trade is open to all who make honest use of them.

In the suit at bar we do not have a case of a defendant using his own name, honestly or otherwise, or the case of a party using a geographical term, either honestly or otherwise. We have the case of a party misappropriating an arbitrary name adopted by and belonging to another as both a corporate name and a trade-mark, using in connection with the misappropriated name all of the ornamental and distinctive characteristics of design which are used by the rightful owner of the name, and thereby causing universal deception of the purchasing public. The authorities cited by the court below have no relevancy to the suit at bar. We will briefly state the facts in the two cases cited by the court below as authority of this Court for the decree appealed from.

The Howe Scale Company, defendant and appellant in *Howe Scale Co.* v. *Wyckoff, Seamans & Benedict* (198 U. S. 118), was sales agent for the Remington-Sholes Typewriter Company, and Wyckoff, Seamans & Benedict were manufacturers of the Remington typewriter. Z. G. Sholes was a son of C. L. Sholes, who was the inventor

of the most important features of the Remington typewriter. In 1892 Z. G. Sholes invented a new form of typewriter and organized the Z. G. Sholes Company to make it. Franklin and Carver Remington, sons of Samuel Remington, formerly president of E. Remington & Sons, the original manufacturer of the Remington typewriter, bought a three-fourths interest in Sholes' invention, Sholes retaining the other fourth. Thereafter the Remington-Sholes Typewriter Company was organized, and the typewriter made by the company was marked "Remington-Sholes, Chicago," and with the trade-mark "Rem-Sho." This Court found that "the name 'Remington-Sholes Company' is not identical with, or an imitation of, 'Remington Standard Typewriter Company,' that the trade-mark 'Rem-Sho' was not imitative of any of Wyckoff, Seamans & Benedict's marks," and stated that "the use of two distinct surnames clearly differentiated the machines of defendant from those of complainant, . . ." (*Ibid,* p. 139.)

In *Canal Co.* v. *Clark* (13 Wall. 311) the Delaware and Hudson Canal Company sought to enjoin Clark from calling the coal which he sold "Lackawanna coal." The Lackawanna valley was known by that name long before the business of either of the parties to the suit came into existence. The coal mines of both parties to the suit were in the Lackawanna valley and so also were many other coal mines owned by others. All of these mines yielded the same kind of coal, that of plaintiff and defendant in the suit being alleged by plaintiff to be indistinguishable. It was upon these facts that this Court affirmed the decree of the lower court refusing to enjoin Clark from calling his coal "Lackawanna coal."

In the typewriter case Remington and Sholes used their own surnames in a manner that was not deceptive and that clearly distinguished their product from that of

the other party, and in the Lackawanna case Clark called his coal by the name of the district in which he, in common with many others, mined coal of precisely the same kind. The typewriter case proceeds upon the principle that a man may use his own name in connection with the sale of any kind of goods provided there is nothing deceptive in the manner in which he uses it. The coal case decision follows the established principle that no one may have a monopoly of a merely geographic name.

The decision of the court below is based upon the assumption that because a man may use his own name in any non-deceptive manner, and because a man who digs coal in a certain locality may designate it by the name of that locality, it is right and lawful for a party to take a name which is not his own, and is not geographical, and to make use of it in trade with the effect of universally deceiving purchasers, and that he may not only do this, but that he may make sure of the deception by printing the name in precisely the style in which the true owner of the name prints it in his business, and may accompany the appropriated name with an essentially exact copy of all of the accessory ornamentation and details with which the true owner of the name surrounds it in his trade-mark. It is needless to refer in detail to the passage quoted by the court below from the opinion of this Court in *Canal Company* v. *Clark*. The meaning of this court's statement is perfectly clear. Even when quoted apart from the context, as in the opinion of the court below, there is nothing in the quotation to contribute any support to the view of the suit at bar taken by the court below.

THE COURT BELOW IN ERROR REGARDING COMBINATION IN SAME BUSINESS OF MANUFACTURE AND SALE OF FOOD AND TOBACCO PRODUCTS.

The court below said (R. Vol. V, p. 2702) that "no company ever combined the manufacture and sale of food and tobacco." The court overlooked the fact, mentioned in brief and argument below, that Mr. Belt, vice-president of the Lorillard Company, testified that Park & Tilford, the well-known New York grocers, have a cigar factory of their own for the manufacture of their own brands of cigars (*ante*, p. 100, and R. Vol. V, p. 2615). Mr. Belt also testified that the Liggett Drug Company, which operates a chain of drug stores, Sprague, Warner & Co., wholesale grocers of Chicago, and Stickney & Co., wholesale grocers of St. Louis, all own their own tobacco trade-marks (R. Vol. V, pp. 2615-2617). It does not appear from Mr. Belt's testimony whether any of these companies own tobacco factories of their own as did Park & Tilford. Mr. Charles stated that his firm, Charles & Co., fancy grocers of New York City, have their own tobacco brands, and that it is a general custom for grocers to put out tobacco products under their own trade-marks without any connection with the name of the manufacturer (*ante*, p. 100, and R. Vol. V, pp. 2465, 2466). In the face of the proved fact that a large and prominent grocery house, Park & Tilford, has its own cigar factory, and in the face of the proved general custom, illustrated by specific instances, of grocers to have their own exclusive tobacco trade-marks, the court below stated that "the evidence shows that no company ever combined the manufacture and sale of food and tobacco." Inasmuch as universal deception of the public has been proved by direct evidence in the instant case, it is not material whether the goods were dealt in by the same or different

dealers, but the point is of interest as showing that it was nothing unusual for the public to see and buy food and tobacco products put out by the same company, and that the court below misapprehended the facts.

POSSIBILITY OF SUBSTITUTING ONE PRODUCT FOR ANOTHER IS NOT THE LEGAL TEST IN THE SUIT AT BAR.

As reason for its decision the court below makes the statement (R. Vol. V, p. 2702) that

> "The evidence shows that its (defendant's) goods have in no way been confused with those of the plaintiff so that when a purchaser desired a certain brand of plaintiff's goods, he in fact secured those of defendant."

This can only mean that when a purchaser wanted some product of the Beech-Nut Company, say a jar of sliced bacon, the salesman could not hand the purchaser a package of Beech-Nut chewing tobacco or cigarettes and make him think he was getting a jar of bacon. This seems quite obvious, but the fact that one kind of deception could not be practiced does not justify another kind. If the purchaser wanted, and bought, tobacco or cigarettes, and was led to believe that they were the product of the Beech-Nut Packing Company, when they were in fact produced by the Lorillard Company, the transaction involved misappropriation of the Beech-Nut Company's business reputation and good-will regardless of whether the Beech-Nut Company did or did not deal in tobacco and cigarettes. If the Beech-Nut Company did itself deal in tobacco and cigarettes there would be additional injury in the loss of profits on a particular sale. There would be no distinction between the two cases otherwise.

AFTER ERRONEOUSLY ADOPTING THE "DESCRIPTIVE PROPERTIES" OF THE GOODS AS THE TEST OF THE RIGHTS OF THE PARTIES THE COURT BELOW APPLIES THAT TEST IN A WAY THAT WOULD BE ERRONEOUS IN ANY CASE, AND TO ASSUMED FACTS WHICH DO NOT EXIST IN THIS CASE.

While we believe that consideration of this case from the standpoint of the character of the goods is erroneous on account of the presence of direct proof of deception of the public, we also believe that a proper consideration of the character of the commodities dealt in by the parties would lead by inference to a conclusion identical with that proved by the evidence to be correct. Under the two following titles we show the irrelevance of the basis of classification adopted by the court below, and the erroneous finding of fact to which it applied the classification so adopted.

Commercial Custom and Association in Trade are the Proper Basis of Classification for the Purposes of the Law of Unfair Competition.

While the court below refers repeatedly to the "class" of the goods dealt in and to the "descriptive properties" of the goods, there nowhere appears in the opinion any reference to authority for adopting the particular system of classification or particular "descriptive properties" which the court had in mind. There are chemical properties, physical properties, electrical properties, medicinal properties, properties as foods, properties that determine how and in association with what other things an article or commodity will be manufactured or otherwise produced, properties that determine with what other things an article or commodity will be associated in trade and properties of an indefinite kind and number, some of which will be relevant for one purpose and some for another.

For the purposes of the law of unfair competition we believe that the relevant properties are those that bear upon the association of different articles and commodities in trade. A buck-saw and a tenpenny nail are both hardware because of their association in trade, and not because of any resemblance between their physical, chemical or other inherent properties, or because of any similarity in the use to which they are put or the effect they have when used. This is the view taken by the Court of Appeals for the Second Circuit in *France Milling Company* v. *Washburn-Crosby Co.*, 7 F. (2d) 304, 305, where it says:

> "Classification of any commercial article depends far more on commercial custom than upon the inherent nature of the product. Dog biscuit and pilot bread are closely allied in physical origin, and so are guncotton and calico, but in commercial classification they are poles apart."

The many different things that are classed as groceries, or as drygoods, or as stationery, are so classed because of the channels of trade through which they flow. A multitude of reasons that could not possibly be traced have brought about a more or less definite grouping in the buying and selling of different articles and commodities. This grouping is primarily related to the convenience of the ultimate purchasers, the effort of the retailer to have in his store those things which the purchasers expect to find in a store of the kind he keeps, and which it is convenient for them to find there. And so it has come about that when retail buyers become familiar with the trade-mark which a manufacturer or dealer uses upon several different commodities which are ordinarily sold in a certain kind of store, they think that any new commodity sold in the same kind of store and under the same trade-mark is the product of the same manufacturer or dealer. The public is thor-

oughly familiar with the fact that large business houses and manufacturers deal in and make a wide variety of products. Everyone knows that the large packing houses are not confined to the sale of beef, mutton and pork, and is familiar with the fact that these same concerns manufacture and deal in soap, glue, butter, eggs, cheese, cleansing powders, canned goods, meat extracts and practically anything that their manufacturing and distributing facilities are adapted to. Therefore when a purchaser sees the name Swift & Co., or Armour & Co., or Beech-Nut on some product that he had not seen it on before, and sees it in the same store where other products of these companies are sold, he instantly accepts the new product as the product of the company of that name with which he has long been familiar.

But the court below says:

> "The crux, therefore, of the trade-mark branch of this case is whether or not the products of the plaintiff and defendant belong to the same class or belong to distinct and unrelated classes, not having 'the same descriptive properties.'" (R. Vol. V, p. 2700.)

and of the unfair competition aspect of the case the court below says there can be no offense unless there is "an endeavor to get the same trade from the same people at the same time." (R. Vol. V, p. 2701.) The theory of the decision below is that the law is indifferent to the act of a defendant who impersonates the plaintiff, profits by his appropriation of the plaintiff's identity, and injures the plaintiff's business reputation, that the law is not concerned with wrongful appropriation of and injury to business good-will, but solely with the likeness or unlikeness of the commodities dealt in by the parties. And taking even this basis of decision the court below does not apply it to the facts of the case but to assumed facts which have no existence in reality, as clearly appears in the following paragraph.

Fundamental Error of Fact in Erroneous Finding of the Court Below that the Beech-Nut Company Deals In Food Products Only.

The court below says in its opinion (R. Vol. V, p. 2700):

> "It is undisputed that the plaintiff and its predecessor in business have always dealt in food products only and that the defendant and its predecessors have always manufactured and sold tobacco and have never dealt in food products."

This proposition is not undisputed. It is denied. Plaintiff started the manufacture and sale of chewing gum in 1911, and at the time of the trial of this suit its sales of chewing gum constituted over half of its total business (*ante*, pp. 19, 22). No one regards chewing gum as food, no one buys it for food. We doubt if the most enthusiastic advertiser of chewing gum ever thought of recommending chewing gum as a food or enlarged on its nourishing qualities. Chewing gum has just about as much claim to virtue as a food as has chewing tobacco. Popularly neither of them are regarded as foods. Both chewing gum and chewing tobacco contain sugar. The Lorillard Beech-Nut scrap tobacco was made sweeter than brands previously made by the Lorillard Company (*ante*, p. 51; for a chewing tobacco formula, see R. Vol. VI, p. 3050, where the formula for the extinct Weissinger Beechnut tobacco appears, including sugar, salt, licorice and glycerine besides tobacco scraps). Either both products are foods on account of the sugar they contain or neither are foods.

The Beech-Nut Company also deals in non-alcoholic beverages. Beginning with the year 1919 such beverages were regular products of the company listed on its nationally distributed price lists. Ginger ale is listed on the 1919 price list (R. Vol. VI, p. 2805); ginger ale, birch beer

and sarsaparilla are listed in 1920, 1921 and 1922, and these same products together with root beer are listed in 1923 (R. Vol. VI, pp. 2807 to 2814). Mr. Barbour, vice-president and manager of the Beech-Nut Company testifies regarding the sale of beverages (R. Vol. I. p. 790, X-Q. 41 *et seq.*).

Inasmuch as the court below attached weight to the Patent Office classification of articles of commerce, we mention the fact that the Patent Office, acting under the amendatory Trade-Mark Act of May 4, 1906, Section 2, has separately classified beverages and foods under the following class numbers and titles: "45. Beverages, non-alcoholic," and "46. Foods and ingredients of foods." (The pamphlet issued by the Patent Office containing the trade-mark statutes and rules of practice is in evidence as Defendant's Exhibit No. 34. Page 46 of this pamphlet, upon which the classification of merchandise appears, is reproduced at page 2941 of Volume VI of the Record.) This classification is authorized by Section 2 of the amendatory Trade-Mark Act of May 4, 1906, ch. 2081 (34 Stat. L. 169); which reads as follows:

> "Sec. 2. That the Commissioner of Patents shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class. On a single application for registration of a trade-mark the trade-mark may be registered at the option of the applicant for any or all goods upon which the mark has actually been used comprised in a single class of merchandise, provided the particular descriptions of goods be stated."

It is quite obvious, as stated in the statute, that the classification is "for the purpose of trade-mark registration" and that its only intended effect, and the only effect within the power of Congress, was administrative,—to limit the number of different kinds of commodities for

which a trade-mark could be registered upon one application and for the payment of one fee. We believe that any discussion of Patent Office classification in the consideration of a substantive question of trade-mark law only tends to confusion of thought, and we are impelled to refer to this subject only for the purpose of showing the fallacy of attaching weight, as did the court below, to the list of classes established by the Commissioner of Patents.

The court below, however, has attached determinative weight to classification, and, furthermore, in applying this irrelevant test has either completely overlooked the principal product of the Beech-Nut Packing Company, chewing gum, and its extensive production of beverages, or it has justified the Lorillard Company's invasion of the rights of the Beech-Nut Company on a distinction between the value of chewing gum and non-alcoholic beverages on the one hand, and the value of chewing tobacco on the other, as articles of diet. The court below does not explain what relation there may be between the Lorillard Company's appropriation of the good-will of the business of the Beech-Nut Company and a scientific determination of the relative food values of chewing gum and chewing tobacco, nor does it anywhere explain what bearing the differences between the uses of a ham and a cigarette have upon the right of the cigarette maker to impersonate and appropriate the business good-will of the man who packs the ham.

IRRELEVANT CASES CITED BY COURT BELOW IN SUPPORT OF ITS THEORY OF CLASSIFICATION AS A TEST OF INFRINGEMENT OF TRADE-MARK RIGHTS.

The authorities cited by the Lorillard Company in the courts below and relied on by those courts upon the proposition that there is no cause of action unless both parties deal in the same commodity or in commodities of the same "class" all involved facts so different from those in the suit at bar that detached quotations, couched in general language, are misleading when applied to the different facts of the instant case. In none of the previous cases where the commodities were different, and the court gave weight to that fact in support of its refusal to find for the plaintiff, was there proof of deception of the public growing out of the use of the same trade-mark by both parties. In the absence of proof of such deception the courts have quite naturally treated differences between the commodities as an evidential fact bearing upon the question of the likelihood of deception resulting from the use of the same trade-mark or label on the different commodities dealt in by the parties, and in discussing such cases the courts have made statements intended to have application only to the facts before them, which, quoted apart from the context, and treated merely as detached words, are susceptible of a meaning which they do not have when read as a part of the opinions in which they occur. Such detached quotations constitute the authorities relied upon by the Lorillard Company in the courts below and accepted by those courts as authorities.

National Picture Theatres Case.

In support of the proposition that there can be no unfair competition unless there is "an endeavor to get the same trade from the same people at the same time" the court below (R. Vol. V, p. 2701) cited *National Picture Theatres, Inc.*, v. *Foundation Film Corporation*, 266 Fed. 208, 211, which case was decided by the Court of Appeals for the Second Circuit, the same court which accorded trade-mark protection to different commodities in *Aunt Jemima Mills Co.* v. *Rigney & Co.* (discussed, *post*, 192), 247 Fed. 407, and in the case of *Anheuser-Busch Co.* v. *Budweiser Malt Products Corp.* (295 Fed. 306—discussed *post*, p. 147). In the National Picture Theatres case defendant and plaintiff used substantially the same name for motion picture plays, the plays themselves being altogether different. The court held that the plaintiff was entitled to an injunction restraining the defendant from using substantially the same name for a different play. The products were the same in so far as they were both motion picture plays, and anyone seeing the name of the play posted in front of a theatre might well have been induced to attend one of the plays when he wanted to see the other, and it is evident that the court regarded the case in this light. The case was based on unfair competition, though we see no reason for applying a different standard of judgment to trade-mark and unfair competition cases as the line between the two is often vague and the wrong in both is appropriation of and possible injury to business goodwill. The remark that there must be "an endeavor to get the same trade of the same people at the same time," which appears in the opinion in the National Picture Theatres case, is couched in broad terms, but quite evi-

dently the sense was not that relied on by the court below for the court which made this remark was the same one which decided the Aunt Jemima and Budweiser cases.

Borden Ice Cream Case.

The other of the two citations made by the court below (R. Vol. V, p. 2701) in support of its view that the suit at bar presents no remediable injury on account of the difference in the commodities dealt in by the parties is *Borden Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 Fed. 510, opinion by Judge Carpenter, 1912 (C. C. A., 7th Circuit). Borden's Condensed Milk Company was founded in 1857 by Gail Borden, and the name of the company had long been identified with the milk and cream business, and the company also manufactured a malted milk ice cream intended for and used only in hospitals. In 1911 one George F. Borden, with others, incorporated the Borden Ice Cream Company for the purpose of manufacturing ordinary, or commercial, ice cream, but the company had never actually made or sold any ice cream or any other product. There had, therefore, been no deception of the public and no actual damage to the Borden Condensed Milk Company. The court said that if the complainant based its right to an injunction on unfair competition, no competition of any kind had been shown by the record, the defendant never having made or sold anything, and that if complainant relied on damage which might result from the use of the name "Borden" on inferior goods, the action was premature, as the defendant had not made or sold any goods of any kind, thus plainly implying that if the action had not been premature, and damage had been shown, plaintiff would have had a remediable grievance.

In the suit at bar we have before us an arbitrary trade-mark, made up of the arbitrary word "Beech-Nut" and the arbitrary design in which it is used. In the Borden case the question at issue was the extent to which the plaintiff was entitled to the exclusive use of the surname "Borden," and the extent to which that name had acquired a secondary significance as a mark of identification for articles of commerce, and the court very carefully limited its discussion of the legal effect of the commodities being different to that particular state of facts. What the court said upon this point was:

> "The secondary meaning of a name, however, has no legal significance, unless the two persons make or deal in the same kind of goods." (201 Fed. 514.)

All that can be fairly drawn from this case is that a man may not have as broad rights in a surname as he might have in an arbitrary trade-mark, and that is in conformity with the principle laid down by the courts in the analogous cases where the courts have accorded broader protection to trade-marks consisting of arbitrary words not in common use than to arbitrary or suggestive words that have been widely used as trade-marks or trade-names. Examples of the last named class of words are cited in the opinion of this Court in *American Steel Foundries* v. *Commissioner of Patents and Simplex Company,* 269 U. S. 372; among them being "Acme," "Anchor," "Champion," "Eureka," "Excelsior," "Ideal," "Jewel," "Liberty," "National," "Pride," "Premier," "Queen," "Royal," "Star," "Sunlight," "Triumph" and "Victor." We next refer to some cases involving the different extent of protection accorded to trade-mark words of different character.

SOME CASES SHOWING VARYING EXTENT OF PROTECTION GIVEN BY COURTS TO TRADE-MARK WORDS OF DIFFERENT CHARACTER.

The Pabst Blue Ribbon Case.

Pabst Brewing Company v. *Decatur Brewing Company,* 284 Fed. 110, C. C. A., Seventh Circuit; Opinion by Judge Alschuler.

In this case the plaintiff, the Pabst Company, had established its right to the words "Blue Ribbon" as a trade-mark for beer. Defendant, the Decatur Company, used the same words as a trade-mark for malt extract, which is not a beverage but is useful, as indicated by the court, in the preparation of beer by the "home brew" process. The Pabst Company had not used the words "Blue Ribbon" on anything but beer. The court decided that

> "in view of the very wide and general employment of 'Blue Ribbon' as a trade-name, we believe the District Court properly concluded that appellant's right to use it was limited to its registered product, and whatever other first use it made of it, and that in appellee's use of it there was no likelihood of any confusion of its product with that of the appellant."

The Budweiser Case.

Anheuser-Busch, Inc. v. *Budweiser Malt Products Corporation,* 295 Fed. 306, C. C. A., Second Circuit; Opinion by Judge Rogers.

In this case the plaintiff, Anheuser-Busch, Inc., had established its right to the word "Budweiser" as a trade-mark for beer but not for malt syrup, and defendant used the same word as a trade-mark for malt syrup. The court held that defendant's use of the word "Bud-

weiser'' as a trade-mark for its malt syrup was an invasion of the trade-mark right of the plaintiff.

The Anheuser-Busch (Budweiser) case was decided by the District Court for the Southern District of New York, before the Pabst (Blue Ribbon) case was submitted to the Court of Appeals for the Seventh Circuit. The Court of Appeals for the Seventh Circuit decided the Blue Ribbon case before the Budweiser case was submitted on appeal to the Court of Appeals for the Second Circuit. It thus came about that the Budweiser case was discussed by the Court of Appeals for the Seventh Circuit in its opinion in the Blue Ribbon case, and that the Blue Ribbon case was discussed by the Court of Appeals for the Second Circuit in its opinion in the Budweiser case. Both courts distinguished the two cases by reason of the fact that the word ''Budweiser'' is to all intents and purposes a purely arbitrary word as applied to beer in the United States, the town of Budweis in Bohemia being practically unknown in this country, and having no significance to the public in connection with beer, while the words ''Blue Ribbon'' have a generally recognized significance as indicating high merit, and by reason of that fact had been registered in the Patent Office by different persons over sixty times as a trade-mark for different products. For this reason both courts were of the opinion that the arbitrary word ''Budweiser'' was entitled to a breadth of protection that should be denied to the generally used and suggestive term ''Blue Ribbon.''

Pease et al. v. *Scott County Milling Co., 5 F. (2d) 524. District Court, E. D. Missouri; Judge Faris (March, 1925). Opinion Contains a Discussion of Blue Ribbon and Budweiser Cases.*

Both the Blue Ribbon case and the Budweiser case were cited and discussed by the District Court for the Eastern District of Missouri in *Pease et al.* v. *Scott Milling Co.*, 5 Fed. (2d) 524. Plaintiff, Pease *et al.*, had used the word "Nox-All" as a trade-mark for stock food, consisting of a mixture of grains and molasses, for 22 years, and sued to enjoin defendant from using the word "Noxall" as a trade-mark for stock food. Defendant and its predecessors had used the word "Noxall" for 32 years as a trade-mark for wheat flour. Defendant set up a counterclaim based on its prior use of the word "Noxall" for wheat flour. The court decided for plaintiff on both the bill and counterclaim, plaintiff being thus permitted to continue the use of the word "Nox-All" as a trade-mark for stock food and defendant being enjoined therefrom. Defendant's right to the use of the word "Noxall" as a trade-mark for wheat flour was not disputed. Upon defendant's contention on its counterclaim that its prior use of the word "Noxall" as a mark for wheat flour entitled it to exclude plaintiff from using the word "Nox-All" in connection with stock food the court referred to the fact that "Noxall" had been registered as a trade-mark 30 times "for almost every conceivable product" and was in use "as a trade-name by some 15 or 20 concerns." The court's discussion of the legal effect of the character of a word upon the breadth of protection to be accorded its use as a trade-mark is so clear and com-

plete that we present the following quotation from the opinion:

"The ruled cases disclose two lines of decision: A narrow rule of protection in a case wherein the trade-mark in dispute has been, as here, registered under the statute for some 30 times as a trade-mark, for as many different products, and has also been used as a common-law trade-mark as to some 20 other products (*Columbia Mills Co.* v. *Alcorn*, 150 U. S. 460, 14 S. Ct. 151, 37 L. Ed. 1144; *Pabst Brewing Co.* v. *Decatur Brewing Co.* [C. C. A.], 284 F. 110; *Church, etc., Co.* v. *Russ* [C. C.], 99 F. 226; *Borden, etc., Co.* v. *Borden, etc., Milk Co.*, 201 F. 510, 121 C. C. A. 200; *Lawrence* v. *Sharpless Co.* [D. C.], 203 F. 762; *Denver, etc., Co.* v. *Alexander, etc., Co.*, 50 App. D. C. 207, 269 F. 859; *George* v. *Smith* [C. C.], 52 F. 830; *Beich Co.* v. *Kellogg, etc., Co.*, 49 App. D. C. 186, 262 F. 640; *Sulzne Laboratories* v. *Electro-Alkaline Co.*, 52 App. D. C. 265, 285 F. 999), and a broad line of protection, where the common-law trade-mark or trade-name, or statutory trade-mark, is original or distinctive (*Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 F. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039; *Peninsular Chemical Co.* v. *Lowinson Co.*, 247 F. 658, 159 C. C. A. 560; *Florence Manufacturing Co.* v. *Dowd*, 178 F. 73, 101 C. C. A. 365; *Enoch Morgan's Sons* v. *Wood*, 152 F. 600, 81 C. C. A. 616, 12 L. R. A. [N. S.] 729; *Anheuser-Busch* v. *Budweiser, etc., Corporation* [D. C.], 267 F. 263; *Vogue Co.* v. *Thompson-Hudson Co.* [C. C. A.], 300 F. 509).

"This distinction is made clear by what was said in the case of *Pabst Brewing Co.* v. *Decatur Brewing Company, supra*, wherein the words in dispute were the words 'Blue Ribbon,' as applied by plaintiff therein to beer, and by defendant therein to malt extract. The court said:

"'It ["Blue Ribbon"] was shown to have been registered in the Patent Office over 60 times. . . . Such registrations at different times and to different persons would indicate that the Patent Office did not recognize a large measure of individuality in the name. . . . In view of the very

wide and general employment of "Blue Ribbon" as a trade-name, we believe the District Court properly concluded that appellant's right to use it was limited to its registered product, and whatever other first use it made of it, and that in appellee's use of it there was no likelihood of any confusion of its product with that of appellant."

* * * * * * * * * * *

"A distinctive name, such as 'Kodak,' 'Budweiser,' 'Ford,' 'Aunt Jemima,' 'Pontiac,' and 'Delmonte,' will be broadly protected in all cases where damage will be inflicted by unauthorized use; while words like 'Blue Ribbon,' 'Star,' and 'Nonail,' and other words of like character, will be protected only within the range of use upon similar goods" (3 F. (2d) 325-326).

The Gold Medal Case.

France Milling Co. v. Washburn-Crosby Co., 7 F. (2d) 308, Circuit Court of Appeals, 2nd Circuit, opinion by Circuit Judge Hough (April 6, 1925).

The Court of Appeals for the Second Circuit in above case also cited and discussed the Blue Ribbon case and the Budweiser case. The court refused to give broad protection to the word "Gold Medal," long used by Washburn-Crosby Co. on wheat flour on the same ground, among other reasons, as given by the Court of Appeals for the Seventh Circuit in the Blue Ribbon case. The court said (7 F. (2d) 308):

"* * * the degree or exclusiveness of appropriation accorded to the originator of a trade-name often varies with the kind of name he originates. If the name or mark be truly arbitrary, strange and fanciful, it is more specially and peculiarly significant and suggestive of one man's goods, than when it is frequently used by many and in many differing kinds of business. Of this 'Kodak' is a famous example, and the English courts have prevented one

from putting forth Kodak bicycles, at the suit of the originator of the name for a totally different article. *Eastman* v. *Kodak Cycle Co.*, 15 R. P. C. 105; cf. re Dunn's Trade-Mark, 7 R. P. C. 311, and *Dunlop* v. *Dunlop*, 16 R. P. C. 12. In this court the same influence is seen in *Aunt Jemima Mills Co.* v. *Rigney*, 247 F. 407 . . ., where the above line of cases is quoted and relied on.

"The phrase 'Gold Medal' is distinctly not in the same class of original, arbitrary or fanciful words as 'Kodak' and 'Aunt Jemima.' . . . It is exactly like the phrase 'Blue Ribbon,' and has been as extensively and variously applied."

Then follows a sentence of peculiar interest in the instant case because the first half of it is so specially applicable to the conditions here:

"One who devises a new, strange, 'catching' word to describe his wares may and often has by timely suit prevented others from taking his word or set of words to gild the repute of even wholly different goods (cases, *supra*); but one who takes a phrase which is the commonplace of self-praise like 'Blue Ribbon' or 'Gold Medal' must be content with that special field which he labels with so undistinctive a name" (7 F. (2d) 306).

Testimony of Defendant's Witness, Mr. Newton, Former Commissioner of Patents, Shows That Many Words Are Commonly Used As Trade-Marks, But That the Word "Beech-Nut" Is Not In Common Use.

One of the witnesses for defendant in the suit at bar was Mr. James T. Newton (R. Vol. V, p. 2518). Mr. Newton was Examiner of Trade-Marks in the Patent Office for seven or eight years, afterwards Assistant Commissioner of Patents, then Commissioner of Patents, and now engaged in the practice of patent and trade-mark law. As a result of a search of the Patent Office records Mr. Newton produced lists showing instances in

which various words had been registered many times for different products by different registrants, and also produced three bound volumes of copies of the Patent Office registration certificates referred to in the lists. The lists (Defendant's Exhibit No. 30) are reproduced at page 2924 of Volume VI of the Record. The bound volumes of registration certificates are Defendant's Exhibits Nos. 31, 32 and 33. The lists showing numerous registrations of the same word by different parties relate to those commonly used and suggestive words referred to by the courts in the cases above discussed as being entitled to only narrow protection, the words shown by Mr. Newton to have been registered by a large number of different registrants being Climax, Red Cross, Eureka, Camel, Omega, Rainbow, Tuxedo, Velvet, Rex, Navy, Army and Navy, Blue Ribbon, Clipper, Horse Shoe, Liberty Bell, Liberty and some others which have been registered a lesser number of times than those named. The only significant thing about Mr. Newton's lists is the fact that the word "Beech-Nut" is not among the words that have been registered for a large number of different people. Mr. Newton was qualified to, and doubtless did, make a very reliable search of the Patent Office registrations, and we may safely take the fact that he did not find the word "Beech-Nut" in general use as a trade-mark by others than the Beech-Nut Company to establish the fact that it is not in such general use. We know of only a few instances in which others have attempted to use it. The suit at bar is the first instance in which the Beech-Nut Packing Company has been compelled to resort to litigation on the subject.

The word "Beech-Nut" is absolutely arbitrary, having no descriptive or other significance or suggestiveness in connection with the products on which it is used, and it has not been used except to an insignificant extent by others than the parties to this suit. The word "Beech-

Nut" is a word of the precise character defined by the courts in the cases above discussed as being entitled to broad protection in its use by the one who first adopted it and by whom it was popularized and given wide significance as an identification of his products.

ERROR OF THE COURT BELOW IN DISREGARDING CONCLUSIVE PROOF OF UNIVERSAL DECEPTION OF THE PUBLIC BY THE LORILLARD COMPANY'S USE OF THE BEECH-NUT TRADE-MARK, AND CONSIDERING ONLY TESTIMONY REGARDING MATTERS NOT OF DETERMINATIVE IMPORTANCE.

We know of no adjudicated case in which deception of ultimate purchasers has been proved to anything even approaching the extent of the deception that has been proved in the suit at bar. The evidence analyzed in Part IV of the Statement of the Case, *ante*, page 75, and quoted in Appendices A to E (App., pp. 1 to 90), can leave no possible doubt that the Lorillard Company's use of the Beech-Nut trade-mark has been universally deceptive. Yet the only mention of the evidence on this point that appears in the opinion of the court below is its statement that "It appears that some people have thought that the plaintiff was putting out the 'Beech-Nut' scrap tobacco and cigarettes and wrote, inquiring about it." (R. Vol. V, p. 2698). The court makes no mention whatever of the universal deception of the public that has been so abundantly proved.

ERROR OF COURT BELOW IN FINDING THAT THE LORILLARD COMPANY DID NOT TRY "TO PALM OFF ITS PRODUCTS AS THOSE OF THE PLAINTIFF."

In another part of the opinion (R. Vol. V, p. 2702) the court said of the defendant: "It has not tried to palm off its products as those of the plaintiff," and further down in the same paragraph the court said: "The plain-

tiff's evidence on this subject consisted of indefinite and unauthorized statements of unidentified persons alleged to be defendant's salesmen." Convincing evidence that the Lorillard Company did try "to palm off its products as those of the plaintiff" is the voluminous evidence of deception of the public resulting from the fact that the Lorillard Company made and used an essentially exact copy of the Beech-Nut trade-mark. The court below completely disregarded this evidence and confined its comment on the evidence to the remarks quoted above relating exclusively to those who wrote letters and to the testimony of a half-dozen retail dealers who testified that salesmen of Beech-Nut tobacco and cigarettes had, by innuendo or direct statement, conveyed to them the idea that the Beech-Nut tobacco and cigarettes were products of the Beech-Nut Packing Company, or of the company which puts out the extensive line of Beech-Nut products. All of the testimony concerning the letters referred to and the testimony of this half-dozen witnesses might be expunged from the case without in the slightest degree impairing the sufficiency of the proof of deception of the public resulting from the Lorillard Company's use of the Beech-Nut trade-mark. Its only tendency is to show that the offense was aggravated far beyond the extent necessary to invoke the protection of the law. Universal deception of the public is proved by direct evidence.

Furthermore, the Lorillard Company having put the means of deception into the hands of salesmen is conclusively presumed to have intended the fraud thereby made possible and encouraged. As stated by Mr. Justice Holmes, when justice of the Supreme Judicial Court of Massachusetts, in *New England Awl & Needle Co.* v. *Marlborough Awl & Needle Co.*, 168 Mass. 154, 155; 46 N. E. 386:

"It has been found that defendant did not

> intend to deceive the public by passing off their goods for the plaintiff's, but this must be taken pretty strictly. They knew that they were putting the power to do so into the retail dealers' hands. It hardly can be doubted that they contemplated that the wholesale dealer at whose request they put up their awls in this form, with full knowledge of the plaintiff's prior use, would or might try to deceive the public, and whether they did or not is immaterial."

The Lorillard Company knew from the very beginning of its use of the Beech-Nut trade-mark in 1915 that the public was being deceived and believed that the tobacco was the product of the Beech-Nut Packing Company. In its letters to the Lorillard Company dated July 2, 1915, September 2, 1915, and September 20, 1915, the Beech-Nut Company informed the Lorillard Company of its certain knowledge that the public was being deceived, and gave the names and addresses of dealers who had written to the Beech-Nut Company about the Beech-Nut tobacco—one inquiring about the price and another ordering a shipment of five cases of Beech-Nut scrap tobacco (R. Vol. VI, pp. 2891, 2896, 2901). The deception of dealers is particularly significant as the business contacts of a dealer place him in a better position to get correct information than a retail purchaser, and the dealers' transactions are on a larger scale than those of the retail purchaser and naturally make him more careful and observing than the purchaser of a five or ten-cent package of tobacco.

NO CAUTIONS TO LORILLARD SALESMEN.

And when the Beech-Nut cigarettes were first placed on the market Mr. Belt, the vice-president of the Lorillard Company who was in charge of the company's cigarette business knew that the cigarettes were being ac-

cepted by the public as a product of the Beech-Nut Packing Company (R. Vol. V, pp. 2618 to 2622). The Lorillard Company never issued any instructions to its salesmen to take any precautions to prevent or correct such deception, as shown by the testimony of nine of the salesmen who took part actively in the introduction of the Beech-Nut cigarette.*

Moreover, the Lorillard Company offered special cash inducements which had the effect of increasing the probability of the deception being aggravated by direct misrepresentations and implications.

Plaintiff's Exhibit No. 12-A, B, and C (reproduced in Rec. Vol. VI, pp. 2714-2719) consists of circulars distributed by the Lorillard Company to its customers, that is, the jobbers and wholesalers, advising them that the Lorillard Company would pay to the salesmen selling Beech-Nut cigarettes a cash premium for all sales within a given period. The effect of the offer of these cash premiums was, of course, to create a tendency on the part of the salesmen to make every possible effort to dispose of as large a quantity of Beech-Nut cigarettes as possible, this, of course, being the purpose of the Lorillard Company, and under the stress of the motive thus created there was every inducement for the salesmen to utilize every possible means at their command to increase their sales. That the result of this policy was to induce many

---

* *W. Goldstein*, Transcript, Vol. II, p. 1378, X-Qs. 223-5, p. 1394, X-Qs. 299-302, p. 1413, R-X Qs. 409-410.
M. J. Schimmel, Transcript, Vol. II, p. 1451, X-Qs. 41-3.
A. Marks, Transcript, Vol. II, p. 1495, X-Qs. 177-181.
F. Hopewell, Transcript, Vol. II, p. 1515, X-Qs. 118-120.
W. H. Brown, Transcript, Vol. II, p. 1608, X-Qs. 130-4, pp. 1609-1611, X-Qs. 138-149, pp. 1617-1618, X-Qs. 189-194.
J. Gay, Jr., Transcript, Vol. II, pp. 1632-1633, X-Qs. 98-103.
F. C. Degan, Transcript, Vol. II, p. 1643, X-Qs. 69-70.
W. H. Norton, Transcript, Vol. III, p. 2004, X-Qs. 42-51.
J. Bacow, Transcript, Vol. III, p. 2020, X-Qs. 40-44, 47-8.

of the salesmen to overstep the bounds of truth in promoting sales of Beech-Nut cigarettes to their customers is evident from the instances of misrepresentation of which plaintiff has been able to learn and which are described in the testimony quoted in Appendix H (App., pp. 101-112). It was obviously the purpose of the Lorillard Company to take advantage of every means at the command of the salesmen without imposing any restriction calculated to hold them within the bounds of business honor. The circulars contain no caution regarding the use to be made of the Beech-Nut name in selling the cigarettes, and the district managers had no written instructions, nor issued any, in regard to avoiding the giving of wrong impressions in their use of the word "Beech-Nut" and their presentation of the Beech-Nut tobacco and cigarette packages (*ante*, p. 157).

That this deception was not objectionable to the Lorillard Company is shown by the fact that when Mr. Belt was asked whether the Lorillard salesmen were instructed to take special precautions to make it clear that the cigarettes were not made by the Beech-Nut Packing Company he replied: ". . . . As far as taking any special precautions we did not take any, except that when a man said 'Is that made by the Beech-Nut Packing Company,' we said 'No, it is made by P. Lorillard.' We did not wish him to deceive himself. . . ." (R. Vol. V, bottom of page 2619.) But even if, contrary to the fact, the Lorillard Company had instructed its salesmen not to make oral misrepresentations and to avoid and correct deception of the public, that would not have purged the Lorillard Company of the fraud inherent in the act of putting the deceptively marked goods into the hands of its salesmen, who, in turn, sold the goods to retailers.

As stated by Judge Lacombe for the Second Circuit

Court of Appeals in *Enterprise Mfg. Co.* v. *Landers, Frary & Clark*, 131 Fed. 240, 241:

> "It is elementary law that, when the simulation of well-known and distinctive features is so close, the court will assume that defendants intended the result they have accomplished, and will find an intent to appropriate the trade of their competitor, even though in their instructions to their own selling agents, they may caution against oral misrepresentations as to the manufacture of the goods."

THE TESTIMONY FAIRLY SHOWS EXPRESS MISREPRESENTATION BY LORILLARD SALESMEN.

As a matter of fact, even upon this non-essential point as to whether the testimony shows satisfactorily that salesmen of Lorillard Beech-Nut tobacco and cigarettes made express misrepresentations by word of mouth, we believe that the court below was in error. In order to avoid interruption of the continuity of this discussion we present our complete analysis of the testimony on this point in Appendix H (App., p. 101). The witnesses gave the names of two of the salesmen who, they say, represented the Lorillard tobacco products to be products of the Beech-Nut Packing Company. One of the witnesses, Jefferson D. Hayden, a grocer of Columbia, S. C., produced a receipt given him by the salesman for payment for Beech-Nut Scrap tobacco. This receipt is on a printed form of the P. Lorillard Company, bearing in rubber-stamp print the name "E. L. Larson" as salesman, and bearing also the signature of E. L. Larson in acknowledgment of the receipt of payment for one dozen packages of Beech-Nut tobacco. (A reproduction of the receipt, Plaintiff's Exhibit No. 14, appears at page 2764 of Vol. VI of the Record.) Mr. Hayden testified at some length regarding his interview with the salesman, as appears in Appendix H, pages 105-109, and it ap-

pears that the salesman participated in the deception rather by innuendo and refraining from correcting Mr. Hayden's erroneous impression than by making flat statements. In one of his answers Mr. Hayden describes the interview as follows:

> "He came in and introduced himself as Mr. Larson, selling Beech-Nut tobacco and from the appearance of the package it looked the same as the other Beech-Nut products, and he told me the Beech-Nut was a good seller, and I told him I had been selling the other products all along, and I thought it would be a good seller, and I would try a small quantity of it . . ." (Appendix H, p. 106; R. Vol. I, p. 757, Q. 28.)

Larson made no explanation and left Hayden under the impression that he was buying goods produced by the Beech-Nut Packing Company. Hayden testified (Qs. 42, 43) that he did not know what the P. Lorillard Company was, whose name was at the top of the receipt given him, and that it meant nothing to him; also (X-Qs. 88-90) that if he had noticed the name P. Lorillard on the receipt he would not have known whether it was the manufacturer or the jobber.

George B. Roach, a grocer, stated that a salesman selling Beech-Nut tobacco gave him the impression that it was a product of the Beech-Nut Packing Company. He stated his reason for this impression as follows:

> "Well, because he [the salesman] said in the conversation that I knew the Beech-Nut trade-mark and knew what it stood for—anything put out under the Beech-Nut trade-mark had to be the highest quality." (Appendix H, p. 102; R. Vol. I, pp. 665-666.)

Mr. Roach said the salesman's name was Bacon (R. Vol. I, p 667, Q. 37; Appendix H, p. 103).

The other witnesses referred to in Appendix H (App., p. 101), did not ascertain the names of the salesmen

who gave them false impressions of the origin of the Beech-Nut tobacco products.

But the fact remains that two reputable witnesses gave the names of two Lorillard salesmen who deceived them by innuendo so pointed as to be difficultly distinguishable from direct statement. The Lorillard Company did not produce these salesmen to deny or explain the testimony of these witnesses, and did not show that it could not produce the salesmen as witnesses, or make any explanation of why they were not produced. The court below refers to our evidence on this point as "indefinite and unauthorized statements of unidentified persons alleged to be defendant's salesmen" (R. Vol. V, p. 2702). The court below does not enlighten us as to what better evidence could possibly be produced of Larson's identity and authority than Hayden's testimony and the printed receipt form of the Lorillard Company bearing Larson's name printed thereon as salesman, and bearing Larson's signature in acknowledgment of payment for Beech-Nut cigarettes. And the salesman, Bacon, was named by the witness Roach. The Lorillard Company must have a record of the names of its employees and must be able to reach them or account for not doing so. Though rebuttal was within the power of the Lorillard Company it stood silent. In a parallel situation in an unfair competition case Judge Coxe said:

> "No excuse, which the court can consider, is given for the failure to contradict this inculpating evidence, and, of course, the presumption is that had the witness been called he would have been unable to deny its truth." (*Hostetter Co.* v. *Conron,* 111 Fed. 737, 738.)

In view of the foregoing we believe we are justified in our contention that the court below was in error in disregarding the abundance of direct evidence which estab-

lishes deception of the public beyond a reasonable doubt, and in confining its attention to and drawing an erroneous conclusion from the testimony of a half dozen witnesses upon a point not necessary to the determination of the case, namely whether Lorillard salesmen orally misrepresented the facts. The matter has importance before this court by way of showing the insufficiency of the foundation upon which the decision of the court below rests.

ERRONEOUS FINDING OF COURT BELOW REGARDING THE RESEMBLANCE BETWEEN BEECH-NUT LABELS USED BY THE LORILLARD COMPANY AND BY THE BEECH-NUT PACKING COMPANY.

In the following statement quoted from the opinion below we find a clear explanation of the court's reason for ignoring the proved fact that the Lorillard Company has deceived the entire purchasing public by its use of the Beech-Nut trade-mark. The following is from the court's opinion (R. Vol. V, p. 2702):

> "The difference between their labels is so great and distinct that any purchaser paying ordinary attention need not and should not be mistaken and certainly not deceived."

Now, inasmuch as the evidence proves beyond the possibility of doubt that all purchasers of Beech-Nut tobacco and cigarettes were deceived, the court's statement is in effect that none of them paid "ordinary attention" to the appearance of the goods which he bought, and that the Lorillard Company is, therefore, not accountable or responsible for the deception which has occurred. It seems elementary, both as a matter of law and as a question of usage of the English language, that "ordinary attention" is precisely that degree of attention which is exercised by purchasers, and in this case they

have testified unanimously that in making purchases in their customary way they were deceived. But, notwithstanding the plain meaning of the expression and the judicial definitions thereof, the court below has decided that "ordinary attention" is not that degree of attention which is exercised by ordinary people when making purchases in their ordinary way, but is a degree of attention to be determined by the court with rigid exclusion of all enlightening evidence. This is not in accord with the cases from which we quote on pages 165-169, *post*.

As before stated, the court below was in error not only in setting aside the proved fact of universal deception and substituting therefor its judgment contrary to the evidence, but the court below was further in error even in its consideration of the trade-marks of the parties unaided by the evidence of actual deception. Assuming, as the court below did in effect, that proof of actual deception should be excluded and that this case may and should be decided upon a bare comparison of the trade-marks of the parties, there can be no doubt that the court was in error in its finding that "the difference between their labels is so great and distinct that any purchaser paying ordinary attention need not and should not be mistaken and certainly not deceived" (R. Vol. V, p. 2702). The Lorillard Beech-Nut trade-mark on the side of the scrap tobacco package bearing the words "Extra Picked" and the Beech-Nut Packing Company's trade-mark (*ante*, p. 73) both have the word "Beech-Nut" as their most conspicuous element. The word is hyphenated, printed in similar type and upon a curved line in both trade-marks. In both trade-marks the word Beech-Nut is surrounded by an oval border, to the upper curve of which the word "Beech-Nut" is adjacent and conforms in curvature. In both a picture of a beech-nut cluster occupies the center of the

oval beneath the printed word "Beech-Nut." Printed matter appears at the right and left of the beech-nut cluster within the oval, upon the Lorillard label the printed words being "Established" at the left, and "1760" at the right, and upon the Beech-Nut Company's label the word "Trade" appearing at the left, and the word "Mark" at the right. Though the words are different, their position, style of type, proportionate size and general effect upon the collective appearance of the trade-marks are the same. The word "Beech-Nut" is printed in a similar shade of blue upon both labels, as also are the oval borders surrounding that word and the beech-nut cluster, and in both cases the trade-mark is surrounded by red. Even in the precise shades of color of the different parts of the design the Lorillard Company has closely followed the Beech-Nut Company's trade-mark. The label upon the opposite side of the Lorillard scrap tobacco package and the label upon the Lorillard cigarettes differ slightly from that above referred to but in all of them there is the hyphenated word "Beech-Nut" printed on a curved line in type like that used by the Beech-Nut Company, surrounded by an oval border, with a picture of a beech-nut cluster in the center of the oval beneath the word "Beech-Nut." The prominent elements are identical. The variations in detail are subordinate—such as to impress even a critical and analytical observer as nothing more than minor variations in the same identical design, and well calculated to escape notice altogether when the marks are not placed side by side for comparison.

THE LAW ON THE DEGREE OF RESEMBLANCE BETWEEN TRADE-MARKS NECESSARY TO CONSTITUTE INFRINGEMENT.

Following are quotations from cases in which, in the absence of direct proof of deception, the courts have been compelled to rely on comparison of the trade-marks, labels or other identifying characteristics used by the parties for the purpose of determining whether deception and confusion would be likely to result. We know of no case other than the one at bar in which the court has substituted its opinion that the public "should not be mistaken and certainly not deceived" for the proved fact that the entire purchasing public was deceived.

> "It is a simple matter, upon comparison of the two trade-mark wrappers, to observe dissimilarities, but that is not the test of infringement. The purchaser has not the advantage of comparison. We observed in *Pillsbury* v. *Flour Mills Co.*, 24 U. S. App. 395, 407, 12 C. C. A., 432, 438, and 64 Fed. 841, 847:
>
> > "'A specific article of approved excellence comes to be known by certain catchwords easily retained in memory, or by a certain picture which the eye readily recognizes. The purchaser is required only to use that care which persons ordinarily exercise under like circumstances. He is not bound to study or reflect. He acts upon the moment. He is without the opportunity of comparison. It is only when the difference is so gross that no sensible man acting on the instant would be deceived that it can be said that the purchaser ought not to be protected from imposition. . . . the imitation need only be slight, if it attaches to what is most salient; for the usual inattention of a purchaser renders a good-will precarious, if exposed to imposition.'"
>
> (*Stuart* v. *F. G. Stewart Co.*, C. C. A., 7th Circuit, opinion by Judge Jenkins, 91 Fed. 243, 245.)

"He sees a speedometer, a lamp, a clock, or some other of the numerous motor car attachments, which is pleasing to the eye, and, having ascertained the name of its maker, resolves to have it on his car. If the general appearance be the same, he does not examine further, and is entirely satisfied that the device he buys is what he intended to buy. This is true of the careless, credulous, and ignorant purchasers, who are certainly as numerous in this as in any other field of business, and depend largely upon the statements of local dealers and the chauffeurs who drive their cars.

"An expert and probably a great majority of automobile purchasers could not be deceived into taking the defendant's lamp, in evidence, for the Rushmore lamp, but the ignorant or careless purchaser looking to general effect, and not to what seems to him to be inconsequential details, would, very likely, be misled. Such simulations place in the hands of dishonest dealers and agents the materials for misleading and cheating the public. It is unnecessary to dwell on these considerations as they have been stated many times by this court and need not be repeated. When it appears that a competitor has unnecessarily and knowingly imitated his rival's goods in non-functional features, a court of equity is justified in interfering." (*Rushmore* v. *Badger Brass Mfg. Co.*, C. C. A., 2nd Circuit; *per curiam*, Judges Coxe, Ward and Noyes, 198 Fed. 379, 380.)

"It is not necessary to constitute an infringement that every word of a trade-mark should be appropriated. It is sufficient that enough be taken to deceive the public in the purchase of a protected article." (*Saxlehner* v. *Eisner & Mendelson Co.*, opinion by Mr. Justice Brown, 179 U. S. 19, 33.)

"What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do, in that regard, is to say that no trader can adopt a trade-mark, so resembling that of another trader, as that ordinary purchasers, buying with ordinary caution, are likely to be misled."

(*McLean* v. *Fleming*, opinion by Mr. Justice Clifford, 96 U. S. 245, 251.)

"It is argued, and it is true, that the differences are apparent to any one who will read and examine the labels, but that argument does not meet the question which this case presents: Are the resemblances between the two labels such that the consumer is likely to be misled? We have no hesitation in saying that they are, and that the variations are wholly insufficient to avoid the charge of infringement, or create a doubt that the label of the appellant was copied from that of the appellee, and was made in close imitation of all its salient features. A consumer who has been accustomed to purchase an article in a dress or a package which has become familiar to him does not stop to read and examine. Many of the consumers of beer are unable to read, and many are foreigners, and unacquainted with the English language. All consumers, whether able to read or not, are in fact guided by the general appearance of the package or label which is before them. The general appearance of the beer bottles, carrying these two respective labels, is strikingly similar. No argument can add force to the conviction which is produced by the mere sight of them." (*Kostering* v. *Seattle Brewing & Malting Co.*, C. C. A., 9th Circuit, opinion by Judge Gilbert, 116 Fed. 620, 621.)

"Now, to one scanning the detailed description of these two Dutch scenes, or laying the pictures side by side, there could be no trouble in distinguishing the one from the other. But this is not the test. Will confusion result to the purchasing public by the use of the two not brought into direct or special comparison? Would the ordinary customer applying at the counter for 'Old Style Lager,' observing the care customary with purchasers in that way, be likely to be deceived or misled into buying 'Old German Lager,' if it was offered him marked with defendant's label? We are impressed that he would.

"A simulation of the most prominent and distinctive features of the complainant's label is found in the defendant's label. The inn is there, with the

legend in slightly different wording suspended from a scroll; the representation of men drinking at a table outside of the inn is there; the barrels or casks in the subway are there; the monks drinking at a table at or near the casks are there; and the coopering of a barrel is there. In short the 'ensemble' is there, and that, says the court in *Cantrell & Cochrane* v. *Butler,* 124 Fed. 290, does the mischief. And quoting again: 'The usual purchaser neither abstracts nor analyzes for the purpose of differentiation and judgment.'" (*G. Heilman Brewing Co.* v. *Independent Brewing Co.,* C. C. A., 9th Circuit, opinion by Judge Wolverton, 191 Fed. 489, 497.) (The opinion in this case contains many quotations from U. S. cases to the same effect as the foregoing.)

"The test is not whether, when goods are placed side by side, a difference can be recognized in the labels or marks; but the test is, when such goods are not placed side by side, would an ordinarily prudent purchaser be liable to purchase the one, believing that he was purchasing the other." (*McDonald & Morrison Mfg. Co.* v. *Mueller Mfg. Co.,* C. C. A., 8th Circuit, opinion by Judge Smith McPherson, 183 Fed. 972, 974.)

"It may be that the cautious and discriminating purchaser is not likely to be so misled; but the protection accorded to a trade-mark is not limited to the cautious and discriminating customer, but embraces the 'ordinary' or 'unwary' purchaser as well." (*DeVoe Snuff Co.* v. *Wolff,* C. C. A., 6th Circuit, opinion by Judge Knappen, 206 Fed. 420, 423-424.)

"While there is an almost ostentatious display of variation in matters not likely to attract the attention of the casual purchaser, there is a substantial similarity in the picture to which the eye has become accustomed. In this connection, we must not lose sight of the character of the article, the use to which it is put, the kind of people who ask for it, and the manner in which it is ordered. Very broad scene painting will deceive an ignorant, thoughtless or

credulous domestic, looking for an article in common and daily use, and of no particular interest to her personally. The same kind of deception would be instantly detected by an intelligent woman of the world, looking for her favorite perfume, soap or dentifrice, or by a man of luxurious tastes inquiring for some special brand of champagne." (*Morgan's Sons* v. *Troxell,* 23 Hun. N. Y. 632, 636.)

ERROR OF THE COURT BELOW IN ITS ASSUMPTION THAT THE LORILLARD COMPANY HAD NO MOTIVE TO APPROPRIATE THE GOOD-WILL OF THE BEECH-NUT COMPANY, AND THAT THE MAGNITUDE OF THE LORILLARD BUSINESS JUSTIFIED ITS APPROPRIATION OF THE BEECH-NUT TRADE-MARK AND ELIMINATED THE ELEMENT OF DAMAGE THEREFROM.

The court below states in its opinion (R. Vol. V, bottom of p. 2701 and top of p. 2702) that it is satisfied that defendant has not injured plaintiff in the suit at bar "within the principles" announced in *Aunt Jemima Mills Co.* v. *Rigney et al.,* 247 Fed. 407, and *Vogue Co.* v. *Thompson-Hudson Co., et al.,* 300 Fed. 509, 512. Our discussion of these cases, *post,* pp. 192, 201, shows that there is absolutely no distinction in principle between them and the case at bar. The court below makes no attempt to show any distinction unless it so intends its statement (top of p. 2702, R. Vol. V) that "it would not have been profitable" for the Lorillard Company to palm off its goods as products of the Beech-Nut Packing Company and its references in various parts of the opinion to the magnitude and assumed antiquity of the Lorillard Company.

We know of no theory upon which the wealth and extensive business of the Lorillard Company could have any bearing upon the legal or moral aspect of the case, excepting by way of aggravation of the wrong. We refer to the subject only because of the prominence given it by the Court of Appeals in its opinion, where (R. Vol. V, p. 2696) it refers to the retail value of the Lorillard Company's

output in 1919 being $80,000,000, and (R. Vol. V, p. 2698) to its sales of Beech-Nut tobacco in that year amounting to $14,650,865.63, and (R. Vol. V, p. 2704) to the Lorillard Company as one of the "great tobacco companies of the country," and (R. Vol. V, p. 2696) to "the small beginning of Pierre Lorillard in 1760," and (R. Vol. V, p. 2704) to "a Lorillard reputation stretching back into three centuries." As a matter of fact it is much less than two centuries since 1760, and it is also a matter of fact that the present P. Lorillard Company is "a new corporation called P. Lorillard Company" formed in the year 1911 by order of the Circuit Court for the Southern District of New York to receive part of the assets of the dissolved American Tobacco Company (decree of the Circuit Court, 191 Fed., p. 423, and *ante*, p. 46). Though the Court of Appeals dwells upon the assumed antiquity and the wealth of the Lorillard Company, this whole matter is aside from any point involved in this case. No amount of inference based upon the wealth of the Lorillard Company, its assumed antiquity, and the magnitude of its business can displace or nullify the proved fact that its use of the Beech-Nut trade-mark has caused universal deception of the public.

There is nothing obscure or difficult to understand in the fact that the Lorillard Company's use of the Beech-Nut trade-mark has deceived purchasers. The testimony quoted upon pages 83 to 86, *ante*, and in Appendices D and E (App., pp. 75 and 89) shows conclusively that the ultimate consumers practically never notice or have any knowledge of the names of the manufacturers of cigars, cigarettes or chewing or smoking tobacco, and invariably identify these products by their trade-mark or brand names, and that the name Lorillard is absolutely unknown to large classes of people including many retail dealers.

By adopting the Beech-Nut Packing Company's Beech-Nut trade-mark for its new tobacco mixture in 1915 the Lorillard Company was enabled to attain instant sales on a large scale to consumers who believed they were buying a tobacco put out by the producers of the widely and favorably known line of Beech-Nut products with which they long had been familiar. But for the prestige of the Beech-Nut Packing Company's Beech-Nut trade-mark the Lorillard Company would have encountered the long delay and uncertainty of success which attends the exploitation of a new and unknown commodity. But as a supposed part of the Beech-Nut line of goods the new tobacco mixture had the immediate benefit of the public impression that it was a tobacco of the highest quality and of the same standard of purity and excellence as the other Beech-Nut products.

Though the Lorillard Company offered in evidence voluminous and minutely detailed financial statements showing the extent of its business in Beech-Nut scrap tobacco and in other tobacco brands totally unrelated to any issue of this case, neither the Lorillard Company in its briefs and arguments nor the courts below in their opinions explained how or why the magnitude of the Lorillard Company's use of the Beech-Nut trade-mark or of its other business had any tendency to show a legal or moral right to use the name Beech-Nut. Obviously the court below did not proceed upon the theory that fraudulent appropriation of a trade-mark may be morally and legally justified by a sufficiently extensive and successful use of the misappropriated mark. Elimination of this theory, however, compels us to look elsewhere than in the opinions of the courts below for an explanation of the weight which they quite evidently attached to the wealth and assumed antiquity of the

Lorillard Company and to the large dimensions to which the Lorillard Beech-Nut tobacco business has grown.

An examination of the history of the Lorillard Company's use of the Beech-Nut trade-mark shows the complete absence of any reason for giving any effect to the magnitude of its business that would not apply with equal force to every trade-mark infringer who has built up a large business in the goods on which he uses the mark to which he is not entitled. As fully set forth in the preceding part of this brief (*ante*, p. 51) the Lorillard Company, prior to the year 1915, had found that the sales of the old brands of chewing tobacco were diminishing on account of the fact that tobacco chewers were becoming dissatisfied with the flavor of the old mixtures. Mr. Ball, vice-president of the Lorillard Company, thought that a sweeter mixture would suit the public better, and he had a new and sweeter mixture prepared for the purpose of using it in an attempt to recapture the lost trade. Having prepared this new mixture, and being hopeful that it would suit the public taste, the Lorillard Company was confronted with the problem of attracting the attention of the public to the new product. However good the mixture might be, and however agreeable its taste, no successful business could be built up without attracting the attention of millions of purchasers. It was only by reaching immense numbers of consumers that a profitable business could be established in a commodity selling at five or ten cents a package. As shown herein at pages 81 to 87, *ante*, and in Appendix D, App., page 75, tobacco products are identified by the consumers solely by the brand names. The names of the manufacturers play no part in the identification of chewing tobacco, smoking tobacco, cigars and cigarettes,

—a fact so well recognized that, as hereinbefore set forth, *ante*, pages 81 to 87, the Lorillard Company does not put its name or even the word "Lorillard" on many of its most important brands.

If in 1915 the Lorillard Company had put its new chewing tobacco mixture on the market under a new brand name or trade-mark, or with simply the word "Lorillard" on the package, the new product would have been a complete stranger to the consuming public, and, whatever its merits, popularity could have been attained only as the result of trial of the new mixture by such consumers as were willing to try a new and unknown tobacco in place of the brand to which they were accustomed. It is, of course, conceivable and possible that success might eventually have been attained by following this honest procedure, but this is not the procedure that was followed. The Lorillard Company, alarmed by the diminishing sales of its old brands, was not content with the slow and honest road to the notice of the millions of consumers whom it was necessary to reach. To put their new mixture on the market for what it was—a new and untried product—meant delay and possible failure. Obviously the new tobacco would reach the consumer much more quickly and surely if it could be put before the public as an addition to an extensive line of products which had been favorably known throughout the country for many years, and the advantage would be especially great if the old and favorably known line of commodities was displayed and sold by the same dealers who would be called upon to display and sell the new tobacco mixture. The Lorillard Company was actuated by its knowledge of these obvious facts in its adoption of the Beech-Nut trade-mark for its new scrap tobacco. There was no more possibility of innocent accident in its adoption of an

essentially exact copy of the Beech-Nut trade-mark than there is in the circumstance of a man's copying another man's signature upon a bank check. The appropriation of the good-will of the Beech-Nut Packing Company was premeditated, carefully planned and unscrupulously executed.

As shown at page 24, *ante*, the reputation of the Beech-Nut line of products is so high that every new product put out under the Beech-Nut trade-mark is immediately ordered by the jobbers and wholesalers, and immediately expected by the public to be a commodity of high quality. That the Lorillard Company profited immediately and greatly by its appropriation of the Beech-Nut Company's trade-mark is shown by the immense sales of the Beech-Nut Scrap Tobacco during the first eleven months that it was on the market. The Beech-Nut Scrap Tobacco was first marketed in February, 1915, and during the following eleven months of the year 1915 the sales amounted to over seven million pounds—7,377,778 pounds (R. Vol. VI, p. 3028). At the present time the ten-cent package of Beech-Nut tobacco contains two ounces (Ball, R. Vol. V, p. 2573). From an examination of Lorillard Patent Office Exhibit E (R. Vol. VI, pp. 3031 to 3048), consisting of specimen invoices from 1915 to 1919, it appears that the Beech-Nut tobacco was sold in five-cent packages as late as July, 1917, and that ten-cent packages were sold thereafter. Assuming that the early five-cent packages contained as much tobacco as the present ten-cent packages—two ounces—the 7,377,778 pounds sold in the last eleven months of 1915 was put up in eight times that number of packages—sixty million packages. Nothing in this record indicates even a remote possibility of selling a new and strange tobacco mixture to such an enormous

extent in the first eleven months of its existence. The conclusion is irresistible that the Lorillard Company reaped an abundant harvest from its appropriation of the Beech-Nut Packing Company's Beech-Nut trade-mark. That the flavor of the tobacco and the financial strength of the Lorillard Company contributed to the growth of the Beech-Nut tobacco business we do not deny. But we do deny that the financial strength of the Lorillard Company and the magnitude of its business in Beech-Nut chewing tobacco is evidence of anything other than the possession of the resources and skill necessary for the successful exploitation of the fraudulently appropriated Beech-Nut trade-mark.

THE LAW.

Cases Involving the Use of the Same Trade-Mark on Different Commodities.

GENERAL STATEMENT AS TO THE AUTHORITIES.

We have been able to find only one unfair competition or trade-mark case in which this Court's interpretation of the law related to facts involving the use of the same trade-mark or trade-name by different parties upon different kinds of merchandise, and, though the decision in that case was upon other grounds, consideration of the difference between the commodities dealt in by the parties was necessary to the decision, and the opinion contains a statement of the principles of law applicable to the suit at bar. We refer to the case of *American Steel Foundries* v. *Thomas E. Robertson, Commissioner of Patents,* and *Simplex Electric Heating Company,* 269 U. S. 372; which we will refer to as the Simplex case. A comparison of the facts and principles involved in the Simplex

case with those in the suit at bar will, we think, make it apparent that the relief sought by the plaintiff in the instant case is in conformity with the law as defined by this Court, and as applied by the lower courts in the cases hereinafter discussed, which involved parallel facts and were decided before the decision in the Simplex case.

The question of the extent to which a party who has established his right in a trade-mark or trade-name for certain goods may exclude others from using the same mark or name on other goods has been considered and decided in several cases in the courts of England, and the decisions there have been accordant with the principles stated by this court in the Simplex case. These English cases are reviewed and approved by the Court of Appeals for the Second Circuit in *Aunt Jemima Mills Company* v. *Rigney & Co.* (247 Fed. 407), which case we discuss and quote from (*post*, p. 192). Two of the English cases are also cited by the Court of Appeals for the Sixth Circuit in the opinion in *Peninsular Chemical* v. *Levinson et al.* (247 Fed. 658), which case also we discuss and quote from (*post*, p. 186). The Court of Appeals for the Second Circuit states the substance of several of the English cases in the part of its opinion in the Aunt Jemima case which we quote (*post*, pp. 194-196), and under the title "The English Cases" (*post*, p. 197), we list all of the English cases referred to and make some additional comment on the Kodak case and *Walter* v. *Ashton*.

The question of the extent of the range of different goods included within the protection accorded by the law to the owner of a trade-mark or trade-name has never, we believe, been directly decided by this Court or by the House of Lords in England, though the question has been repeatedly decided by the lower courts of both countries. This fact has been commented on in a very instructive book on the "Historical Foundations of Trade-Mark

Law'"* by Mr. Frank I. Schechter of the New York bar. Upon this point Mr. Schechter says (pages 169-170):

> "There are indications that the question as to the logical and effective basis of the law of trade-marks and unfair competition will have to be decided by the highest courts of both this country and England within the next few years in connection with the problem of the protection which is being sought against the use of infringing marks upon non-competing goods. In 1898 an English Court of Chancery took a radical step in the direction of the protection of symbols of good-will, in holding that the trade-mark 'Kodak' on cameras was infringed by 'Kodak' on bicycles, because 'Kodak cameras are especially available for use on cycles' and 'many shops sell . . . both bicycles and photographic cameras . . .'† Again in 1917 the United States Circuit Court of Appeals for the Second Circuit decided that the trade-mark 'Aunt Jemima's' for flour was infringed by 'Aunt Jemima's' for syrup because 'syrup and flour are both food products, and food products commonly used together.'‡ Within recent months the Circuit Court of Appeals for the Sixth Circuit has held that a trade-mark for a magazine might be infringed by a similar mark on hats, although there was no actual market competition between the products of the plaintiff and the defendants. Explaining the doctrine of unfair competition, Judge Denison said:
>
> "'. . . There is no fetish in the word competition. The invocation of equity rests more vitally upon the unfairness. If B. represents that his

---

* The Historical Foundations of the Law Relating to Trade-Marks, by Frank I. Schechter, A. M., J. D., with Foreword by Munroe Smith, J. U. D., LL. D., J. D., Bryce Professor Emeritus of European Legal History, Columbia University. Published by Columbia University, 1925.

† "*Eastman Photographic Materials Co., Ltd.* v. *John Griffiths Cycle Corporation, Ld.* (1898), 15 Rep. Pat. Cas. 105, 110. *Cf. Walter* v. *Ashton* (1902), 2 Ch. 282." (The English cases mentioned in the foregoing author's note are referred to in this brief at pages 194, 198, 199.)

‡ "*Aunt Jemima Mills Co.* v. *Rigney & Co.* (1917), 247, Fed. 407, 410. But cf. *France Milling Co.* v. *Washburn-Crosby Co.* (U. S. C. C. A., 2nd Cir., April 6, 1925, not yet reported.)" (The France Milling case, 7 F. (2d) 304, referred to in the foregoing author's note, is discussed in this brief at page 219, and the Aunt Jemima case at page 192, *post.*)

goods are made by A. and if damage therefrom to A. is to be seen, we are aware of no consideration which makes it controlling whether this damage to A. will come from market competition with some article which A. is then manufacturing or will come in some other way."*

"Shortly after the filing of the decision just quoted a United States District Court held the use of the trade-mark 'Rolls-Royce' for automobiles to be infringed by the use of the mark upon radio tubes. The court brushed aside all citations of precedents, remarking:

" 'I am more impressed with the broad equities in this matter as it is presented in this individual case than I am perhaps by certain collateral citations. . . . I can't see, even in the citations that have been given that which leads me to determine otherwise than I am minded to determine."†

"The *ratio decidendi* in such cases would appear to be simply a reluctance on the part of the court to permit defendants 'to get the benefit of complainant's reputation or of its advertisement or to forestall the extension of its trade.'‡ It discards entirely the archaic theories of the Middle Ages and of 'gild jurisprudence,' predicated upon the proprietary, regulatory and monopolistic significance of trade symbols and is a salutary, if somewhat belated, recognition of the actual nature and function of the trade-mark under modern conditions of production

---

* "*Vogue Co.* v. *Thompson-Hudson Co.*, 300 Fed. 509, 512." (The case referred to is discussed in this brief at page 201.)

† "*Runyon, D. J., in Rolls-Royce of America, Inc.* v. *Howard Wall, Inc.* (Oct., 1924), 15 T. M. Rep. 12, 13. See, also, contra, the decision of Judge Dickinson (U. S. D. C., E. D. Pa.), in *Rosenberg Brothers and Company* v. *John F. Elliott* (June, 1924), 3 F. (2d) 682, that 'Fashion Park' as a trade-mark on overcoats, coats, vests, trousers and the like kind of clothing, sold to the wholesale trade, was not infringed by 'Fashion Park' on men's hats sold only at retail. Cf. *France Milling Co.* v. *Washburn-Crosby Co.*, — Fed. ——." (*Rolls-Royce* v. *Wall, Rosenberg* v. *Elliott* and the *France Milling* case, referred to in the foregoing author's note, are discussed in this brief at pages 208, 210, 219.)

‡ "*Aunt Jemima Mills Co.* v. *Rigney & Co.*, 247 Fed. at p. 410. For a further discussion of the appropriation of trade symbols by non-competitors, see 25 Columbia Law Review (1925), 199; 23 Michigan Law Review (1925), 433." (The paper in the Columbia Law Review referred to in the foregoing author's note is discussed in this brief at page 270.)

and distribution. Such reasoning, unhampered by medieval preconceptions and present misconceptions, will give adequate protection to both existent and potential good-will, and will prove the most effective means of combating trade-mark pirates who lurk ever watchful on the fringes of the field of trade."

THE SIMPLEX CASE.

In the Simplex case (*American Steel Foundries* v. *Commissioner of Patents and Simplex Electric Heating Company,* 269 U. S. 372) the question decided was whether the previous adoption of the corporate name "Simplex Electric Heating Co." by one of the parties barred the other party, the American Steel Foundries, from registering the word "Simplex" as a trade-mark for certain railway appliances because of the prohibition quoted below from Section 5 of the Trade-Mark Act of February 20, 1905 (33 Stat. L., 725):

> "Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual . . . shall be registered under the terms of this act."

We quote Section 5 in its entirety in Appendix G, (App., p. 95).

Inasmuch as the word "Simplex" is but part of the corporate name of the company which opposed registration of that word, the prohibition of the statute did not apply literally, and the question whether the case came within the intent of the statute was resolved upon the principles of the law of trade-marks and unfair competition. The fact that the parties dealt in different commodities led to the discussion by this Court of points which are involved in the instant case.

Following the statement of the facts and question in-

volved, the opinion, by Mr. Justice Sutherland, continues as follows:

> "The answer to this question will be simplified if we approach it by first considering certain principles of the substantive law of trade-marks and unfair competition, in the light of which the legislation under review must be examined" (*Ibid*, p. 379).

Proceeding with the analysis of the case the Court states that it is not clear from the decisions whether a corporate name has been regarded as a trade-mark or a trade-name, but that "the precise difference is not often material, since the law affords protection against its appropriation in either view upon the same fundamental principles." The law upon the exclusive rights in a corporate name, trade-mark or trade-name is then stated as follows (pp. 380-382):

> "The effect of assuming a corporate name by a corporation under the law of its creation is to exclusively appropriate that name. It is an element of the corporation's existence. *Newby* v. *Oregon Cent. Ry. Cy., et al.*, Deady 609, 616; s. c. 18 Fed. Cases 38, case No. 10,144. And, as Judge Deady said in that case:
>
> > " 'Any act which produces confusion or uncertainty concerning this name is well calculated to injuriously affect the identity and business of a corporation. And as a matter of fact, in some degree at least, the natural and necessary consequence of the wrongful appropriation of a corporate name, is to injure the business and rights of the corporation by destroying or confusing its identity.'
>
> "The general doctrine is that equity not only will enjoin the appropriation and use of a trade-mark or trade-name where it is completely identical with the name of the corporation, but will enjoin such appropriation and use where the resemblance is so close as to be likely to produce confusion as to such identity, to the injury of the corporation to which the name belongs. *Cape May Yacht Club* v. *Cape May*

Yacht & Country Club, 81 N. J. Eq. 454, 458; *Armington & Sons* v. *Palmer,* 21 R. I. 109, 115. . . . Judicial interference will depend upon the facts proved and found in each case. *Hendriks* v. *Montagu,* L. R. 17 Ch. Div. 638, 648; *Higgins Co.* v. *Higgins Soap Co.,* 144 N. Y. 462, 469-471. . . .

"These principles, it must be assumed, were in mind when Congress came to enact the registration statute. And, since that body has been given no power to legislate upon the substantive law of trade-marks, it reasonably may be assumed, also, that, to the extent the contrary does not appear from the statute, the intention was to allow the registration of such marks as that law, and the general law of unfair competition of which it is a part, recognized as legitimate. The House Committee on Patents, in reporting the bill which upon enactment became the registration statute in question, said:

> " 'Section 5 of the proposed bill we believe will permit the registration of all marks which could, under the common law as expounded by the courts, be the subject of a trade-mark and become the exclusive property of the party using the same as his trade-mark. Report No. 3147, Dec. 19, 1904, H. of R., 58th Cong., 3rd Sess.'

"The provision, therefore, that no mark consisting merely in the name of a corporation shall be registered, is to be construed in harmony with those established principles in respect of the appropriation of corporate names to which we have referred. Where the appropriation of the corporate name is complete, the rule of the statute, by its own terms, is absolute and the proposed mark must be denied registration without more. But where less than the whole name has been appropriated, the right of registration will turn upon whether it appears that such partial appropriation is of such character and extent that, under the facts of the particular case, it is calculated to deceive or confuse the public to the injury of the corporation to which the name belongs.

"The fact, for example, that the articles upon which the mark is used are not of the same description as those put out by the corporation, is entitled to weight, since the probability of such confusion and

> injury in that situation obviously is more remote than where the articles are of like kind. The cases, naturally, present varying degrees of difficulty for the application of the rule. Primarily, the power and the duty rests with the Commissioner of Patents to determine the question in each case in the exercise of an instructed judgment upon a consideration of all the pertinent facts" (*Ibid*, pp. 380-382).

We have quoted from the opinion in the Simplex case for the reason that the facts there existing involved the principles of law by which the rights of the parties to the suit at bar must be tested, and because those principles are there brought together in a comprehensive statement fully confirmatory of the law as interpreted and applied in cases in the lower courts which we review later.

In both the Simplex case and the suit at bar the goods dealt in by the parties were specifically different, and in both cases the word constituting the trade-mark was also the salient word in the name of the corporation objecting to the use of the trade-mark by the other party.

In the Simplex opinion this Court, referring to the duty of the Commissioner of Patents as the tribunal of first instance, says that the question in each case must be determined upon a consideration of all the pertinent facts. Upon the facts in the Simplex case this Court decided that it did not appear that the use of the same trade-mark by both parties would probably confuse or deceive the public.

Upon every determinative point the facts in the instant case are the reverse of those in the Simplex case. In the Simplex case there was no proof of deception of the public and no indication of the probability or possibility of such deception. In the instant case there is absolute proof of universal deception of the public and even of retail tobacconists and of others having superior means and reason for obtaining correct informa-

tion including many wholesale dealers. The word "Simplex" has a suggestive significance, is in common use in many lines of business as a trade-name, and when used as a trade-mark or as part of a corporate name does not identify or even indicate any particular business or corporation. The word "Beech-Nut" in its use as a trade-mark or trade-name is absolutely arbitrary and devoid of any significance other than that created by its use in trade; it is not in common use, and when used in trade identifies the Beech-Nut Packing Company and its business, and is universally so understood by the public. It clearly appears from the conclusion of the opinion in the Simplex case that this Court's decision rested upon the absence of that evidence of deception and confusion of the public which is so abundantly present in the suit at bar. In fact, in the next to the last paragraph of the opinion, the Court, after stating that it does not appear that the use of the word "Simplex" by both parties will probably confuse or deceive the public, adds, as its conclusion from this premise, that it follows that the refusal to allow the registration was erroneous.

DISTINCTION BETWEEN TRADE-MARK USE OF COMMONLY USED WORDS HAVING A SUGGESTIVE MEANING AND ARBITRARY WORDS NOT IN COMMON USE.

The word "Simplex" is suggestive of the idea of simplicity and, as stated in the opinion, is commonly used in trade, the subject of over sixty registrations in the Patent Office and used as a part of the names of numerous corporations, which widespread and promiscuous use has divested the word of any significance as a symbol of the identity of any particular business. In the opinion in the Simplex case this Court quotes with approval the following from an opinion of the Commissioner of Pat-

ents in a previous case involving registration of the word "Simplex" as a trade-mark:

> " 'It is a fact that the word "Simplex" has been in such wide and varied use in this country not only as a trade-mark but as part of a firm or corporation name that everybody has heretofore considered something more than the word "Simplex" necessary to identify a corporation. . . .
>
> " '. . . The word "Simplex" does not identify any corporation in particular, for the simple reason that it is equally the name of various corporations. In short, if one referred to "the company Simplex" without anything else, it would not be known to what he was referring. . . .
>
> " 'The word involved in this case is one of a large class of words which have for a great many years been much used because of their peculiarly suggestive meaning. For other examples there are the words "Acme," "Anchor," "Champion," "Eureka," "Excelsior," "Ideal," "Jewel," "Liberty," "National," "Pride," "Premier," "Queen," "Royal," "Star," "Sunlight," "Triumph," "Victor." It would be a serious matter if the law actually permitted any one who chose to do so to organize a series of corporations with names containing these words, respectively, and thereupon virtually withdraw these words from public use as trade-marks and monopolize them by preventing their registry as such.' " (269 U. S. 383-4.)*

The word "Beech-Nut" is a purely arbitrary word in its trade-mark use. It has no inherent significance even by the most remote suggestiveness, and it is not in common use as a trade-mark, nor is it in common use as a trade-name or as part of corporate names. The search made by Ex-Commissioner of Patents Newton, a Lorillard witness, for the express purpose of finding instances of the registration of the same word as a trade-

* The same idea is brought out in the Pabst Blue Ribbon, the Budweiser, the Noxall, and the Gold Medal cases, which we discuss *ante*, pages 147 to 152.

mark by different parties is significant in its failure to disclose such registrations of the word "Beech-Nut" (*ante*, pp. 152-4). The word "Beech-Nut" possesses all of those characteristics which are requisite as a foundation for broad protection, the absence of which characteristics was one of the fundamental reasons for limiting the breadth of protection accorded to the word Simplex. Wherever the word "Beech-Nut" appears upon or in reference to merchandise, it has been universally understood by the purchasing public as signifying that such merchandise is the product of the Beech-Nut Packing Company or of the company, firm or individual that produces the extensive line of Beech-Nut products. In the Simplex case this Court said:

> "There may be, of course, instances where a single word in the corporate name has become so identified with the particular corporation that whenever used it designates to the mind of the public that particular corporation. But here it is not shown that, standing alone, the word 'Simplex' has that effect; . . ." (*Ibid*, p. 383.)

In the case at bar there is proof absolute that the single word "Beech-Nut" has that very significance which the word "Simplex" lacked, that the word "Beech-Nut" means the Beech-Nut Packing Company, or the producer of the extensive line of Beech-Nut commodities and that it has this meaning to people of all classes, to the foreign-born who speak English with difficulty, to men of limited education and experience as well as educated and informed men of affairs whose high positions in business, journalism, professional and official life testify to their high intelligence, *ante*, pp. 75 to 80; 88 to 95; and Appendices A, B and C (App., pp. 1 to 74).

Defendant's contention in the instant case that the law justifies its use of the Beech-Nut trade-mark because the Beech-Nut Packing Company does not deal in tobacco

products ignores all of the fundamental principles of the law of unfair competition as set forth in the Simplex case and many previous cases in the lower courts of this country and England. The very fact that the rights of the parties are analyzed in such cases as the Simplex case and others shows the fallacy of defendant's position in the case at bar. If the fact that both parties do not deal in the same commodities were determinative without anything more, then it would only be necessary for the courts in such cases to ascertain that the commodities were the same or different and render judgment accordingly, and we would be forced to the conclusion that in the many cases, including the Simplex case, which have come up in the past involving different commodities, the courts performed a vast amount of useless labor, instead of simply ascertaining whether the commodities were the same or different and entering judgment on the fact so ascertained.

CASES IN WHICH THE LAW AS STATED IN THE SIMPLEX CASE HAS BEEN APPLIED TO FACTS PARALLEL TO THE FACTS IN THE CASE AT BAR.

THE PENSLAR CASE.

Peninsular Chemical Co. v. *Levinson et al.* (Court of Appeals, 6th Circuit, 1917, Opinion by Judge Denison, 247 Fed. 658).

In this case the plaintiff, Peninsular Chemical Company, used the coined word "Penslar" as a trade-mark for about 175 commodities, including medicines and other goods of the kind ordinarily sold by druggists, and had registered its Penslar trade-mark in the Patent Office. The Peninsular Chemical Company did not deal in cigars or other tobacco products.

Defendant, Samuel Levinson, was a manufacturer of

cigars and had no business connection with plaintiff. He applied a copy of plaintiff's trade-mark to the encircling paper bands and to the boxes of a line of cigars made by him and marketed these cigars as the product of the "Peninsular Cigar Co." Samuel Levinson's brother, S. W. Levinson, was also a party defendant. S. W. Levinson, as agent for his brother, was engaged in the sale of the cigars and represented to Penslar drug stores that defendant's business was connected in some way with plaintiff's business, and that the Penslar cigars were of high quality because plaintiff could not afford to sell a poor cigar. Samuel Levinson disclaimed authorization for these oral misrepresentations. Mr. S. W. Levinson seems to have been somewhat more direct in his methods than the Lorillard Company in the case at bar but the result was the same, and "it is the fraud, not the manner of it, which calls for the interposition of the court," as stated in Lord Macnaughten's words by Judge Morris in commenting upon a similar situation in *Willys-Overland Co.* v. *Akron Overland Tire Co.*, 268 Fed. 151, 153.

The sale of the Levinson's Penslar cigars in the Penslar drug stores which dealt in the goods of the Peninsular Chemical Company finds a parallel in the case at bar, where the evidence shows that tobacco products are almost universally carried by wholesale grocers and jobbers who are the principal distributors to the retail trade of the goods of the Beech-Nut Packing Company, that in many localities retail grocers and delicatessen dealers carry tobacco products, that drug stores carry both tobacco products and Beech-Nut chewing gum and candies, that defendant's scrap tobacco and cigarettes are often displayed upon the shelves and in the windows of these stores side by side with the products of Beech-Nut Packing Company (*ante*, pp. 95 to 98) and that purchasers buy defendant's tobacco products in the belief that the

Beech-Nut Packing Company has extended its business to include tobacco.

The court held that "so far as concerns the registered trade-mark and the jurisdiction and rights which rest solely thereon, plaintiff can have no relief," for the reason that the registration specified the use of the trade-mark only on articles in "class No. 6, chemicals, medicines, and pharmaceutical preparations," in which class cigars are not included "nor can they be said to be of the same descriptive properties as the specified articles."

The court discussed the common-law aspect of the trade-mark as follows:

> "Based upon its common-law trade-mark rights, plaintiff argues that it has adopted the name 'Penslar' for articles commonly sold in drug stores; that cigars are so sold; that, although it has not yet sold cigars, it plans to do so, and that this would be a natural and ordinary development of its business; and that it has, therefore, a right to exclude from the use of the name one who adopts it for the sole purpose of forestalling plaintiff's impending adoption. This argument presents the very interesting question as to how far, if at all, a trade-mark may be pre-empted or reserved in advance of actual use —a question one aspect of which was somewhat considered by this court in *Rectanus* v. *United Drug Co.*, 226 Fed. 545, 553, 141 C. C. A. 301 (now pending in the Supreme Court). Its special color in the present case arises from the commercial practice, not yet, as far as we know, considered in any decided case, where a manufacturer or jobber is in the course of establishing and expanding throughout the country a chain of stores which use a trade name and handle a constantly increasing line of articles sold under that same trade-name.
>
> "We have concluded that this question, as well as the somewhat co-relative argument by defendants that the terms of plaintiff's charter do not permit it to sell cigars, do not require any decision in this case. We also pass without consideration the argument that since plaintiff is not selling cigars, there

is no competition at all between the parties, and so there can be no unfair competition." (247 Fed. 660.)

It is apparent from the foregoing that the court considered the possiblity of common-law trade-mark rights extending beyond the particular goods upon which the owner of the mark had used it. While the court held that the statutory rights conferred by registration did not extend beyond goods of the same class as those for which the mark was registered, it does not appear that the distinction between Sections 16 and 19 of the Trade-Mark Statute of February 20, 1905 (referred to *ante*, pages 126 to 129) was called to the attention of the court.

As shown by the following quotations from the opinion the court based its decision upon the right of the owner of a business to have the good-will of the business protected against injury. The court expressly refrained from grounding its decision upon the law of trade-marks or unfair competition, and based its decision upon its power and duty as a court of equity to enjoin injury to the property right which exists in the good-will of a business. Finding that a wrong had been committed against property the court enjoined its continuance, and found it immaterial whether the wrong should be classified as infringement of a trade-mark or as unfair competition. The court discussed the subject of good-will as the ground of its decision as follows:

"It is not denied that the good-will of a business and the good reputation of an output, when considered in connection with the business itself, are a species of property which may not be destroyed with impunity; and we know of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger. Indeed, it was assumed by all parties in the court below, and in this court—and we do not doubt—that malicious damage by defendants to the good-will of plaintiff's business and to the good reputation of plaintiff's

line of goods would be redressed by the law, and would call for an injunction where the remedy at law was not adequate." (247 Fed. 661.)

The Court of Appeals then referred to the fact that the District Court felt that the existence of damages was not sufficiently proved, and upon this phase of the case the Court of Appeals reasoned as follows:

"When it appeared that defendants untruthfully represented that the article they were selling was, in effect, the plaintiff's article, and that they were selling for or in the interest of plaintiff, that regular customers of plaintiff bought goods in the belief that they were of high quality or else plaintiff would not have put them out, and that certain customers found the goods unsatisfactory and unsalable, except at a sacrifice, we think there arose a sufficient presumption of threatened pecuniary injury to plaintiff to call for the injunction. Not only was there reasonable ground for apprehending injury to the high reputation of plaintiff's goods among its dealers and among consumers, but also the causing of a large number of dealers in different parts of the country to suppose that they had entered into contracts with plaintiff when, in fact, they had not, was reasonably sure to produce trade disputes and complications leading to expenditure of valuable time and efforts to remove the false impression, even if it did not lead to the costs and expenses of actual litigation. That this is a kind of injury of which the law must take notice seems to us the necessary result of the fundamental principles involved; but if somewhat specific support in precedent is desired, it may be found in *Eastman Co.* v. *Cycle Corp.*, 15 Pat. Cas., 105, and *Walter* v. *Ashton* (1902), 2 Chancery, 282. In the former of these cases it was held that a defendant should not be allowed to sell 'Kodak Bicycles,' because of the injuries naturally resulting to the established trade in 'Bicycle Kodaks'; and in the latter, the defendant was not allowed to call its bicycle a 'Times' bicycle, and represent that it was made by or for the newspaper of that name." (247 Fed. pp. 661-662.)

There were two defendants in this case, Samuel Levinson and his agent, S. W. Levinson. The latter held himself out as selling for plaintiff, but Samuel Levinson, the manufacturer of the cigars, denied that he authorized such conduct. Upon this point the Court of Appeals commented as follows:

> ". . . but when, in this case, we find a word of arbitrary form, which also is a plain imitation of plaintiff's name, and find it used with the peculiar script and decorations of plaintiff, and find it so marked on goods offered for sale by defendants to plaintiff's dealers under such a system as existed here, there is no escape from the inference that both defendants indirectly made the same representations which S. W. Levinson made in express words. It must be remembered that plaintiff's system of expanding business, and the systems followed by similar houses and well known to the dealers, made it a naturally to be expected thing that plaintiff should add cigars to its line, and the normal implications from the complete adoption of plaintiff's dress are affected by this well understood situation." (247 Fed. p. 662.)

These facts in the "Penslar" case are paralleled in the case at bar. As held by the Court of Appeals in its consideration of Samuel Levinson's conduct, the mere use of the trade-mark in trade under the circumstances there and here prevailing is a misrepresentation. As held by the court the misrepresentation was as satisfactorily established by the circumstance of appropriation of the trade-mark as by the oral statements made by S. W. Levinson.

In the case at bar plaintiff is engaged in an expanding business which has given rise to the precise condition that is referred to by the court in the "Penslar" case in its statement that

> "It must be remembered that plaintiff's system of expanding business, and the systems followed by similar houses and well known to the dealers, made

it a naturally to be expected thing that plaintiff should add cigars to its line." (247 Fed. p. 662.)

The court defined the injunction to which plaintiff was entitled as follows:

> "The injunction will prohibit defendants from representing that cigars offered for sale by them are made by the plaintiff, or sold by its permission, or in its interest, or that plaintiff has any interest, direct or indirect, in such manufacture or sale, and from using, in connection with such cigars, the word 'Penslar' in the same or in substantially the manner and form in which the word has been used by them." (*Ibid*, p. 663.)

The Aunt Jemima Case.

(Containing a discussion of the English cases.)

Aunt Jemima Company v. *Rigney & Co.* (Dist. Court, E. D. New York, Veeder, J., 234 Fed. 804; Court of Appeals, 2nd Circuit, 1917, opinion by Judge Ward, 247 Fed. 407):

In this case plaintiff, a Missouri corporation, had used and registered its trade-mark for self-rising flour and defendant, a New York corporation, used and registered the same trade-mark for syrup. Neither company dealt in the goods dealt in by the other. The lower court refused relief. The Court of Appeals reversed.

The case was heard in the Court of Appeals by Judges Ward, Rogers and Learned Hand, Judge Ward writing the opinion. Judge Hand dissented on a point not involved in the case at bar. Following is a part of the court's opinion bearing upon the points involved in the case at bar (247 Fed. pp. 409-412—italics are ours):

> "To use precisely the same mark, as the defendants have done, is in our opinion, evidence of intention to make something out of it—either to get the

benefit of the complainant's reputation or of its advertisement or to forestall the extension of its trade. There is no other conceivable reason why they should have appropriated this precise mark. The taking being wrongful, we think the defendants have no equity to protect them against an injunction, unless they get it from a consideration now to be examined.

"It is said that even a technical trade-mark may be appropriated by any one in any market for goods not in competition with those of the prior user. This was the view of the court below in saying that no one wanting syrup could possibly be made to take flour. But we think that goods, though different may be so related as to fall within the mischief which equity should prevent. Syrup and flour are both food products, and food products commonly used together. Obviously the public, or a large part of it, seeing this trade-mark on a syrup, would conclude that it was made by the complainant. Perhaps they might not do so, if it were used for flatirons. In this way the complainant's reputation is put in the hands of the defendants. It will enable them to get the benefit of the complainant's reputation and advertisement. These we think are property rights which should be protected in equity. We have held in *Florence* v. *Dowd,* 178 Fed. 73, 101 C. C. A. 565, that a manufacturer of hair brushes under the trade-mark 'Keepclean,' who did not make toothbrushes, is entitled to be protected against the unfair competition of one who manufactures toothbrushes under the trade-mark 'Sta Kleen.' So in *Collins* v. *Oliver Ames Co.* (C. C.), 18 Fed. 561, a manufacturer of metal articles, which had never made shovels was granted an injunction preventing the defendant from putting the complainant's trade-mark on its shovels.

"The defendants are a partnership, and did not incorporate the words 'Aunt Jemima's' into their firm name; but the complainant seems to think that appropriation of a trade-mark is to be treated in exactly the same way as appropriation of a trade-name. The latter is a trespass of the same nature as is committed by one who applies another man's name to his own goods. *This is a wrong which equity will enjoin without reference to the character of the article, or to the question of competition or*

of prior occupation of the market in any particular territory. No one has a right to apply another's name to his own goods. If, for instance, one were to publish a book on banking under the name of a firm of bankers, it would be no answer to say that there was no competition between banking and publishing, or that the bankers had sustained no pecuniary damage, or that the book was a good book. The act would still be a trespass, for which the bankers would be entitled to at least nominal damages at law, and, that remedy being inadequate and the trespass being a continuing one, they would be entitled to relief in equity. Such is our decision in *British American Tobacco Co.* v. *British American Cigar Stores Co.*, 211 Fed. 933, 128 C. C. A. 431, Ann. Cas. 1915 B., 363, in which a company engaged solely in the wholesale tobacco business was protected against the use of a similar corporate name by a retailer of cigars, although there was not competition between them.

"There are many decisions of the English courts to the same effect. In *Eastman Company* v. *Kodak Cycle Co.*, 15 Reports Patent Cases, 105, the complainant was a manufacturer of cameras under the name Kodak. Defendant, under the name 'Kodak Cycle Co.,' began the manufacture of bicycles, calling them 'Kodak' cycles, and registered the name as a trade-mark for bicycles and other vehicles. The Eastman Company brought suit to restrain the use of the word 'Kodak' and to rectify the register. The motion for injunction and the motion to rectify the register came on to be heard together. The motion to rectify was sustained, and the defendant's mark expunged, and an injunction was granted. Mr. Justice Romer said:

> " 'Then I have to deal with the application for an injunction against the defendants in respect of what they are doing. They have just started business practically, and it appears to be that to allow them to use the word "Kodak" as part of the title of the Kodak Cycle Company, Limited, would be to give them the benefit of what, in my opinion, substantially amounts to an improper dealing on their part. It would be to allow this

company certainly to cause confusion between it and the plaintiff company. I think it would injure the plaintiff company and would cause the defendant company to be identified with the plaintiff company, or to be recognized by the public as being connected with it, and I think, accordingly, the defendant, the Kodak Cycle Company, Limited, ought to be restrained from carrying on business under that name. Moreover, it appears to be that they ought not to be permitted to sell their cycles under the name of the "Kodak Cycles" for similar reasons. I think it would lead to confusion, I think it would lead to deception, and I think it would be injurious to the plaintiff company. I therefore, grant an injunction to restrain the defendant companies, or either of them from carrying on business under the name "Kodak Cycle Company, Limited," or under any name comprising the word "Kodak" likely to mislead or deceive the public into the belief that the defendant company is the same company as or is connected with either of the plaintiff companies, or that the business of the said companies, or either of them, is the same as, or is in any way connected with, the business of the plaintiff's the Eastman Photographic Materials Company, Limited. I also grant an injunction to restrain the defendant companies, and each of them, from selling, or offering to sell, any of their cycles or goods as "Kodak." I think that will sufficiently protect the plaintiffs. Of course, the respondents, the defendants, must pay the costs, including the costs, of the comptroller.'

"*Dunlop Pneumatic Tyre Co.* v. *Dunlop Lubricant Co.*, 16 Reports Patent Cases, 12: In 1888 the word 'Dunlop' was first used by complainant's predecessors to designate goods manufactured by them. Complainant made bicycle tires, rims, pumps, etc. One Funt started in business as the 'Dunlop Lubricant Co.,' and dealt in oils and lubricants for bicycles, which he sold in packages bearing the word 'Dunlop' in large letters. Complainant had never dealt in oils or lubricants. Held, that the use of the word, 'Dunlop' by defendant was deceptive, and it was enjoined.

"In *Valentine Meat Juice Co.* v. *Valentine Extract*

Co., 17 Reports Patent Cases, 673, the complainant used the word 'Valentine' upon liquid meat extracts for medicine. Defendant used the word 'Valentine' on beef extract used for food. An injunction was granted.

"*Dunlop Pneumatic Tyre Co.* v. *Dunlop-Truffault Cycle & Tube Manufacturing Co.*, 12 Times Law Reports, 434: This was a motion for a preliminary injunction to restrain the defendant from using the name 'Dunlop' as a part of its corporate style. Complainant was the manufacturer of pneumatic tires, defendant the manufacturer of bicycles and steel tubes used in the manufacture of bicycles. An injunction was granted. Mr. Justice Chitty holding that the name 'Dunlop' had been chosen by the defendants to create confusion in the minds of the public and make them think that the defendant company was connected with that of the plaintiffs.

"*Premier Cycle Company* v. *Premier Tube Company*, 12 Times Law Reports, 481: This was a motion for a preliminary injunction to restrain the defendants from using the word 'Premier' as a part of their business style. Complainant was a manufacturer of bicycles and tubes used in their construction. The defendants stated that they were tube manufacturers and had no intention of competing with the complainant in the making of bicycles. An injunction was granted.

"We do not think these authorities apply to the appropriation of a trade-mark.

"As the defendant's conduct was wrongful, the complainant is entitled to an injunction, notwithstanding the delay of some eight years in asserting its rights (*McLean* v. *Fleming*, 96 U. S. 245, 24 L. Ed. 828), but is not entitled to an accounting for damages and profits.

"The decree is reversed."

The court did not explicitly state whether it based its decree on the theory that the facts constituted infringement of the technical common law trade-mark "Aunt Jemima," or that defendant's act was a wrongful appropriation of plaintiff's corporate and trade-name. The

court undoubtedly took the view expressed by Mr. Justice Pitney in the Hanover Star Milling case (240 U. S. 403), that the underlying right is the "right to be protected in the good-will of a trade or business," and that this right and its violation having been established, it was not necessary or important to determine the particular method employed by defendant, whether by the appropriation of a technical trade-mark or of a corporate or trade-name.

In the instant case the word "Beech-Nut" is both plaintiff's trade-mark and corporate and trade-name, the word "Beech-Nut" having been the distinctive element of its corporate name since 1899, and the company being known in the trade as "the Beech-Nut people."

The English Cases.

Following is a list of the English cases to which reference is made herein:

Walter v. *Ashton* [1902], 2 Chancery, 282. (High Court of Justice, Chancery Division—Before Mr. Justice Byrne.)

The Eastman Photographic Materials Company, Ld., and The Kodak Company, Ld. v. *The John Griffiths Cycle Corporation, Ld., and The Kodak Cycle Company, Ld.* (1898), 15 Reports Patent Cases, 105. (High Court of Justice, Chancery Division—Before Mr. Justice Romer.)

The Dunlop Pneumatic Tyre Company, Ld. v. *The Dunlop Lubricant Company* (1898), 16 Reports Patent Cases, 12. (High Court of Justice, Chancery Division—Before Mr. Justice Romer.)

Valentine Meat Juice Company v. *Valentine Extract Company, Ld.* (1900), 17 Reports Patent Cases, 673. (Court of Appeal, Lords Alverstone, Rigby and Collins.)

Dunlop Pneumatic Tyre Company, Ld. v. *Dunlop-Truffault Cycle and Tube Manufacturing Company* (1896), 12 Times Law Reports, 434. (High Court of Justice, Chancery Division—Before Mr. Justice Chitty.)

Premier Cycle Company, Ld. v. *Premier Tube Company, Ld.* (1896), 12 Times Law Reports, 481. (High Court of Justice, Chancery Division—Before Mr. Justice Chitty.)

With the exception of *Walter* v. *Ashton* all of these cases were cited, with a statement of the facts, by the Court of Appeals for the Second Circuit in the opinion in the Aunt Jemima case (*ante,* pp. 194 to 196), and *Walter* v. *Ashton* was cited by the Court of Appeals for the Sixth Circuit in the opinion in the Peninsular Chemical Company case (*ante,* p. 190). In view of the discussion of the English cases appearing in the opinion in the Aunt Jemima case (*ante,* pp. 194 to 196) we present here merely some brief additional comments on the Kodak case and a statement of the facts in *Walter* v. *Ashton,* the citation of which in the opinion in the Peninsular Chemical Company case (*ante,* p. 190) was accompanied by only a brief reference to the circumstances.

In his opinion in the Kodak case, *supra,* Mr. Justice Romer gave weight to the fact that "many shops sell and deal in both bicycles and photographic cameras and materials," and also to the fact that "the plaintiff company may wish hereafter to manufacture and to sell cycles specially adapted to carry their 'Kodaks.'" Both of these circumstances are paralleled in the instant case.

The Lorillard Beech-Nut tobacco products are sold in the same shops where the Beech-Nut Packing Company's chewing gum and other products are sold. Furthermore, the Beech-Nut Packing Company not only "may wish hereafter to manufacture and to sell" tobacco products, but, as set forth in the statement of the case (*ante*, pp. 120 to 122), the Beech-Nut Company has for years had under consideration the manufacture and sale of cigarettes and at one time engaged a man who was expert in the blending of tobacco to assist in their investigation of the subject. In its opinion in the instant case the Court of Appeals made the following statement:

> "There is no evidence that the defendant ever intended presently or prospectively to compete for the trade of the plaintiff. It could not have done so as long as they continued their distinct and unrelated lines of business and there is no evidence that a change was ever contemplated by either." (R. Vol. V, p. 2701.)

The concluding part of the above quoted statement, namely, that "there is no evidence that a change was ever contemplated by either" is one of the several instances in which the court below based its reasoning upon a misapprehension of the proved facts. So far from there being no evidence that the Beech-Nut Company ever contemplated competing in the tobacco business, there is the direct and positive testimony of W. C. Arkell, assistant secretary, and of Francis E. Barbour, vice-president, of the company, that the question of manufacturing and selling cigarettes has long been a matter of serious consideration (*ante*, p. 121).

Following is a statement of the facts in *Walter* v. *Ashton* [1902], 2 Chancery, 282, referred to by the Court of Appeals for the Sixth Circuit in the opinion in the Peninsular Chemical Company case (*ante*, p. 190).

Mr. Walter was one of the proprietors of the London Times newspaper. The Times had sold the Encyclo-

paedia Britannica and other books on installment payments, and this system of sale and payment had come to be known as the Times system of monthly payments. It also appears that the Times used the representation of a clock with the hands pointing to five minutes past six, though whether as part of the heading of the newspaper or in some other way is not made clear by the Court's opinion. The defendant, Ashton, offered for sale bicycles which he called in his advertisement circulars "The Times Cycle," and he stamped or printed on the bicycles a representation of a clock with the hands pointing to five minutes past six "as in the clock in the Times newspaper." The style of type and stationery used by Ashton in the advertisements of his bicycle was imitative of the type and stationery used by the Times newspaper in the advertisements of the Encyclopaedia Britannica. The decision of the Court was upon an application for an interim injunction restraining the defendant from representing that the cycles offered by him for sale were offered for sale by the Times newspaper, and from representing that he was carrying on business as a department of or in connection with the Times newspaper or that the Times newspaper was the owner of his business. The suit was not for infringement of trade-mark rights, but was grounded upon the deception brought about as the collective effect of several acts each of which might in itself have been harmless. The injunction was granted as prayed for. Mr. Justice Byrne agreed with the defendant that he was entitled to call his cycle "The Times Cycle" or to stamp or print a picture of a clock on his bicycle in the absence of other acts which collectively would produce the deception complained of. The test was the presence or absence of deception of the public, not the nature of the means used to effect the deception or the properties of the goods which were sold by means of, or with the aid of, the deception.

The Vogue Case.

Vogue Company v. *Thompson-Hudson Co.*, 300 Fed. 509, and 6 F. (2d) 875. U. S. Circuit Court of Appeals, Sixth Circuit, opinion by Judge Denison (Oct. 7, 1924).

Plaintiff, the Vogue Company, is the publisher of the fashion magazine "Vogue" and has published the same since the year 1892. The Vogue Company claimed ownership of the word "Vogue" as a trade-mark, and also of a mark consisting of a large capital letter "V" having between its sides the figure of a woman, the latter mark being called the "V-girl." The defendant, Thompson-Hudson Company, sold women's hats to each of which was affixed a label bearing the words "Vogue Hats" and a mark consisting of a large capital letter "V" having between its sides the representation of a woman's head. The Vogue Company, publisher of the magazine, did not deal in hats. The court held the word "Vogue" taken alone to be descriptive and not appropriable as a trade-mark, but enjoined the defendant from using the "V-Girl" mark on the ground that such use was unfair competition. As stated by the court, the Vogue Hat Company, manufacturer of the hats, intervened and conducted the defense. The court explains its views in the following quotations from the opinion:

> "In 1912 the Vogue Hat Company was organized, and in 1913 it began to mark its hats with the above label. These hats, so manufactured, were put on sale by retailers throughout the country. There is no reason to doubt that this course of conduct by the defendant manufacturer and its retailers created a very common alternative impression—first, that these hats were manufactured by the plaintiff; or, second, that, although some knew that plaintiff was not manufacturing, yet these hats were in some way vouched for or sponsored or approved by the plaintiff. Such an impression is obviously one that

would be inevitable, there is abundant proof that the average purchaser in different parts of the country so believed, and there is no reason to doubt that the saleswomen of the defendant retailer, who thus represented in express terms to inquiring customers, were speaking what they believed to be the truth. Save for the obstacles which have been mentioned, and which the District Court thought insuperable, the plaintiff's case for relief is too clear for question.

"So far as plaintiff's rights are based upon the mere use of the word 'Vogue,' in the phrase 'Vogue Hats,' we think the District Court was right. The word itself was by no means arbitrary. In 1892, as since, the word was one of common right. It was approximately synonymous with 'style' or 'fashion.' (300 Fed. 511.)

. . . . . .

"Whether we consider the case as one of technical trade-mark or so-called unfair competition, and if we consider plaintiff's rights as confined to the use of this 'V-Girl' and the capital letter 'V' in its dominating relation to the remainder of the word, the defendant's appropriation of plaintiff's dress is not to be disputed.

"For the purpose of this opinion, but without intimating a decision, we assume that relief could not be given under the law of technical trade-marks. Whether the commonly applicable rule, that the trade-mark product and the infringing article must be of the same descriptive qualities, should be modified and adapted to meet such a case as this, can be passed until necessary for decision.

"*We come, then, to what is called 'unfair competition.' This is nothing but a convenient name for the doctrine that no one should be allowed to sell his goods as those of another. This rule is usually invoked when there is an actual market competition between the analogous products of the plaintiff and the defendants, and so it has been natural enough to speak of it as the doctrine of unfair competition; but there is no fetish in the word 'competition.' The invocation of equity rests more vitally upon the unfairness. If B. represents that his goods are made by A., and if damage therefrom to A. is to be seen, we*

are aware of no consideration which makes it controlling whether this damage to A. will come from market competition with some article which A. is then manufacturing or will come in some other way. The injury to A. is present; and the fraud upon the consumer is present; nothing else is needed. This is the principle upon which the two English bicycle cases were decided. *Walter* v. *Ashton* [1902] 2 Ch. Div. 282; *Eastman Co.* v. *Kodak Co.*, 15 Rep. Pat. Cases, 105. It was also at the bottom of our own decision in *Peninsular Co.* v. *Levinson*, 247 Fed. 658, 159 C. C. A. 560 [8 T. M. Rep. 171] and of *Akron Co.* v. *Willys Co.* (C. C. A. 3) 273 Fed. 674 [11 T. M. Rep. 281]; *Imperial Co.* v *Fairbanks Co.*, 50 App. D. C. 250, 270 Fed. 686 [11 T. M. Rep. 107]; *Aunt Jemima Co.* v. *Rigney* (C. C. A. 2) 247 Fed 407, 159 C. C. A. 461, L. R. A. 1918C, 1039 [8 T. M. Rep. 163]. We have no doubt it is a sound principle, and should be applied in appropriate cases.

"In this case the reasonable probability of injury to plaintiff through defendant's misrepresentation is clear, even if it has not actually occurred. Plaintiff's magazine is so far an arbiter of style and the use of plaintiff's trade-mark upon defendant's hats so far indicates that the hats were at least sponsored and approved by the plaintiff, that the same considerations which make the misrepresentation so valuable to defendants make it pregnant with peril to plaintiff. It seems not extreme to say, as plaintiff's counsel do, that persistence in marking under this trade-mark articles of apparel which are unfit, undesirable, or out of style would drive away thousands of those who customarily purchase plaintiff's magazine. This record makes a case entirely fit for the application of the principle just discussed; and plaintiff was entitled to an injunction against the further use either of the 'V-Girl' or the 'V,' not in its ordinary use as a capital letter, but as the dominating feature of the label. (Pp. 511-512.) . . .

"Since the misrepresentation put by defendant manufacturer upon the label requires the injunction, it is unnecessary to differentiate the case more expressly made against the retailer. The other grounds urged in defense have not impressed us.

"The decree dismissing the bill is vacated, and the

case remanded for further proceedings pursuant to this opinion." (P. 513.) (Italics are ours.)

The court held in its opinion on the hearing of the appeal (300 Fed. 509) that the word "Vogue" is descriptive and therefore not appropriable as a trade-mark. In the hearing of the motion to direct the form of the mandate (6 F. (2d) 875), the court adhered to this view, but held that defendant's otherwise clear right to mark its hats "Vogue Hats" had been tainted and forfeited by its original use of those words accompanied by the plaintiff's "V-Girl" trade-mark, and ruled that the defendant should not be permitted to retain and carry on the business so built up by merely dropping the "V-Girl" and the dominant letter "V." Hence the court directed that the defendant accompany the words "Vogue Hats" with a manufacturer's name which it might select of which name the word "Vogue" should not be a part. The court referred to a similar decision which it had made in *Coca-Cola Co.* v. *Gay-ola Co.* (200 Fed. 720, 723) in which the defendant was prohibited from coloring its beverage in a way that it would have been perfectly free to do except for the fact that it had used the color in question as one of several steps in a plan to bring about the fraudulent substitution of its product for that of the plaintiff.

In the instant case, even if the Lorillard Company had had, in the year 1915, the right to use the word "Beech-Nut," its use of that word as part of the Beech-Nut Company's trade-mark would have worked a forfeiture of that right in the same way that such forfeiture was brought about in the Vogue and Coca-Cola cases referred to in the preceding paragraph. The Lorillard Company, by using the word "Beech-Nut" as part of the Beech-Nut Company's trade-mark has confirmed the belief of the purchasing public that the word "Beech-Nut" upon tobacco and cigarettes means that those goods are produced

by the Beech-Nut Company. Even if the word "Beech-Nut" alone, *i. e.,* without the other elements of the Beech-Nut Company's trade-mark, could have been used on tobacco in 1915 without causing deception, it is certain that today it would, as it does, mean that the tobacco was the product of the Beech-Nut Packing Company for the reason that for the past ten years the Lorillard Company has sold tobacco and cigarettes labeled with the word "Beech-Nut" as part of the Beech-Nut Company's trade-mark. Therefore, even if the old Weissinger Beechnut trade-mark had not been abandoned the Lorillard Company's fraudulent use of the word "Beech-Nut" would have worked a forfeiture of any right to use the Weissinger trade-mark or the word "Beechnut" which formed part thereof.

THE OVERLAND AND ROLLS-ROYCE CASES IN THE THIRD CIRCUIT.

Akron-Overland Tire Co. v. *Willys-Overland Co.,* District Court, District of Delaware, Morris, J., 268 Fed. 151; Circuit Court of Appeals, 3rd Circuit, Opinion by Judge Buffington, 1921, 273 Fed. 674.

Howard Wall, Doing Business Under the Name and Style Rolls-Royce Tube Co. v. *Rolls-Royce of America, Inc.,* Circuit Court of Appeals, 3rd Circuit, 1925, Opinion by Judge Buffington, 4 F. (2d) 333.

In the Overland and Rolls-Royce cases the Court of Appeals for the Third Circuit affirmed the decrees of the District Court enjoining the defendants against using the trade-names or corporate names of the plaintiffs. In each of these cases the plaintiff and defendant dealt in non-competing articles. In the Overland case plaintiff was a manufacturer of automobiles and had no connec-

tion with the tire business other than the use of tires as part of the equipment of its automobiles. The defendant dealt in tires. In the Rolls-Royce case plaintiff was a manufacturer of automobiles and defendant was a manufacturer of or dealer in vacuum tubes for radio apparatus.

In our discussion (*post*, p. 210) of a later case decided by the Third Circuit Court of Appeals (*Rosenberg* v. *Elliott*, 7 F. (2d) 962), in which the court discusses the Overland and Rolls-Royce cases, we point out the conflict between the decisions in the two cases last mentioned and the decision of the same court in the suit at bar.

The Overland Case.

Akron-Overland Tire Co. v. *Willys-Overland Co.*, U. S. Circuit Court of Appeals, 3rd Circuit, 1921, opinion by Judge Buffington, 273 Fed. 674.

The Willys-Overland Company was engaged in the manufacture and sale of automobiles. Its only connection with the tire industry was the use of tires for the equipment of its automobiles. In its bill of complaint the Willys-Overland Company charged the Akron-Overland Tire Company, Inc. (which dealt in tires and not in automobiles), with a wrongful and unfair use of the word "Overland," and moved for a preliminary injunction restraining the defendant from using that word as the whole or as part of its corporate name, from listing its capital stock under such name in any stock exchange, and from designating its tires, or any other accessories by the word "Overland," or by any combination of words containing that name.

The opinion of the District Court by Judge Morris (268 Fed. 151) sets forth the fact that plaintiff's name "Overland" was in 1909 registered in the Patent Office as a

trade-mark for automobiles, that the trade-mark has been so used and is widely and favorably known. As shown by the list on page 46 of the copy of the Patent Office rules relating to trade-marks which is in evidence as Defendant's Exhibit No. 34 (R. Vol. VI, p. 234), automobiles are classified by the Patent Office in Class 19, entitled "Vehicles, not including engines," and rubber tires in Class 35, "Belting, hose, machinery packing, and non-metallic tires."

In the opinion of the Court of Appeals reference is made to defendant's contention that there could be no unfair competition by defendant because defendant and plaintiff were not engaged in the same kind of business, the defendant dealing in tires and the plaintiff in automobiles. Upon this point the court said:

> ". . . in exact terms the two do not compete in these particular things, yet the fact remains that the business of both is so connected with automobiles that the public, in buying the stocks, securities, and retread tires of the defendant company, by the use of the word 'Overland' in connection therewith, will, by such descriptive word, be led to believe it is buying property or articles owned or dealt in by the plaintiff or one of its subsidiary companies." (273 Fed. 676.)

The Court of Appeals reasoned as follows upon the facts before it:

> "That the defendant's use of the word 'Overland' in connection with the sale of its retread tires and its stocks and securities, would enable it to share in the plaintiff's good-will and reputation, also cannot be gainsaid. That such use of the word 'Overland' by the defendant would breed confusion and misunderstanding in the minds of the public is foreshadowed by what did happen in the way of third parties confusing and connecting the defendant and its acts with the plaintiff company, and even holding the plaintiff accountable for such acts. Indeed, it is manifest that under the facts of this case the main-

tenance by the plaintiff of the good-will attributed to Overland business and products would, in the future, be determined, not alone by what the plaintiff did to uphold the standard of that good-will, but by what the defendant might do by failure to uphold such reputation and maintain such good-will." (*Ibid*, p. 676.)

THE ROLLS-ROYCE CASE.

Howard Wall, Doing Business Under the Style and Name Rolls-Royce Tube Co. v. *Rolls-Royce of America, Inc.*, Circuit Court of Appeals, Third Circuit, opinion by Judge Buffington, 4 F. (2d) 333.

Plaintiff, Rolls-Royce Company, manufactures automobiles and aeroplanes. Defendant, Howard Wall, dealt in radio tubes under the name Rolls-Royce Tube Company and advertised and marked the tubes which he sold with the name "Rolls-Royce." After stating the facts the Court of Appeals discussed the case as follows:

"From the pleadings and statements made at the argument, it is clear that the purpose of Wall was to take and use the good-will, fair name and trade record which the two companies had, through years of business integrity, given to the name Rolls-Royce, and thereby create in the minds of the public, the impression that his mail order tubes bore some connection with the real Rolls-Royce Companies. Upon no other theory than a purposed appropriation to himself and an intent to convey to the public a false impression of some supposed connection with the Rolls-Royce industries, can Wall's actions and advertisements be explained. Seeing then that by putting his individual business under the name Rolls-Royce and utilizing its trade reputation and earned good will, Wall could greatly benefit himself, the converse of the proposition follows, that this veiling of his business under the name Rolls-Royce might and indeed almost surely would injure the real Rolls-Royce industries and substantially detract from their good

will and fair name. It is true those companies made automobiles and aeroplanes and Wall sold radio tubes and no one could think when he bought a radio tube he was buying an automobile or an aeroplane. But that is not the test and gist of this case. Electricity is one of the vital elements in automobile and aeroplane construction and having built up a trade-name and fame in two articles of which electrical appliances were all important factors, what would more naturally come to the mind of a man with a radio tube in his receiving set on which was the name Rolls-Royce, with nothing else to indicate its origin, than for him to suppose that the Rolls-Royce Company had extended its high grade of electric product to the new, electric-using radio art as well. And if this Rolls-Royce radio tube proved unsatisfactory, it would sow in his mind at once an undermining and distrust of the excellence of product which the words Rolls-Royce had hitherto stood for.

"In addition to what has been said it is quite possible that the use of such a name might lead third parties to credit the defendant's business, on account of its name of Rolls-Royce, with an unwarranted financial reliability and if such assumptions eventually prove unfounded the name of Rolls-Royce would suffer accordingly. Indeed, from the standpoint of commercial integrity, fair business and trade equity, we feel the court below, sitting in equity, was justified in preventing the defendant from veiling his business under the name of Rolls-Royce for he had and could have had but one object in view, namely, to commercially use as his own a commercial asset that belonged to others, the continued use and abstraction of which is fraught with such possibilities of irremediable injury that the only way to remedy it is to stop it at the start.

"The decree below is affirmed." (4 F. (2d) 333-334.)

Rosenberg Bros. & Co. v. *Elliott* (District Court, Eastern District of Pennsylvania, Dickinson, J., 3 F. (2d) 682; Circuit Court of Appeals, Third Circuit, opinion by Judge Woolley, 7 F. (2d) 962.)

Plaintiff, Rosenberg Bros. Co., manufactured "ready made" clothing and applied to the same the trade-mark "Fashion Park." Plaintiff did not make or deal in hats or caps. Defendant, Elliott, dealt in hats bearing the trade-mark words "Fashion Park." The lower court dismissed the bill of complaint on the ground that the goods dealt in by the parties were different, holding that the plaintiff's rights in his trade-mark did not extend to any goods other than those to which it had applied the mark. The Court of Appeals stated the issue involved in the case as follows:

> "This brings us to the question—the central question of fact in the case—whether hats and caps are so closely related to men's clothing, both being wearing apparel, as to be within the same class and of the same description." (Page 964).

The Court of Appeals found hats and caps to be in the same "class" with ready made clothing, therefore held that the clothing manufacturer's trade-mark rights extended to hats and caps, and enjoined the hat dealer from applying the clothing maker's trade-mark to hats. In this respect the decision is of interest here only as further showing the rigid adherence of the Court of Appeals of the Third Circuit to the arbitrary rule of classification of merchandise as a principle governing the extent to which business reputation and good-will and the fruits of expensive advertising shall be protected. The opinion in the case is interesting, however, in that it contains a discussion of the Overland and Rolls-Royce cases, previ-

ously decided by the same court (discussed *ante* at pages 205-9), which discussion is directed to showing that those cases are not authorities on trade-mark law but involve a question altogether distinct therefrom. We will discuss this part of the opinion in the Rosenberg case with the purpose of attempting to ascertain the distinction which led the court to grant relief in the Overland and Rolls-Royce cases and to deny relief in the case at bar.

The court states (p. 963, second column) that though the law governing trade-marks is a branch of the broader law regulating trade competition

> "it should be kept in mind that, though alike in principle, they are enough unlike in practice to admit of raising and trying different issues. Yet the distinction between these similar laws is not always observed, as we have found from an inclination of counsel rather frequently to cite the decisions of this court in *Akron-Overland Tire Co.* v. *Willys-Overland Co.* (C. C. A.), 273 F. 674, and *Howard Wall* v. *Rolls-Royce of America, Inc.* (C. C. A.), 4 F. (2d) 333, as authority for finding infringement of a trade-mark by its use on different but related wares and sometimes as authority for infringement by use on wares that are not related. We pause to note that those cases are not authority on the law of trade-mark infringement at all, for each was tried and decided on the single issue of unfair competition, and then not unfair competition in the sale of goods but in the unfair appropriation and use of a competitor's trade-name—with the intention, of course, thereby to profit in the sale of goods of a related character. Such an act is not infringement of a trade-mark but is a trespass of the same nature as is committed by one who applied another man's name to his own goods. It is a wrong which equity will enjoin even when the goods of the two men do not strictly enter into competition."

Judge Woolley wrote the opinion in *Rosenberg* v. *Elliott*. The opinion in the instant case was written by

Judge Davis and contains the following reference to the opinion in the Rosenberg case:

> "Judge Woolley in his comprehensive exposition of the law of trade-marks said with reference to the property right of an owner of the mark: 'If property, it is property of a qualified nature, for it is settled that no absolute ownership in or exclusive right to use a name as a trade-mark is vested in anyone.' (*Rosenberg Bros. & Co.* v. *Elliott.*)" (R. Vol. V, p. 2699.)

It appears from the opinion in the Rosenberg case (p. 967, near the top of the first column) that there was no testimony in that case that any purchaser had actually been deceived, although the court indicates (paragraph beginning near the bottom of the second column on page 965) that it considers deception of the public a factor of weight.

Judge Woolley, in the passage above quoted, says that the Overland and Rolls-Royce cases "are not authority on the law of trade-mark infringement at all," and that these cases were tried "on the single issue of unfair competition." But, inasmuch as the wrong—the appropriation of good-will—is the same in both we are unable to understand how in this connection the distinction is more than verbal. Judge Woolley continues with the statement that the unfair competition in the Overland and Rolls-Royce cases was "not unfair competition in the sale of goods but in the unfair appropriation and use of a competitor's trade-name—with the intention, of course, thereby to profit in the sale of goods of a related character." Studying these words in the endeavor to find therein a reason for granting relief in the Overland and Rolls-Royce cases and not in the suit at bar, we find only a statement of what the court's words indicate to be lesser wrongs in the Overland and Rolls-Royce cases than in the case at bar, for the court has said that those

cases involved no trade-mark question but only the appropriation of a trade-name with the intention thereby of profiting in the sale of goods. We are unable to see any material distinction in the degree of vice between appropriating a party's trade-name for the purpose of profiting thereby in the sale of goods and appropriating his trade-mark for that purpose. However this may be, the Lorillard Company has committed the greater offense of appropriating both the trade-mark and trade-name of the Beech-Nut Packing Company, this double appropriation involving also the appropriation of the corporate name of the Beech-Nut Company inasmuch as the word "Beech-Nut" is so far the predominating and identifying part of its corporate name that appropriation of that word is in effect appropriation of the corporate name.

The court, in the passage above quoted, refers to the appropriation of the trade-names in the Overland and Rolls-Royce cases as being for the purpose of profiting "in the sale of goods of a related character." In the Overland case the goods were automobiles as an entirety and tires as a separate article of trade. There was no competition between them, no possibility of substitution of one for the other, but it may be that the use of tires on automobiles would tend to re-enforce the suggestion of similarity of origin growing out of the use of the same name on both automobiles and tires, and thereby aggravate the tendency to deceive purchasers. But this is of importance only in so far as deception of the public is important, and universal deception of the public has been proved by direct evidence in the suit at bar. Furthermore in the Rolls-Royce case the goods were automobiles and radio tubes. It is difficult to conceive of articles less related in structure, use, mode of operation and in the channels of trade through which they flow than automo-

biles and radio tubes. Yet the Court of Appeals found them sufficiently related to grant relief in the Rolls-Royce case on its theory that the goods must be related in some way, and at the same time found that Beech-Nut chewing gum and packaged candies and Beech-Nut tobacco and cigarettes are totally unrelated although they are all luxuries which from the time they leave the factory door travel together through the houses of the same jobbers and wholesalers to the same retailers where they are advertised and displayed side by side and sold to the same customers often at the same time. And the court did this notwithstanding the nation-wide understanding of the fact that the Beech-Nut Packing Company produces a large number of commodities under its Beech-Nut trade-mark and is constantly bringing out new goods under the same trade-mark. The Overland Company and the Rolls-Royce Companies used their names only upon the automobiles which they made. Despite the fact that neither the Overland Company nor the Rolls-Royce Company had ever produced more than one article and had never given the public reason to believe that they were ever going to produce anything else, and despite the fact that the Beech-Nut Packing Company produces regularly upwards of sixty different commodities and has thoroughly implanted in the public mind the expectation that they will produce new products under their name from time to time, the Court of Appeals has decided that the Overland name extends not only to automobiles but also to tires as a separate article of commerce, and that the Rolls-Royce name extends not only to automobiles but also to radio tubes, and then has decided that the Beech-Nut Company's rights in its name do not extend to the Beech-Nut tobacco and cigarettes which the public believes that it produces and which are sold alongside of the Beech-Nut Company's chewing gum, packaged hard

candies and other products. The distinction between a trade-mark applied to an extensive line of products and one applied to a single commodity is referred to by Judge Hough in the opinion in *France Milling Co.* v. *Washburn-Crosby Co.* (*post*, p. 221).

It would be easy to reconcile the different decisions of the Court of Appeals for the Third Circuit if they had refused injunctions in the Overland and Rolls-Royce cases and granted an injunction in the suit at bar. As it is we are able to find nothing in the opinions of that court or elsewhere to support any conclusion other than that the decision of the Third Circuit Court of Appeals in the suit at bar collides as forcibly with its own previous decisions as with the decisions of the Courts of Appeal of the Sixth and Second Circuits in the cases elsewhere herein reviewed.

Collins v. Ames.

Collins v. *Ames*, Circuit Court, S. D. N. Y., opinion by Mr. Justice Blatchford, 18 Fed. 561.

The Collins Company manufactured axes, hatchets, adzes, picks and other implements, all of which it marked with the words "Collins & Co.," the name of the business before it was incorporated, but did not make or deal in shovels until after the Ames & Sons Corporation had established an extensive business in shovels bearing the name "Collins & Co." The Ames & Sons Corporation contended that it had the right under the law to apply the words "Collins & Co." to shovels by reason of the fact that Collins & Co. did not make or deal in shovels until after the Ames business had become established. Upon defendant's theory in the case at bar this would have been a good defense in that there can be no direct competition between shovels and edged tools, no possibility

of substitution of shovels for axes, etc., in particular sales, and hence no diversion of particular sales from the Collins Company to the Ames Corporation. As in the case at bar the injury to the Collins Co. was confined to the impairment of their business reputation and good-will and the prevention of the expansion of the Collins business under its own name to include a product lying in the path of its normal growth. The following passages are quoted from Mr. Justice Blatchford's opinion:

> "Therefore, although the shovels made by Ames & Sons under this order and subsequently, and stamped 'Collins & Co.,' and sent to Australia and elsewhere, may intrinsically have been of high quality, yet the only object of the defendant in putting the stamp 'Collins & Co.' upon them must have been to avail himself of the credit and reputation and market which the plaintiff had established for the articles it made and sold with the stamp 'Collins & Co.' upon them. There was no other purpose in this. Clearly, those who purchased shovels made by Ames & Sons, and stamped 'Collins & Co.' would believe that such shovels were made by the plaintiff, for there was no other Collins & Co. than the plaintiff. This was an unlawful appropriation of the plaintiff's trade-mark. It is true that the plaintiff up to that time had made no shovels. It is also true that Ames & Sons and the defendant have built up a business in shovels stamped 'Collins & Co.' But the plaintiff had a right to make shovels, and it had made kindred articles of metal, and its good name and reputation in its business were wholly connected with the use, in its trade, of the mark 'Collins & Co.'" (Pp. 569, 570).

> "It is strongly urged, on the part of the defendant, that a mark or stamp, to be a trade-mark, must be the mark of an existing trade; that the mark 'Collins & Co.' on shovels, when adopted by Ames & Sons, became the mark of a trade in shovels carried on by Ames & Sons; that the plaintiff had no trade in shovels at the time; that the mark 'Collins & Co.' thus became the mark of Ames & Sons' trade in shovels, and the property of Ames & Sons in respect

to shovels made by them, by prior right; that any use of that mark on shovels afterwards by the plaintiff became wrongful as against Ames & Sons or the defendant; and that the plaintiff has no right in the premises which it can enforce against the defendant. This view is specious but unsound. The plaintiff having from 1843 the right to make any article of iron, steel or other metal, and having gone on from that time, both before and after 1856, extending its manufacture beyond edge-tools into digging tools, such as picks and hoes, and having always put the mark 'Collins & Co.' on its best quality of articles, the fact that it did not before 1856 make a digging tool such as the shovels on which, in 1856, Ames & Sons put the mark 'Collins & Co.' does not warrant the conclusion that the mark was not in 1856 the mark of the plaintiff's trade in respect to such shovels.

"The plaintiff is entitled to a decree for a perpetual injunction, as prayed in the bill, and for an accounting before a master as to profits and damages, and for the costs of the suit" (p. 571).

It is significant that in the concluding part of its opinion above quoted the court referred to the mark as being in 1856 "the mark of the plaintiff's trade in respect to such shovels." This shows that the court considered that the trade-mark right of plaintiff extended to shovels in advance of the date when it manufactured shovels, and that the court did not find it necessary to base its decision upon the ground of unfair competition as distinguished from infringement of a technical trade-mark.

Aluminum Co. v. Sargoy.

Aluminum Company v. *Sargoy Bros. & Co.*, District Court, E. D. N. Y., 1921, Chatfield, J., 276 Fed. 447.

In this case the plaintiff, the Aluminum Company, dealt in cooking vessels made of aluminum to which it applied the word "Wear-Ever" as a trade-mark. Plaintiff did not deal in wash boilers. Defendant put on the

market a tin wash boiler upon which it used the word "Wear-Ever" as a trade-mark. In the following quotations from Judge Chatfield's opinion the pertinent facts and the court's judgment are set forth:

> "The testimony in this case shows that in the Patent Office cooking utensils are considered and classified as a different line of commercial manufacture from articles for laundry purposes or articles for household work, like cleaning or scrubbing,
>
> . . . . . .
>
> "Validity of trade-mark cannot depend upon classification or indexing by the Patent Office alone. . . ." (p. 448.)
>
> . . . . . .
>
> "the plaintiff certainly makes out a case of unfair competition when it shows that the defendants are placing upon the market an article of tin, in general resembling aluminum, sold in stores dealing in household supplies, in such a way that the 'Wear-Ever' cooking utensils and the 'Wear-Ever' wash boiler would be substantially side by side in its exposure for public inspection and convenience, where the paper wrapper is obviously copied from the plaintiff's advertising matter, where a large portion of the tin surface is covered up so that the uneducated or not-understanding person might fail to note the difference between the metal aluminum and metal tin, and where the purpose of putting this article on the market in that form is shown by the significant opportunity presented by the plaintiff's failure to have wash boilers as one article in their line of utensils. The defendants seek to excuse their act by showing that their wash boilers are 'good' tin wash boilers and that a purchaser is not cheated. They also show that the plaintiff does not sell wash boilers and therefore there is no competition in the wash boilers themselves. . . ." (p. 450).
>
> "The record makes it plain that the defendants are competing unfairly with the plaintiff by trading upon the public's belief in the 'Wear-Ever' name and the demand created for "Wear-Ever' articles by the plaintiff's advertising (pp. 450-457).
>
> . . . . . .

"For all of these reasons the plaintiff is entitled to a decree" (p. 450).

FRANCE MILLING CO. v. WASHBURN-CROSBY CO.

France Milling Co. v. *Washburn-Crosby Co.* District Court, S. D. N. Y., Winslow, J., 3 F. (2d) 321; Circuit Court of Appeals, Second Circuit, opinion by Judge Hough, 7 F. (2d) 304.

We will refer to the parties as "France" and "Washburn," following the terminology appearing in the opinion of the Court of Appeals. In the year 1904 France, a manufacturer of "pancake" and buckwheat flour, was awarded a gold medal for those products by the Louisiana Purchase Exposition at St. Louis, and thereupon, in the year 1904, adopted the words "Gold Medal" as a trade-mark for its pancake and buckwheat flours. France's pancake flour was a mixture of wheat and corn flours, leavened and seasoned, and his buckwheat flour was a mixture of wheat and buckwheat flours leavened and seasoned. France did not make or deal in wheat flour except as an ingredient of the products above described.

Washburn and his predecessors had used the words "Gold Medal" as a trade-mark for wheat flour since 1880 but had never made or dealt in any mixed flour under any name until the year 1924 when he commenced the manufacture and sale of prepared flours similar to those made and sold by France, and used the trade-mark "Gold Medal" thereon.

France had bought wheat flour from Washburn since the year 1912, the wheat flour so bought being used in the manufacture of his pancake and buckwheat flours. In ordering this wheat flour France conducted the correspondence "on paper prominently announcing its trade-

mark and the character of its products," as set forth in the statement of facts by the Court of Appeals.

France moved to enjoin Washburn from using "Gold Medal" on pancake flour and buckwheat flour. Washburn counterclaimed with a motion that France be enjoined from using the Gold Medal trade-mark on pancake flour and buckwheat flour. France's claim rested on his prior use of "Gold Medal" on the particular kind of flour, namely, pancake and buckwheat flour. Washburn's claim rested on his prior use of "Gold Medal" on wheat flour, and his contention that such prior use on "straight" wheat flour established his exclusive right as to all kinds of flour. The court decided against Washburn's claim upon the ground that he had acquiesced in France's use of the words "Gold Medal" during a long period during which he had sold wheat flour to France knowing that it was to be used in the manufacture of France's Gold Medal pancake and buckwheat flour, and on the further ground that the words "Gold Medal" were a "laudatory phrase" similar to the words "Blue Ribbon," and not in the same category with such arbitrary words as "Kodak," "Aunt Jemima" and "Budweiser," and therefore not affording a basis for broad protection. The court also found that the two commodities were different "as shown by the exhibition of business methods given by the affidavits." It is not possible to determine from the opinion what relative weight the court gave to the three grounds of its decision, namely, acquiescence, the character of the words "Gold Medal" and the character of the goods. Seemingly the acquiescence must have been considered sufficient in itself to support the decision as it could have no bearing at all otherwise, being a matter independent of the character of the words or goods and without influence on the relation thereof to the law. The character of the words and of

the goods taken together might well have contributed mutually to a decision that would not have been made for either of those reasons in the absence of the other. At all events it is quite obvious that the court's decision did not rest upon classification of merchandise as an arbitrary standard, as did the decision in the suit at bar. The law is well established in the Eighth, Seventh and Second Circuits (*ante*, pp. 147 to 152) that suggestive words which have been commonly used in trade will be accorded protection only for the particular goods upon which the party asserting a right of exclusion has actually used them. The words "Gold Medal," as found by the court, were of this character, and that finding alone was sufficient to support the decision arrived at, as was also the court's finding of acquiescence. The court, therefore, dismissed the counterclaim motion of Washburn that France be enjoined from continuing to mark his pancake and buckwheat flour with the words "Gold Medal," and enjoined Washburn from doing so.

In its opinion in the *France Milling* v. *Washburn* case the court expressly distinguished the facts there prevailing from facts of the kind that exist in the case at bar, the distinction being stated in the following sentence quoted from the opinion:

> "In the present case Washburn has made known by advertising Gold Medal not a line of products, nor any product of a varied business, but one separate, well known commodity, pure wheat flour, and with that he must be content" (7 Fed. (2d), p. 306).

The court was quite evidently familiar with the practice of large business houses of dealing in numerous commodities, and took pains to guard against its decision being taken as authority for piratical inroads upon the rights of parties whose trade-marks have been applied to many different articles of commerce with the result of endowing them with a broad significance.

The Statutory Phrases "Same Class" and "Same Descriptive Properties" as Interpreted by the Court of Appeals of the District of Columbia.

The Court of Appeals of the District of Columbia has jurisdiction of appeals from the Commissioner of Patents in trade-mark interferences, oppositions and petitions for the cancellation of trade-mark registrations. This jurisdiction is conferred by the Trade-Mark Act of February 20, 1905, ch. 592 (33 Stat. L. 724), Sections 5, 6, 9 and 13 of which are quoted in Appendix G (App., p. 95). Section 5 defines the conditions necessary for registration. Section 6 provides for oppositions, Section 9 for appeals to the Court of Appeals of the District of Columbia, and Section 13 for petitions for cancellation of registrations. The statutory basis of the opposition and the petition for cancellation is injury to the opposing party or petitioner for cancellation (Sections 6 and 13), and Section 5 prohibits registration of a mark identical with a registered or known mark in use by another for goods "of the same descriptive properties," but, with certain enumerated exceptions, permits registration of any mark which will distinguish the registrant's goods from other goods "of the same class."

That the Court of Appeals reasons the cases appealed from the Commissioner of Patents largely in terms of classification and descriptive properties of the goods arises from the fact that the court's jurisdiction in these cases relates solely to the interpretation of the provisions of the statute. Where the adverse parties use the same trade-mark upon different goods the Court of Appeals looks to the statutory phrases "same class" and "same descriptive properties," and has decided that, whenever the use of the same trade-mark on different commodities will cause the public to believe that both commodities

are the product of the same party such commodities belong to the "same class" and are "of the same descriptive properties" within the meaning and intent of those expressions as used in the statute. This has the effect of preventing the registration of a trade-mark for use upon any commodity where the use of the mark on such commodity would deceive the public and result in misappropriation of the good-will of the business of another party who uses the same mark upon different goods. The Court of Appeals of the District of Columbia in the exercise of this limited appellate jurisdiction thus arrives at a result similar to that accomplished by other courts under their general equity power to enjoin misappropriation of the good-will of a business in cases where the parties deal in different commodities. The cases next referred to illustrate the course followed by the Court of Appeals of the District of Columbia in this regard.

Oppenheim, Oberndorfer & Co., Inc. v. *President Suspender Co.* (3 F. (2d) page 88):

In this case the President Suspender Company used the word "President" as a trade-mark for suspenders and opposed the registration by Oppenheim, Oberndorf & Co. of the same word as a trade-mark for underwear and shirts. The court sustained the opposition, saying:

> "It may be said in general that, if goods are such that the purchasing public, seeing them sold under the same mark, will believe that they have the same commercial origin in point of manufacture or marketing, it follows that they will be regarded as of the same descriptive properties. *American Stove Co.* v. *Detroit Stove Works,* 31 App. D. C. 304; *N. Wolf & Sons* v. *Lord & Taylor,* 41 App. D. C. 514; *Williams* v. *Kern & Sons,* 47 App. D. C. 441; In *re Interrieden Canning Co.,* 277 F. 613, 51 App. D. C. 214; *E-Z. Waist Co.* v. *Reliance Mfg. Co.,* 286 F. 461, 52 App. D. C. 291."

Anglo American Incandescent Light Co. v. *The General Electric Co.* (43 App. D. C. 385):

In this case the General Electric Company used and had registered the word "Mazda" as a trade-mark for electric incandescent lamps and opposed the registration of the same word by the Anglo American Company as a trade-mark for incandescent gas mantles. In sustaining the opposition the court said:

> "While, of course, no one of average intelligence would purchase a 'Mazda' gas mantle in the belief that it was a 'Mazda' electric lamp, the average person *would* believe that he was purchasing the product of the manufacturer of 'Mazda' lamps."

Lord & Taylor v. *Wolf & Son* (41 App. D. C. 514):

Lord & Taylor owned the trade-mark consisting of the word "Onyx" for hosiery and opposed the registration of the same trade-mark by Wolf & Son for underwear, *i. e.*, shirts, drawers and union suits. Here there was no possibility of confusion in the sense of mistaking one commodity for the other, for instance, of a purchaser buying a pair of socks with the idea that they were an undershirt, or to be worn like or substituted in use for an undershirt. The Court of Appeals sustained Lord & Taylor's opposition, saying:

> "We think the word class, as used in the statute, means broadly a genus including as species any goods upon which the use of the same mark, when the goods are exposed side by side, would tend to mislead the purchasing public."

Simplex Electric Heating Company v. *The Ramey Company* (46 App. D. C. 400):

The Court of Appeals of the District of Columbia reversed the decision of the Commissioner of Patents permitting the Ramey Company to register the word

"Simplex" as a trade-mark for electric vacuum cleaners. The Simplex Electric Heating Company had made and sold many varieties of electrically heated cooking and other electrically heated utensils, but had never made or dealt in vacuum cleaners. The evidence showed that the Simplex Company had advertised its products for years at an expense of about two hundred thousand dollars per year with the result that it had become known throughout the United States to purchasers of electrical devices; and a number of people had been deceived, including prospective purchasers, a party desiring repairs and another party who wanted a sales agency. There was also proof tending to show that electrical dealers handle both electric heating devices and vacuum cleaners.

The court sustained the opposition of the Simplex Company, holding that the goods dealt in by the parties were of the same class. Upon this point the court said:

> "There is some difficulty attending these questions of classification. A thing may not be the same and yet of the same general description and used for similar purposes. In this case the corporate name which is widely advertised for electrical goods caused persons to suppose that these cleaners were the product of the Simplex Company. With the enormous range afforded for the selection of trade-mark names, it is not unreasonable to suspect that this trade-mark was adopted for the purpose of obtaining the benefit of the wide advertising that had been done by the Simplex Company. In such a case the benefit of any doubt in regard to the classification should be given to the one who has used, developed and advertised the mark and given it trade value."

Boston Rubber Shoe Co. v. *Joseph Abramowitz* (47 App. D. C. 199):

In this case the Commissioner of Patents held that there was no conflict between parties using the same trade-mark on rubber shoes and on leather shoes, respectively. The court reversed the Commissioner of Patents, saying:

> "The error into which the Patent Office has fallen is in a rigid adherence to the separate classification of rubber and leather goods. The particular subject-matter of this interference is whether or not the marks of the contending parties are so similar as to create confusion in trade when used on footwear generally or on particular grades of footwear."

The Canton Culvert and Silo Co. v. *Consolidated Car Heating Co.* (44 App. D. C., 491):

The court held that the trade-mark "Nokoro" for "electrical resistances, electrical apparatus," etc., conflicted with the trade-mark "No-Co-Ro" used in connection with the sale of sheet metal, which sheet metal was particularly adapted for use in the construction of electrical resistances. The court said:

> "It is familiar doctrine in this court that the owner of a trade-mark will not be hampered in the legitimate extension of his business by the registration of his mark to another."

Williams v. *Kern* (47 App. D. C., 441):

The Court of Appeals in discussing the descriptive properties of self-rising pan-cake flour and ordinary wheat flour said:

> "The test here is not in the likelihood of confusing the products, but the source from which they come."

G. & J. Tire Co. v. *G. & J. Motorcar Co.* (39 App. D. C. 508):

This case involved the question whether the same trade-mark (a triangle inclosing the letters "G. & J.") should be registered by the Patent Office to different parties for use upon rubber tires and automobiles. These are the same commodities that were before the Court of Appeals for the Third Circuit in the Overland case (*ante*, p. 206). In the G. & J. case no testimony was taken and there was no evidence of deception of the public or of injury to the complaining party. The court declined to base a finding of deception and confusion of the public and of injury to the complaining party on bare inference, and decided that both parties were entitled to registration of the "G. & J." trade-mark. In the Overland case there was evidence of deception of the public and of the probability of injury, and in that case the defendant was enjoined from using the word "Overland." There is no conflict between the two cases. In the absence of proof of confusion and injury in the G. & J. case there was no reason why both parties should not use the same trade-mark, and the presence of proof of confusion and injury in the Overland case made it illegal and improper for the defendant to use the same name as the plaintiff. It is conceivable that evidence might have been adduced in the G. & J. case showing confusion and injury as was done in the Overland case, but in the absence of such evidence the court quite naturally did not assume as proved that which was not proved, and more particularly so as the facts, if they existed, were easily provable.

Principles Established by Previous Cases in Which Parties Dealt in Different Commodities, and Application of that Principle to the Instant Case.

In some of the cases which we have reviewed, the name or symbol protected by the injunction had been used as the name, or part of the name, of the corporation or other organization through which the plaintiff's business was conducted, and in others the plaintiff had applied the name or symbol to the goods dealt in; and in some of the cases the defendant had used the misappropriated word in one of these ways and in the other way in other cases. But in all of the cases the controlling fact was that a name or symbol that had in some way become identified with one party's business or goods had been misappropriated and used deceptively in connection with another party's business or goods with the effect of wrongfully appropriating and injuring the good-will of the business rightly entitled to the use of the name or symbol. The right of the original user of the name or symbol is the same whether its association with his goods and business has arisen from use as a trade-mark applied to goods or use as the name of the organization conducting the business, and the invasion of the property right is the same whether the party who misappropriates the name or symbol uses it as a trade-mark applied to goods or as the name of the organization conducting the business or as both.

The cases discussed on pages 179 to 221, *ante*, present illustrations of these different uses of an identifying name by both the plaintiff and the defendant, and in all of them in which deception of the public and injury to the plaintiff was proved the fraudulent use of the misappropriated name was enjoined. Therefore we believe that all of the cases referred to are equally in

point in the consideration of the instant case, in which the appropriated word, "Beech-Nut," is both the dominant element of plaintiff's corporate name and also of plaintiff's trade-mark.

Judge Denison, in the Penslar case, based the injunction on the appropriation of and injury to good-will by the defendant's use of the word "Penslar" and by false representations of fact, and enjoined such use of that word and the continuance of such misrepresentations. He expressly refrained from basing his decision either upon infraction of trade-mark rights or upon the ground of unfair competition. Judge Denison saw no necessity of attempting to fit the definition of trade-mark rights or of unfair competition to the circumstances of the case. He perceived the fact that the defendant by using the word "Penslar" had invaded the plaintiff's property right in the good-will of its business and enjoined the continuance of the wrong. The wrong to property having been committed it was immaterial whether that wrong be called a violation of trade-mark rights, or an infraction of the law of unfair competition, or be given some other description or name. While not always so explicitly stated as in Judge Denison's opinion, the underlying principle is the same in the Aunt Jemima and Vogue cases, and in the English cases, and in the other cases cited herein. In some of these cases the subject-matter has been discussed as the appropriation of a corporate or firm name, in some as a violation of trade-mark rights, and in some as unfair competition. But in all of them the governing principle is the right to protection of the good-will of a business, and in all of them the ultimate effect of the injunction was to enjoin appropriation of and injury to the good-will of the plaintiff's business.

In the Vogue case the "V-Girl" trade-mark was used by both parties, and the word "Vogue" was the distinctive element in the corporate name of the Vogue Company, the plaintiff, and that of the Vogue Hat Company, intervenor, and the injunction prohibited the use of the "V-Girl" trade-mark and the use of the words "Vogue Hat" unless accompanied by a prominently displayed manufacturing name of which the word "Vogue" was not a part. In the Aunt Jemima case the words "Aunt Jemima" were the dominant element of the corporate name of the plaintiff, and the words and accompanying picture formed the trade-mark of both parties, but the defendant did not use the words "Aunt Jemima" as part of its corporate name. In this respect the facts were the same as in the instant case, where the word "Beech-Nut" is the dominant element of plaintiff's corporate name and its trade-mark, but is used by defendant only as a trade-mark. Judge Ward, who wrote the opinion in the Aunt Jemima case, did not find it necessary to, and did not, discuss the question whether the wrong committed by the defendant was unfair competition, or trade-mark infringement, or whether it fell within the literal definition of either of these offenses. From the fact that he did not discuss the point it fairly may be inferred that he thought it immaterial and found ample ground for the injunction in the proof of a continuing violation of property rights, and saw no necessity for an investigation regarding the name or classification of the wrong that had been committed. While Judge Ward stated that he did not think the English cases "apply to the appropriation of a trade-mark" he gives no reason for that view, and none is apparent from his analysis of the Aunt Jemima case or from the reasoning in any of the other cases.

In the English Eastman Photographic Materials Com-

pany case the word "Kodak" was used by both plaintiff and defendant as part of the name of a subsidiary company, and both applied the word "Kodak" to their goods. In the English Dunlop cases the proper name "Dunlop" was the dominant element of the name of the plaintiff company and an element in the names of the defendant companies, and the Dunlop Lubricant Company sold its oil in containers bearing the name "Dunlop Lubricant Company." The injunctions restrained the defendants from all of those uses of the name "Dunlop."

In the English case of *Walter* v. *Ashton*, the word "Times" was the name of plaintiff's newspaper, and the defendant used that word in the advertisement of his bicycles but not as the name of his business. In the English Premier Cycle Company case the word "Premier" was the distinguishing element in the names of both the plaintiff and defendant companies, but the word does not appear to have been used as a trade-mark by the defendant.

It seems incontrovertible that the owner of a business has the same right to protection of the good-will of his business against misappropriation by unauthorized use of the name under which the business is conducted as by unauthorized use of a trade-mark applied to the goods, and that his right to protection is the same whether the defendant uses the misappropriated name as a part of its corporate or firm name or as a trade-mark so long as the use results in misappropriation of good-will. The relevant point is that a name which the plaintiff has in some way identified with his business or goods has been misappropriated by the defendant and in some way applied to defendant's business or goods. We believe that all of the cases discussed upon pages 179 to 221, including the English cases, are authorities equally upon the

trade-mark aspect of the instant case and its relation to the law of unfair competition.

Where, as in the instant case and the Penslar and Aunt Jemima cases, the misappropriated word or symbol is arbitrary and the resulting misappropriation of and injury to the good-will of the plaintiff's business is proved, we believe that a complete foundation for an injunction has been laid, and that it is a mere matter of terminology, and not of substance, whether the wrong is classifiable as trade-mark infringement, or as unfair competition, or conforms to the literal definition of either of these offenses. Judges Denison and Ward viewed the matter in this light in the Penslar and Aunt Jemima cases. They each found a continuing wrong to a property right and enjoined it precisely as a court of equity does in other fields of litigation. No reason is apparent in cases involving the property right in the good-will of a business, any more than in cases involving any other property right, for ignoring an assault upon property because the wrong does not fall within the rigid and literal terms of a definition framed in former times to fit other circumstances.

We believe that there has been trade-mark infringement in the instant case for the simple, and seemingly quite sufficient, reason that plaintiff's trade-mark has been appropriated by defendant and damage done to plaintiff thereby. But, even if it be argued that this is not trade-mark infringement because plaintiff did not deal in tobacco and cigarettes, and was not unfair competition because there was no competition between the parties in the sale of tobacco and cigarettes, the fact remains that defendant has appropriated plaintiff's trade-mark and also the distinctive element of its corporate name, has appropriated and injured the good-will of plaintiff's business, has deceived the entire purchasing

public, has misrepresented the facts to stay plaintiff's hand, and has realized large profits at the expense of damage inflicted upon the good-will of plaintiff's business. The proof of the wrong is complete. The inadequacy of the remedy at law is apparent, and it is equally apparent that redress by injunction lies within the general equity powers of the court. Whether the terms "trade-mark infringement" or "unfair competition" are or are not apt descriptions of the wrong here complained of, the wrong exists, and is of the character which courts of equity have the power to redress.

Use of Same Trade-Marks Upon Different Commodities by Several Persons, All Strangers to This Case, Not Relevant Here.

Defendant has offered in evidence six large scrap books containing a collection of labels (Defendant's Exhibits Nos. 19 to 24,—physical exhibits, not printed,—described and put in evidence over plaintiff's objection, R. Vol. V, pp. 2508, 2517-2518) alleged to have been used upon tobacco and food products and other commodities.

There is absolutely no evidence in the case even remotely establishing the absence of conflict or protest arising from such use of these names. Furthermore, there is absolutely no evidence in the record of this case to show that in a single one of the many instances where the same name is alleged to have been used in different industries any of the parties using the names referred to had a reputation so widespread as to cause the public to believe that the different products were of the same origin.

The conditions indicated by defendant's collection of labels may be based upon agreement between the parties or may have caused wholesale conflict and litigation.

The record is silent on these points. These many labels have simply been offered in evidence by defendant without a shred of evidence connecting them in the remotest degree with any issue before the court in the instant case. This same sort of defense was advanced by defendant in the case of *Aluminum Cooking Utensil Co.* v. *Sargoy Bros. Co.* (276 Fed., p. 447), as stated in that part of the opinion of the court appearing at the bottom of page 448 of Volume 276 of the Federal Reporter. Although in the Sargoy case the defendant proved the use of the very trade-mark in issue, the word "Wear-Ever," by others upon several different commodities, the court gave no weight to this proof and issued its injunction against the defendant. In the instant case, the evidence offered by the defendant is even more remote than that in the Sargoy case in that the collection of names offered by defendant is made up of trade-mark words which do not figure in the instant case at all.

Defendant has also offered in evidence three bound volumes of copies of Patent Office trade-mark registrations of words other than "Beech-Nut" (Defendant's Exhibits Nos. 31, 32 and 33,—physical exhibits, not printed, offered in evidence over plaintiff's objection, R. Vol. V, pp. 2523, 2542), and a list of these registrations classified according to the word registered (Defendant's Exhibit No. 30—printed in Transcript, Vol. VI, pp. 2924-2940). Defendant argues that these Patent Office registrations of words not involved in this case are evidence of its right to use plaintiff's trade-mark. As a matter of fact, however, there is nothing in this record to establish any analogy whatever between the conditions existing in the matter of these Patent Office registrations and the conditions existing in the case at bar. There is not a particle of evidence in this case to indicate that a single one of the Patent Office registrations was granted

in the presence of proof that such registration would result in injury to or diversion of the good-will of another party using the same or a similar mark upon a different commodity. The case at bar is replete with proof of injury to and diversion of plaintiff's good-will. The Patent Office makes no effort to obtain evidence regarding the effect of the registration of the same or similar trade-marks for different commodities beyond publishing its intention to grant registration. If no opposition is made the Patent Office Examiner simply grants registration upon his own unaided judgment regarding the liability of a conflict of interest.

There is nothing in the record of the case at bar to show that controversy and litigation have not resulted in many or all of the cases in which the Patent Office granted the registrations referred to in defendant's exhibits. There is nothing in the record of this case to show that the parties to whom registry of the same or similar marks have been granted did not consent to such registration, or that certain of these parties are not the successors in interest of others and in legal effect identical with them, or that groups of such registrants are not under single ownership. Furthermore, all Patent Office trade-mark registrations are granted subject to cancellation as a result of a statutory proceeding provided for that purpose (Trade-Mark Act of February 20, 1905, Section 13, quoted in Appendix G, p. 97). There is nothing in the nature of a final adjudication of rights in the act of the Patent Office in registering a trade-mark, nothing here to show to what extent the registrations offered in evidence by defendant have been cancelled. In fact, a Patent Office registration is evidence of nothing other than the fact that some one claims a right to a certain trade-mark. No right is conferred by the registration and the registration itself is subject to cancellation.

In fact, registration is not evidence of any use of the mark registered beyond the very slight use required by the Patent Office as a foundation for registration.

In none of the instances of registration cited in defendant's exhibits above referred to does it appear that any one party has used and registered his trade-mark for use upon a wide variety of products and thereby extended the significance of his trade-mark to such wide bounds as to cause confusion in trade when the same mark is applied by others to different, even though quite similar, commodities. In the absence of such conditions there is no analogy between the isolated registrations cited by defendant and plaintiff's use and registration of the same trade-mark for more than seventy different products.

At the trial objection was made to the admission in evidence of Defendant's Exhibits Nos. 19, 20, 21, 22, 23, 24 (R. Vol. V, pp. 2507, 2509, 2517), and Defendant's Exhibits Nos. 30, 31, 32 and 33 (R. Vol. V, p. 2523). We believe that the total irrelevance of this testimony warrants its exclusion from consideration.

The Weissinger Beechnut Trade-Mark Was Abandoned Prior to 1915 When the Lorillard Company Put Its Beech-Nut Tobacco on the Market.

In most of the cases in which the question of abandonment has arisen the defendant has attacked the plaintiff's right to the disputed trade-mark on the ground that the plaintiff's conduct has worked an abandonment of the right which he attempts to assert against the defendant. In the suit at bar the posture of the parties is the reverse of this. Here the plaintiff charges abandonment of a trade-mark which is pleaded by defendant as a justification for using an essentially exact copy of plaintiff's trade-mark. Where a party uses

a trade-mark in his business, then, after temporarily suspending the business, again resumes the same business, and uses *the same trade-mark* in connection with it, there is a presumption that the good-will of the business has survived and that the original owner's rights in his trade-mark have not been abandoned and have not lapsed by disuse. But where, as in the suit at bar, the defendant who has used an essentially exact copy of plaintiff's trade-mark, attempts to justify such use by a representation of continuous use since an early date of a mark that, though different, bears a similar word—"Beechnut," and where it appears, contrary to the representation, that the trade-mark relied on had been out of use for such a period of time that it had been completely forgotten by the public, and where it appears furthermore that the defendant has transformed the old mark out of all resemblance to its original form, we believe that there is no ground for a presumption that the good-will of the old trade-mark survives and attaches to the transformed trade-mark, and that it has not been abandoned, but that there is compelling reason for the assumption that defendant knew that the old trade-mark had been abandoned and was forgotten by the public, and that the transformation of the trade-mark from its original form into an essentially exact copy of plaintiff's label was a recognition and admission of the fact of abandonment, and that the transformation was made for the purpose of repudiating any possibility of association with the old mark and substituting therefor a false impression of association with plaintiff's business.

The business to which the Weissinger Beechnut trade-mark was appurtenant was the manufacture and sale of a chewing tobacco mixture compounded according to a certain formula. It was not the trade-mark of the business of Harry Weissinger as an entirety, or of the busi-

ness of Luhrman & Wilbern, successor to Weissinger, as an entirety, and it was never used by the Lorillard Company as a symbol of anything. There is nothing in this record to show or suggest that any of these companies ever had any trade-mark that symbolized or identified anything more than one particular product, such as a particular brand of cigars, cigarettes or tobacco. Now, if the Weissinger Beechnut brand of tobacco had been made and sold up to the time the Lorillard Company put its new tobacco mixture on the market, and the Lorillard Company had used on the new mixture the old Weissinger Beechnut trade-mark in the form in which it had previously been used, it might with some show of reason be contended that the change in the formula of the tobacco mixture worked no abandonment of the trade-mark right, but that the character of the product had simply been changed to keep pace with the times. But this is not what occurred.

As set forth in the statement of facts, the testimony shows that the manufacture of the Weissinger Beechnut tobacco by the Luhrman & Wilbern Company, Weissinger's successor, ceased some time prior to the year 1909 (*ante*, p. 49); that the last sale of the tobacco was in April, 1910 (*ante*, p. 47); that the sales during the years immediately preceding 1910 were insignificant, negligibly small as a business enterprise (*ante*, p. 47); that the last price list containing an entry of the Weissinger Beechnut brand was issued by the Luhrman & Wilbern Company not later than 1910 (*ante*, p. 49); that the sales of the Weissinger Beechnut brand ceased in 1910 because there was no demand for it (Boykin, Q. 10, R. Vol. IV, p. 2305); and that in the year 1915 when the Lorillard Company first put on the market its "Beech-Nut" scrap tobacco bearing a copy of the Beech-Nut Packing Company's Beech-Nut trade-mark no

ultimate consumer is shown to have even remembered that such a brand as the Weissinger Beechnut tobacco had ever existed (*ante*, p. 54). In November, 1911, the stock of the Luhrman & Wilbern Company was, by order of court, transferred to the newly organized P. Lorillard Company (*ante*, p. 46). In 1913 the P. Lorillard Company, as sole stockholder of the Luhrman & Wilbern Company, assigned to itself the assets of the Luhrman & Wilbern Company (*ante*, p. 46).

At this point there arises the preliminary question whether this 1913 assignment conveyed the Weissinger Beechnut trade-mark. At the time of the assignment there was no business in the Weissinger Beechnut tobacco. None had been sold since April, 1910 (*ante*, p. 47), for the reason that there was no demand for it (R. Vol. IV, p. 2305, Q. 10). None had been manufactured since some undetermined date prior to the year 1909 (*ante*, p. 49). There is nothing to show that in 1913 the good-will of the Weissinger Beechnut brand still existed, or that anyone outside of a few veterans of the tobacco trade (*ante*, p. 54) even remembered that there ever had been such a brand. The preponderance of evidence indicates that the good-will and even the public's memory of the Weissinger Beechnut tobacco business had expired prior to 1913, and there can be no question that there is an absolute lack of any evidence tending to the contrary conclusion. The assignment of the assets of the Luhrman & Wilbern Company to the Lorillard Company in 1913 was in general terms, simply a transfer of all its assets including good-will and all trade-marks (R. Vol. IV, p. 2252). It is elementary that a general assignment does not convey specific property unless the ownership of the property by the assignor at the time of the assignment is shown. Here it is not even shown that the property was in existence at the time of the assignment.

But even if, for the purpose of argument, we assume that which is not shown by the record, namely, that the good-will of the Weissinger Beechnut brand survived until 1913, and that Luhrman & Wilbern had retained ownership of it up to the time of the 1913 assignment, we are confronted with the fact that the Weissinger Beechnut tobacco business has never been resumed to this day, for the simple reason that the Weissinger Beechnut tobacco was never again manufactured and that the "Beech-Nut" labels since used have been so exact a copy of the Beech-Nut Packing Company's trade-mark that they were universally understood by the public to indicate products of the Beech-Nut Packing Company, and in not a single instance as conveying to any ultimate consumer even the remotest suggestion of any connection with the Weissinger Beechnut tobacco business.

The officers of the Lorillard Company never had any idea that in putting on the market their Beech-Nut scrap tobacco in 1915 they were reviving and continuing the old Weissinger Beechnut tobacco business. They do not so testify. They do not even mention the good-will of the Weissinger Beechnut tobacco business, or make the slightest reference to the possibility of the reputation of that business having survived until 1915, or express or suggest the slightest concern as to whether it had survived or not. All of the circumstances repudiate the idea that the good-will of the Weissinger Beechnut business had not expired long before the year 1915, and show, on the contrary, that the officers of the Lorillard Company wanted for their new tobacco mixture a trade-mark word that would not be associated with any old brand of tobacco, and for that reason eliminated from the Weissinger Beechnut label everything that would suggest any connection with the Weissinger Beechnut tobacco business, retaining only the word "Beechnut," and that word

changed to "Beech-Nut" and framed in an essentially exact copy of the Beech-Nut Packing Company's trade-mark. It is perfectly plain that it was the Lorillard Company's intent to leave the Weissinger Beechnut flag in obscurity and to hoist the Beech-Nut Packing Company's flag.

When the Lorillard Company was preparing to put its new scrap tobacco on the market in 1915 Mr. Ball looked about for a trade-mark word that would draw trade. He knew the word "Beech-Nut" was such a word, not because the word "Beechnut" had once been used on a brand of tobacco that had become so unpopular that tobacco users would no longer buy it, but because the Beech-Nut Packing Company had made it a household word from one end of the country to the other, and for this reason Mr. Ball used the word "Beech-Nut"—not "Beechnut"—and used it not as a part of the old Weissinger trade-mark, but as part of an essentially exact copy of the Beech-Nut Packing Company's trade-mark. Mr. Ball's own testimony shows his desire, and the effective means he adopted, to repudiate any connection between the Lorillard Beech-Nut scrap tobacco and the old Weissinger Beechnut business.

As set forth in the Statement of the Case (*ante*, p. 51), when the Lorillard Company became alarmed by the decreasing sales of their old brands of chewing tobacco it decided to put a new brand on the market. As stated by Mr. Ball:

> "So we decided to put out another brand, and in looking around for a brand, as is our usual custom, I referred to our list of brands to see what were in a way dormant, and that had been turned over to us as our property by the American Tobacco Company, and one of the first brands I noticed was the brand of Beech-Nut, and that seemed to me to be a very appropriate name for this article and we de-

cided to use this brand for that purpose." (R. Vol. V, p. 2558, and *ante*, p. 51.)

The list of brands referred to by Mr. Ball is Defendant's Exhibit No. 35. It is reproduced at pages 2942 to 2955, inclusive, of Volume VI of the Record. This list as printed in the record covers fourteen pages, two columns to the page, and includes over one thousand names of tobacco products that had been on the market at one time or another prior to the dissolution of the old American Tobacco Company in 1911. Mr. Ball stated (R. Vol. V, pp. 2576-77) that the Lorillard Company has about fifty tobacco brands on the market, and Mr. Belt put the number at "50-75-80, extreme aggregate, taking everything that exists" (R. Vol. V, p. 2620). Therefore, of the thousand brands on the list referred to by Mr. Ball, over nine hundred are not on the market, and the immense growth of the Lorillard business since 1915 shown by Mr. Ball's testimony at pages 2570 to 2573 of Volume V of the Record, indicates with practical certainty that these nine hundred brands have not disappeared from the market since 1915, but that all or most of them were dead in 1915, and probably most of them equally dead in 1911 when the Lorillard Company received the assets of the companies that once had manufactured them. The list itself was not included in the decree of court dissolving the old American Tobacco Company, and formed no part of any of the papers of transfer. It is a memorandum prepared by Mr. William R. Perkins, one of the counsel of the Lorillard Company in 1911. He testified (R. Vol. V, pp. 2537-38) that he included in the list all of the brand names appearing in the papers and books of the companies assigned to the Lorillard Company by the 1911 decree of dissolution. Among the sources of the trade-marks in the list he names the conveyances which he found in the files of these companies and their price lists and brand books,

these latter being books in which lists of brands were kept. Mr. Perkins did not remember omitting from the list any brand name that he found in the records mentioned. Mr. Perkins listed over six hundred of these alleged trade-marks as coming from the Federal Cigar Company (R. Vol. VI, pp. 2948-55), over fifty from the Duke's Mixture Department of the American Tobacco Company (R. Vol. VI, p. 2947), eight brands from the Luhrman & Wilbern Company (R. Vol. VI, p. 2945), several hundred from the old P. Lorillard Company which had been part of the combination that was dissolved in 1911, these latter including the S. Anargyros Turkish cigarette brands, and others whose origin does not appear further than that they were mentioned in the files of the old Lorillard Company.

Neither Mr. Ball nor Mr. Belt testified to any survival of the good-will of the Weissinger Beechnut brand of scrap tobacco. They did not testify that they had any idea that the business in the Lorillard Beech-Nut tobacco had any relation to the former business of Luhrman & Wilbern in the Weissinger Beechnut tobacco or that they were in any sense continuous. The only testimony relating even remotely to this point is that of Mr. Ball, who said that he referred to this list to find an appropriate name that had been used in connection with some brand of tobacco that was "dormant." It is merely a theory of the Lorillard counsel that the Lorillard Beech-Nut tobacco is a continuation of the trade in the Weissinger Beechnut tobacco, and it is a theory that is flatly contradicted by the surrounding circumstances and the motives and purpose of the Lorillard Company in putting its Beech-Nut tobacco on the market. As stated by Mr. Ball (*ante*, p. 51), the purpose of the Lorillard Company in putting a new brand of tobacco on the market in 1915 was the necessity of offering a sweeter and differently

flavored chewing tobacco to tobacco users who had ceased to buy the old brands. The Weissinger Beechnut tobacco was one of these old brands which tobacco users had stopped buying in 1910. The ordinary motives that govern human conduct, in this instance the desire to sell tobacco and make money, make it certain that the Lorillard Company did not want to put its new tobacco on the market under a trade-mark that would cause the public to believe that it was one of the old and unpopular brands which the public had tired of and refused to buy. The purpose was to introduce a new brand and to make it known to the public that it was new, and thereby obtain the trade of tobacco users who refused to buy the old brands. Hence it was necessary to adopt a trade-mark that the public would not associate with any of the old brands. That is why Mr. Ball examined the list of trade-mark words to find one that was, as he says, "dormant," and why he eliminated from the Weissinger Beechnut label the names of the Harry Weissinger Tobacco Company and the Luhrman & Wilbern Company, eliminated the squirrel which was its dominating feature, and suppressed every element of the label except the one element that could be utilized in making a copy of the Beech-Nut Packing Company's Beech-Nut trade-mark, namely, the word "Beechnut," which word he transformed into "Beech-Nut," thus neglecting no conceivable precaution to submerge the identity of the Harry Weissinger Beechnut business and to substitute therefor the identity of the Beech-Nut Packing Company.

The only theory upon which the Lorillard Beech-Nut tobacco business can be considered a continuation of the Weissinger Beechnut business would equally well have made the present Lorillard scrap tobacco business a continuation of any other of the thousand businesses the trade-mark of which might have been selected by the

Lorillard Company from Mr. Perkins' list. The Lorillard theory is that the preservation of a vast vocabulary of extinct and forgotten trade-mark words preserves the company's right to the exclusive use of those words as trade-marks, and that if, while these unused trade-mark words are lying "dormant," some word on the list becomes a valuable and widely known symbol of merchandise of high quality by reason of the efforts and expensive advertising of another party, then the Lorillard Company has the right to use that word for the purpose and with the effect of appropriating the good-will and reputation of the other party, and that the existence of this word in a list along with a thousand other words justifies the appropriation of the other party's reputation and good-will.

That Mr. Ball and the Lorillard Company had not the remotest idea of continuing the business in the Weissinger Beechnut tobacco, or of utilizing and perpetuating the reputation and good-will of that business, is emphasized by the meticulous care with which the Lorillard Company preserved the identity of the labels of tobacco brands which it acquired by purchase and intended to continue to deal in.

In the Statement of the Case at pages 61 to 73, *ante*, we have presented specimens and reproductions of the labels of tobacco brands that had been owned by the Luhrman & Wilbern Company (*ante*, p. 58), the assets of which company were acquired by the Lorillard Company upon the dissolution of the old American Tobacco Company and specimens or reproductions of the labels of the same brands as used by the Lorillard Company. Of the seven brands claimed to have been acquired by the Lorillard Company from Luhrman & Wilbern, six (Scrap Iron, Polar Bear, Old Nut, Honest, Bag Pipe and Natural Leaf scrap tobaccos) were active brands which were be-

ing made and sold at the time of the transfer to the Lorillard Company (*ante*, pp. 58-59) and the Lorillard Company continued to use upon these six brands precisely the same labels that had previously been used by Luhrman & Wilbern as shown by the specimens and reproductions at pages 61 to 71, *ante*. Contrasting with this is the transformation wrought in the label of the seventh, Weissinger Beechnut, as shown by the specimens on page 73, *ante*, where also there are mounted some specimens of the Beech-Nut Packing Company's Beech-Nut labels for comparison with the Lorillard Beech-Nut labels.

Mr. Ball, in his testimony, repeatedly referred to the danger to business involved in making even the most insignificant change in the label. He said that "In the change of anything on a live brand, you frequently take a chance of prejudicing the consumer" (R. Vol. V, p. 2578), and then he continued in the same part of his testimony to relate how the omission from the Duke's Mixture package of so small an element as a little letter "G" in a circle no larger than a pea had caused a falling off of business on account of the belief of many people that it was not the same tobacco (R. Vol. V, p. 2578). Mr. Ball also expressed himself on this point as follows:

> "I mentioned that as an instance where we were always very careful not to change a package. We have some packages today that are big sellers, and as long as they sell, we jealously try to keep them identical with what they have been." (R. Vol. V, p. 2579.)

In view of this testimony, the complete transformation effected in the Weissinger Beechnut label can only be taken as an expression of the Lorillard Company's intention to abandon and repudiate all connection or association with the old brand and the Weissinger business. Mr. Ball in his testimony even referred

explicitly to the presence of the name of the Harry Weissinger Tobacco Company on the Weissinger Beechnut label as one of his specific reasons for changing the design of the label. He was asked (R. Vol. V, p. 2559) how he "came to adopt this form of package," the question referring to the Lorillard Beech-Nut scrap tobacco package. He says in his answer (R. Vol. V, pages 2559-2560), referring to the old Weissinger Beechnut package:

> ". . . this package was out of date; in the first place, it had too much reading matter on it. . . . It had the name of the Harry Weissinger Tobacco Company that had long since gone out of business. . . ."

So the Lorillard Company eliminated the name of the Harry Weissinger Tobacco Company and also the name of the Luhrman & Wilbern Company. These names had formed a quite conspicuous feature of the Weissinger Beechnut labels (specimen of the label at page 73, *ante*), vastly more conspicuous both in significance and as an element of the design than a small letter "G" in a circle no larger than a pea. The elimination of these names and the identifying squirrel, together with the complete transformation of all the rest of the label into an essentially exact copy of the Beech-Nut Packing Company's Beech-Nut label are as clear and loud an expression of the intent of the Lorillard Company to abandon the trade-mark of the Weissinger Beechnut tobacco business as an express declaration in words could be. Aside from an express declaration of abandonment, hardly to be expected of an opponent in a contested case, we would have difficulty in imagining a more explicit declaration of intention to abandon a trade-mark than that made by the Lorillard Company in the suit at bar.

A clear statement of the principle that a trade-mark

cannot outlive the good-will of the business which it had previously symbolized appears in the opinion of Judge Showalter, Circuit Judge, in *Royal Baking Powder Company* v. *Raymond*, 70 Fed. 376. In that case the right of the plaintiff, Royal Baking Powder Company, rested on continuous use of the word "Royal" as a trade-mark for baking powder since about the year 1873. Defendant, Raymond, started a baking powder business in 1894, using the trade-mark "Royal London," but with the "Royal" more conspicuous than the "London," and he claimed the right to do so by reason of his succession to the ownership of a business which had failed in 1871, but which previous to that time had included as one of its branches the manufacture and sale of baking powder under the trade-name "Royal London." From 1871 to 1894 defendant had not made or sold any baking powder. The period of non-use of the trade-mark was longer than in the instant case and the products dealt in by the parties were the same, but the principle that a trade-mark right cannot outlive the good-will of the business to which it had been attached has the same application to both cases. In his opinion in the Royal Baking Powder case Judge Showalter said:

> "I can conceive such a stoppage of business by accident or design, even for a series of years, where the good-will, including the trade-marks, may still be found extant; that is to say, valuable, upon resumption. But when it is not shown in some satisfactory way that the trade reputation of a suspended business continues to have value,—can be exchanged or sold, for instance, for a price,—a court cannot say that a good-will remains; in other words, that there still attaches to the old proprietor any dominion over, or property right in, a mark which may once have had, but which no longer has, significance for him in the world of trade.
>
> "In the case of this defendant, even upon his own showing, it cannot be said that the good-will of the

old business, which ceased in 1871, attaches to the new business, started in 1894. There is no continuity between the old and the new. The good-will of the old business, whatever such good-will may have amounted to, became extinct years ago. The word 'Royal,' or the words 'Royal London,' had no function, when defendant recommenced the baking powder business, as identifying a baking powder made by him. Any other sign or word would have answered his purpose to the same extent. The bare intent to use or adopt a word as a trade-mark signifies nothing, and confers no right, in the absence of the actual use of such mark as a trade-mark. The intent by defendant from 1871 to 1894, if he had such intent, of resuming the use of the word 'Royal' as a mark for baking powder, amounts to nothing in the way of keeping alive the function which we may assume once attached to that word as identifying a baking powder made by him. On the theory that he once had a right in the word 'Royal' as a trade-mark, his attitude with respect to that word in February, 1894, was the same as that of a stranger who then for the first time took up the baking powder business. By reason of the essential nature of a trade-mark I should say that this defendant has not the 'better right,' as insisted in his answer." (70 Fed., pp. 380, 381.)

The foregoing applies to the facts in the suit at bar with even greater force than to the facts in the Baking Powder case. Here, in addition to the disuse of the trade-mark, there is conduct—the changes in the label and copying of the Beech-Nut Packing Company's trade-mark—that affirmatively shows the intention to abandon.

It is settled law that a trade-mark cannot be assigned separate and apart from the good-will of a business with which it has been associated. Though the Weissinger Beechnut tobacco business had ceased long before 1913, and though there is no proof or indication of the survival of the good-will of that business in 1913, the Lorillard Company contends not only that it took a good assignment of the rights previously possessed by the

Luhrman & Wilbern Company in the Weissinger Beechnut trade-mark, but that, by virtue of the assignment, it derived rights which the Luhrman & Wilbern Company would not have had if it had retained ownership of and continuously used the Weissinger Beechnut mark. The rightful owner of a trade-mark has no right to so change its appearance that it is no longer recognizable by the public as his trade-mark but is substantially identical with another party's trade-mark. We believe that, inasmuch as the business in the Weissinger Beechnut tobacco ceased in 1910, and has never been resumed, the 1913 assignment was ineffective to convey to the Lorillard Company the Weissinger Beechnut trade-mark, and that even a good conveyance of that trade-mark to the Lorillard Company would not justify its metamorphosis into another party's trade-mark.

In the Patent Office opposition proceeding (referred to *ante*, pp. 41 to 44) the Lorillard Company contended, as in this suit, that its use of the Beech-Nut trade-mark was a continuation of the use of the Weissinger Beechnut trademark, and that its title extended back to the Weissinger Company's date of adoption of the mark, 1898. The Patent Office Examiner of Interferences stated his conclusions on this point as follows:

> "What seems to the examiner of more significance is the character of the label found on opposer's Exhibit No. 16 [1915 Lorillard Beech-Nut Scrap tobacco package] when considered in connection with opposer's Exhibit No. 17 [the Weissinger 'Beechnut' tobacco package]. Considering the great care which is exercised by traders generally to keep intact the dress and style of the label for the purpose of preserving any good-will that may be symbolized thereby, the difference between the label found on Exhibits 16 and 17 seems highly significant. . . . If the originator of the label shown on opposer's Exhibit No. 16 was aware at the time of its adoption in 1915

of the label found on opposer's Exhibit No. 17, Exhibit No. 16 is mute testimony that its originator deemed the good-will that was at one time symbolized by opposer's Exhibit No. 17 to have in 1915 little or no value. The further circumstance that the opposer carefully preserved the dress of other brands which it had acquired from its predecessors tends to emphasize this significance of Exhibit No. 16. (See Beech-Nut Cross-Exhibits 1, 1*a*, 2, 2*a*, 2*b*, 2*c*, 2*d*, 3 and 4 in connection with the deposition of Bowman, a witness for the opposer.)

"It seems to the examiner that in February, 1915, the trade-mark right evidenced by opposer's Exhibit No. 17 was not merely sleeping but actually dead and abandoned. The circumstances of this case resemble those found in the case of *Levering Coffee Company* v. *Merchants Coffee Company,* 181 O. G. 1075; 1912 C. D., 547; 39 App. D. C., 151. In view of conclusion just referred to, whatever rights the opposer may have to use the word 'BEECHNUT,' it is believed, must be predicated on its use which was commenced in February, 1915." (R. Vol. VI, p. 2821.)

In *Levering Coffee Company* v. *Merchants Coffee Company,* 39 App. D. C. 151, referred to by the Patent Office Examiner of Interferences in the foregoing quotation, the parties were involved in the Patent Office in an interference, the issue being the right to use the word "Hygeia" as a trade-mark for coffee. The Merchants Company adopted the word "Hygeia" as a trade-mark in 1898 and used it continuously thereafter. The Levering Coffee Company in 1881 and thereafter made shipments of coffee contained in packages bearing the word "Hygeia." Eugene Levering, Jr., succeeded to the business of the firm on November 30, 1900. Before the books of the firm were produced he testified to continuous use by the firm of the trade-mark "Hygeia" for coffee down to the time he succeeded to the business. The books disproved this testimony. The books showed that for two or three years prior to 1897 the sales of the Hygeia brand of coffee were infrequent and inconsequential, and

that from 1897 to 1902 there was a complete non-user of the Hygeia trade-mark. Beginning in 1898 the Levering Company put a new brand of coffee, called "Hioja" on the market. The final decision in this case was by the Court of Appeals of the District of Columbia on appeal from the Patent Office. The following is quoted from the court's opinion:

> ". . . the gradual falling off of sales under that brand, the final complete cessation of those sales under the circumstances mentioned, the adoption soon after of the similar mark 'Hioja,' the period of time which elapsed before the old mark was again used, the fact that the new use was not begun until several years after a rival concern, in the same city, had established a good business under that mark, the failure to call available members of the old firm to explain away the inference naturally resulting from the acts and circumstances detailed, all lead to the conclusion that when, in 1897, appellant's predecessors discontinued the use of this mark they did so with the intent to abandon it. . . . It is not unlikely, in our view, that the revival of the use of this mark by appellant was the result of its successful use by appellee, rather than the result of the intent of the predecessors of appellant not to abandon it."

The District Court, referring to the continuity of the Lorillard Beech-Nut tobacco business and the Weissinger Beechnut business and to the differences between the labels, said:

> "The old formula was not to be dealt in any longer and it seems to us that the change in the formula justified a change in the decorative feature of the package which was to contain this new blend or mixture." (R. Vol. V, p. 2675.)

The foregoing statement that one is justified in applying a new label to a new product is quite true, but by no logical process does it establish the proposition that the use of the new label is lawful and right despite the fact

that it has been divested of any resemblance to the old label and made essentially identical with another party's trade-mark. The Court of Appeals based its opinion solely upon its classification of chewing gum and the other products of the Beech-Nut Company as foods, and its ruling that the Beech-Nut Company's rights do not extend to anything other than foods, and gave no weight to the Lorillard Company's claim that its present use of the Beech-Nut trade-mark is a continuation of the Harry Weissinger tobacco business and trade-mark.

We contend that the application of the law to the facts of this case results in the following conclusions:

1. That the Weissinger Beechnut trade-mark was abandoned by the Luhrman & Wilbern Company in 1910 by reason of the fact that the Weissinger Beechnut tobacco was never offered for sale after that year and the fact that the Weissinger Beechnut trade-mark has never been used since that year by either the Luhrman & Wilbern Company or the Lorillard Company.

2. That the Lorillard Company took no title to the Weissinger Beechnut trade-mark by the assignment of 1913 by reason of the fact that the evidence shows that the Weissinger Beechnut tobacco business went out of existence in the year 1910 and was never resumed, and the fact that the evidence fails to show that the good-will of that business continued to exist until the year 1913, but indicates the contrary, in that the admitted reason for discontinuing the business in 1910 was the fact that there was no demand on the part of the public for the Weissinger Beechnut tobacco.

3. That even if it be assumed that the Lorillard Company obtained ownership of the Weissinger Beechnut trade-mark in 1913, it abandoned that trade-mark by failure ever to use it on any product, thereby causing and permitting the good-will and the trade-mark to expire and pass from the knowledge and memory of the public.

4. That even if it be assumed, as in the next preceding proposition, that the Lorillard Company obtained ownership of the Weissinger Beechnut trade-mark in 1913, it abandoned that trade-mark not only by disuse and permitting it to be forgotten by the public, but also abandoned it by using the word "Beech-Nut" as a part of an essentially exact copy of the Beech-Nut Packing Company's Beech-Nut trade-mark, thereby repudiating and disclaiming any connection between the word "Beechnut" or "Beech-Nut" and the Weissinger trade-mark and business, and representing its significance as a symbol of the origin of merchandise to reside solely in its use as a part of the Beech-Nut Packing Company's trade-mark.

5. That even if it be assumed that the Lorillard Company had in 1915 the right to use the word "Beechnut" in a proper way as a trade-mark for tobacco, the deceptive use which it has made of the word "Beech-Nut" as part of an essentially exact copy of the Beech-Nut Packing Company's trade-mark has impressed upon the public the belief that the word "Beech-Nut" upon tobacco products signifies that such products are produced or dealt in by the Beech-Nut Packing Company, and that the Lorillard Company has thereby forfeited any right or claim of right to use the word "Beechnut" or "Beech-Nut" in any form or design as a trade-mark for any tobacco product.

Alleged Acquiescence of the Beech-Nut Company in the Lorillard Company's Use of the Beech-Nut Trade-Mark Was Temporary Inaction of the Beech-Nut Company Induced by the Lorillard Company's Misrepresentation of the Facts.

In Part II of the Statement of the Case (*ante*, p. 26) we have set forth the facts which establish beyond question that the Lorillard Company silenced the Beech-Nut Company's protest against appropriation of its trade-mark by representing, contrary to the fact, that the Lorillard Company and its predecessors had used the word "Beechnut" as a trade-mark for tobacco continuously since the year 1898. The Beech-Nut Company not only protested against the misappropriation of its trade-mark, but also informed the Lorillard Company of its certain knowledge that the public was deceived by the Lorillard Company's use of the Beech-Nut trade-mark (letter dated "7/2/15," R. Vol. VI, p. 2892), gave the Lorillard Company the name and address of a dealer who had written to the Beech-Nut Company asking for the "best jobbing price on Beech-Nut scrap tobacco" (letter dated "9/2/15," R. Vol. VI, p. 2896), and the name of another dealer who had written to the Beech-Nut Company ordering five cases of Beech-Nut scrap tobacco (letter dated "9/20/15," R. Vol. VI, p. 2901). It would involve a violent strain of credulity to believe that the Lorillard Company did not intend the deception caused by its use of the Beech-Nut Packing Company's trade-mark even in the absence of specific proof of knowledge of the deception (*ante*, pp. 156, 157), but these letters, written at the very start of the Lorillard Beech-Nut tobacco business make it impossible to doubt that the Lorillard Company had full knowledge of the deception from the start and intended to utilize it.

That the misrepresentation made by the Lorillard Company was deliberate and intentional is shown not only by the fact that it was made in answer to the Beech-Nut Company's protest and for the purpose of inducing the Beech-Nut Company to believe that its protest was groundless, but the deliberate and studied character of the misrepresentation is further shown by the fact that the Lorillard Company's representative stated that the Lorillard Company and its predecessor had continuously used the Weissinger Beechnut trade-mark since 1898 "*as shown by records in my office*" (*ante*, p. 27; R. Vol. VI, pp. 2893-94). This left no possibility of questioning the accuracy of the statement other than on the ground that it was a flat and deliberate falsehood. When the representative of a large business says that the records of the business show continuous use of a certain trade-mark for a specified period of time there can be no appeal among honorable men from the accuracy and finality of the statement.

As a matter of fact, the records referred to show the precise opposite of continuous use, namely, that there was a complete discontinuance of such use from and after the year 1910 (*ante*, p. 47). The representative of the Lorillard Company either said that continuous use was shown by the records without ever looking at the records, or he examined the records and then told the Beech-Nut Company that they showed the precise opposite of what they did show. There was not even a remote possibility of accident in this reference to the records. The representative of the Lorillard Company knew whether he had examined the records or not, and if he had examined them he knew whether they showed continuous use of the Weissinger Beechnut trade-mark or not.

The Beech-Nut Company had no means of ascertaining

the facts other than from what the Lorillard Company said, and the Beech-Nut Company had no reason to doubt or entertain the slightest suspicion of the accuracy and truthfulness of what the Lorillard Company said. In a country of the size of the United States in which there is no universal registry of trade-marks it would be impossible to establish the negative proposition that a certain trade-mark had not been in continuous use from 1898 to 1915. The truth of the matter was known to the Lorillard Company, and there was not the remotest reason why the Beech-Nut Company should not believe, as it did, what the Lorillard Company said.

In the Statement of the Case (*ante*, pp. 29 to 31), we have stated the facts showing that in the year 1898 both the business of the Harry Weissinger Tobacco Company, at Louisville, Kentucky, and that of the Beech-Nut Packing Company, at Canajoharie, New York, were being conducted on a small scale, with not the slightest indication, or probability, that they were anywhere being conducted in the same territory, or that either of them was sufficiently known to the public either by reason of the size of its business or the character and variety of its products, to lead the public to associate new products bearing the word "Beechnut" or "Beech-Nut" with either of them. If the Harry Weissinger tobacco business had been continued from 1898 to 1915, and if the original Weissinger Beechnut trade-mark had been continuously used in that business from 1898 to 1915, the Beech-Nut Packing Company would have had no legal ground for objecting to the continued use of the word "Beech-Nut" by the Lorillard Company as a trade-mark for tobacco. But contrary to the representation made by the Lorillard Company, the use of the Weissinger Beechnut trade-mark had not been continuous since 1898, its use ceased absolutely and for all time in 1910.

It is true that the Beech-Nut Company might, in 1915, have brought suit against the use by the Lorillard Company of a copy of its entire trade-mark, but the Lorillard Company's representation that its right to use a trade-mark of which the characteristic feature was the word "Beechnut" was a representation that it would be impossible for the Beech-Nut Packing Company to prevent the Lorillard Company from using that word as the dominating element of a trade-mark. The word "Beechnut" or "Beech-Nut" is the element of controlling importance. As a spoken word, as the spoken name of a product, distinctions in the manner of printing or the design of the label are of no effect in preventing confusion, and the appearance of the same word, even on labels of different design, would cause confusion, though quite probably not to as great an extent as that caused by the use of the word as part of a copy of the Beech-Nut Packing Company's entire trade-mark. But the apparent impossibility of enjoining the greater cause of conflict, the use of the word "Beech-Nut," caused the Beech-Nut Company to suspend its protest rather than become involved in litigation that at best could result in only a relatively small advantage.

Acquiescence may properly be ascribed to the Beech-Nut Packing Company to the extent of interpreting its conduct as equivalent to taking the position that if the Lorillard Company had the right to use the word "Beechnut" or "Beech-Nut," then the Beech-Nut Company did not think it would be good business to become involved in litigation for the purpose of attempting to enjoin the Lorillard Company from using that word in a particular design of label, namely a design imitative of that used by the Beech-Nut Company. The Lorillard plea of acquiescence therefore amounts to asserting that, so long as it did not misrepresent all of the facts, *i. e.*, did not

represent that the Weissinger label was precisely like the Lorillard Beech-Nut label, it had a perfect legal right to misrepresent enough of the facts to accomplish the intended purpose of causing the Beech-Nut Company to suspend assertion of its rights. Upon this thread of fallacy hangs the Lorillard Company's charge of acquiescence in its fraudulent use of the Beech-Nut trade-mark.

In Part IV of the Statement of the Case, at pages 90-91, *ante*, we refer to the evidence of many specific instances in which orders for Beech-Nut tobacco were addressed to the Beech-Nut Packing Company. Mr. Lipe, who was vice-president and general manager of the Beech-Nut Company at the time he testified, told about an old stockholder of the Beech-Nut Company who, during the month preceding the time Mr. Lipe testified, which was in August, 1920, wrote to the Beech-Nut Company ordering a shipment of Beech-Nut tobacco. During the five years that had passed since the Lorillard Company put its Beech-Nut tobacco on the market this stockholder had all the time assumed that it was a product of the company in which he owned stock (R. Vol. IV, p. 2174, X-Q. 129). That many such orders were received and that they were forwarded, or the parties sending the orders were referred, to the Lorillard Company appears from the testimony of Mr. Lipe (R. Vol. IV, p. 2174, X-Q. 130), Mr. W. C. Arkell, assistant secretary of the Beech-Nut Company (R. Vol. IV, p. 2188, Q. 3, *et seq.*, and p. 2192, X-Q. 26) and Mr. Francis E. Barbour, vice-president of the Beech-Nut Company (R. Vol. I, pp. 794, 795, X-Qs. 76, 77). But the forwarding of these orders to the Lorillard Company is evidence only of the fact that the parties who sent the orders were deceived by the Lorillard Company's use of the Beech-Nut trade-mark, and that the Beech-Nut Company had been deceived by the false representation made by the Lorillard Company.

While the mere suspension of the Beech-Nut Com pany's protest constituted definite assurance to the Lori lard Company that its misrepresentation had had th desired effect, the continued forwarding of orders fo tobacco by the Beech-Nut Company to the Lorillard Com pany during the following years must have acted t further relieve the Lorillard Company of any uneasines on the subject. As set forth in Part II of the Statemer of the Case at pages 33 to 35, *ante*, the Lorillard Com pany in the year 1919, at the suggestion of the Beech-Nu Company, proceeded against another tobacco manufa turer, the Beech-Nut Stogie Company, which had starte to use the word "Beech-Nut" as a trade-mark for tobacc products. This circumstance has significance in that shows that the Lorillard Company had specific and direc notice that the Beech-Nut Company asserted its exclusiv rights in the word "Beech-Nut" as a trade-mark agains all tobacco manufacturers and dealers other than the Lo illard Company. The Beech-Nut Company sent to th Lorillard Company a letter in which counsel for th Beech-Nut Company stated that the fact that the Beech Nut Company had filled orders for the Beech-Nut Stogi Company would not have any bearing upon "you [the Beech-Nut Company's] right to stop the us by them of your mark" (*ante*, p. 34). There wa no conceivable circumstance other than the misrep resentation made by the Lorillard Company in 191 that could cause the Beech-Nut Company to believe tha it had the right to stop the Beech-Nut Stogie Compan from using the word "Beech-Nut" but had no right t stop the Lorillard Company from using that word.

As set forth in Part II of the Statement of the Cas (*ante*, p. 39), when the Beech-Nut Company learned, i the year 1919, that the Lorillard Company was plannin to extend the use of the Beech-Nut trade-mark to ciga ettes the Beech-Nut Company again protested, and as

defensive measure sold a few boxes of cigarettes in boxes bearing the word "Beech-Nut," and applied to the Patent Office for registration of that word as a trade-mark for cigarettes. The Lorillard Company opposed this application for registration and in its notice of opposition filed in the Patent Office pleaded continuous use of the word Beech-Nut since 1898 as a trade-mark for tobacco. The Beech-Nut Company in its answer admitted all of the formal and other allegations of the Lorillard Company the truth of which its officers had personal knowledge, and pleaded a general denial as to the rest of the allegations. It was this general denial, made without the slightest anticipation, or reason to believe, that the Lorillard Company would have the slightest difficulty in proving what it had said in 1915 was shown by the records of its office, that brought out the fact that the Lorillard records do not show anything of the kind, but, on the contrary, show complete dis-use from and after the year 1910. Had it not been for the controversy about the cigarettes the Beech-Nut Company would never have learned that the Lorillard Company did not tell the truth in 1915. The abstract of the evidence contained in Part II of the Statement of the Case shows conclusively that the acquiescence charged by the Lorillard Company was the temporary inaction of the Beech-Nut Company induced by the Lorillard Company's misrepresentation of the facts made in 1915 for the purpose of concealing the unlawfulness of its use of the Beech-Nut trade-mark.

Damage.

The use by the Lorillard Company of the trade-mark and trade-name of the Beech-Nut Company converts the Beech-Nut Company's right to the exclusive enjoyment of its reputation and the good-will of its business into the mere right to enjoy and use that reputation and good-will in common with the Lorillard Company, and with anyone who desires to utilize the good-will of the Beech-Nut Company in the sale of any commodity not heretofore dealt in by the Beech-Nut Company. The damage lies in the conversion of an exclusive owner into a mere tenant in common. That specific damage results from such a conversion needs no demonstration. The mere conversion is damage.

The Lorillard Company has defended its position on the principle that no one may have an exclusive right in the use of a word or other symbol as a trade-mark except in connection and association with an established business, and that as the Beech-Nut Company has no business in tobacco it has no legal right to prevent others from using its name and trade-mark in the tobacco business. But there is a vital difference between the association of a trade-mark with a business, and its association merely with the sale of some particular commodity or commodities. The Beech-Nut Company's trade-mark is associated with its business generally, and not merely with the sale of particular commodities. That this is so, and that it is recognized by the public, is shown by the universal acceptance by the public of the Lorillard Beech-Nut tobacco products as products of the Beech-Nut Packing Company.

We find nothing in any of the decisions of this Court to give support to the view that the exclusive right of the owner of a trade-mark or trade-name is con-

fined to its use on the very commodities in connection with which he has used it, but we do find expressions indicative of the contrary view. In the concluding paragraph of the quotation on page 268, *post*, from Mr. Justice Pitney's opinion in the Hanover Star Milling case (240 U. S. 403) a trade-mark is referred to as the subject of property "in connection with an existing business," not in connection with the sale of a particular commodity. And in the opinion of this Court in the Simplex case Mr. Justice Sutherland refers to the purpose of the law of unfair competition and trade-marks as "to prevent one person from passing off his goods or his business as the goods or business of another" (269 U. S. 372, 380). This statement was made in a case involving parties who dealt in different and non-competing commodities, and involves, as does the opinion in its entirety, recognition of the principle that the exclusive rights of the owner of a trade-mark are not to be arbitrarily confined to the particular commodities upon which he has used it, but may extend to any business in which the use of that mark will indicate to the public that the business is his. When this Court stated that the object of the law is "to prevent one person from passing off his goods or his business as the goods or business of another," we believe the distinction between "goods" and "business" was made advisedly, and for the purpose of making the protection of the law commensurate with the demand of justice.

The injury inflicted upon the Beech-Nut Company by the Lorillard Company's appropriation of its name and trade-mark lies primarily in the fact that the public has been led to believe that the Beech-Nut Company is conducting a business with which it is not connected and which it does not and cannot control. The most valuable asset of the Beech-Nut Packing Company is the high

regard in which it is held by the public—the good-will of its business. The good-will of such a business is the result of years of upright dealing accompanied by extensive and costly advertising. Its value may well exceed that of the physical assets of a company whose business consists in the sale of commodities in small quantities to millions of customers. The perpetuation of good-will depends absolutely on the continued and constant observance of the highest standards of business ethics. Good-will is at once the most valuable and the most easily destroyed of the assets of a business. With rigid observance of high and wise standards of business, good-will is a permanent asset, subject to injury and destruction only by failure of the law to enjoin strangers from impersonating the party who has won the good-will of the public. The claim of a business enterprise to protection of its good-will is merely a request that one be protected in the ownership of that which he creates. Other titles rest upon appropriation from the store of nature, or grants from government which may ultimately trace back to mere force and conquest, but good-will is something absolutely created by the party who claims its exclusive enjoyment. There is every reason, both legal and ethical, why the law should most scrupulously guard and protect this species of property.

During the years that have passed since the law first accorded protection to business good-will, that protection has been limited to the conditions existing at the time the protection of the courts was invoked. In an age when world-wide advertising was unknown, when business enterprises were small compared with present-day operations, and trade-marks and trade-names had value only in connection with a single commodity, the courts formulated the general principles of law in terms applicable to the facts before them. At a time when no purpose would

be served by applying a trade-mark or trade-name to different commodities, and when no one did so, courts were not called upon to formulate rules that would be applicable literally to present day conditions,—conditions that no one then even dreamt ever would or could exist. And in formulating principles of law applicable to conditions of those past times it was sufficient and proper that the principles be limited to the adjustment of the rights of men under conditions then existing. At a time when no wrong had ever been done by the misappropriation of a trade-mark for use on goods different from those to which the owner of the trade-mark applied it, and when no one foresaw or had any reason to speculate upon the possibility of wrong in the use of the trade-mark on different goods, full justice was done by the unlimited application of the principle that the same trade-mark may be used by different parties upon different goods, and likewise by the principle that there is no unfair competition in the absence of an effort by different parties to get the same trade of the same people at the same time. It would have been a visionary attempt at the impossible for the courts of former times to have undertaken to formulate principles for the regulation of conditions which they were called on to adjudicate that would be literally applicable to any conditions that might arise in the future. We do not criticise the legal acumen of jurists who have said that the owner of land owns it from a point at the center of the earth below, to the depths of space above, nor do we attempt to apply that principle when an aeroplane passes over our land.

The changes that have come about in the magnitude and manner of conducting business enterprises have prompted the courts to formulate new and broader statements of the law of trade, but we take it that the greater breadth of these modern rules does not result from the

development of any new principle, or of any principle that conflicts with the principles applied by courts of former times. The earlier courts stated the principle in a form that included all of the then known ways by which one man could misappropriate another man's identity and reputation. Modern courts in doing the same thing have found it necessary to state the same principle in broader terms simply because material progress has given rise to new ways in which one man may appropriate another's identity and reputation. In the eighteenth century a hat merchant could not appropriate a publisher's reputation by using the publisher's trade-mark, but such a thing may happen in the twentieth century as found by the Court of Appeals for the Sixth Circuit in the Vogue case (*ante*, p. 201).

In former times when the appropriation of good-will was proved in cases where both parties dealt in the same commodity there was always specific damage, for the true owner of the trade-mark was deprived of sales when the goods of the other party were substituted for his goods. Where the difference between the goods sold by the parties is such that the goods of one cannot be substituted for those of the other, there can be no loss of sales by substitution of goods and no specific damage from this source. Where the goods dealt in by the parties are different, the legal analysis of the wrong may take different forms. Business good-will may be regarded as absolute property and its misappropriation as a trespass to be enjoined without proof of damage. Or the misappropriation of good-will, accompanied by damage, may be regarded as a tort. Judge Gray, in the opinion of the Court of Appeals for the Third Circuit in *Sharpless* v. *Lawrence* (213 Fed. 423), said (p. 426) that in theory a technical trade-mark, like a patent right, is a species of property and that its appropriation is referred to as tres-

pass, but that in unfair competition cases the complaint is not of an appropriation of property but of a tort.

All cases involving appropriation of business good-will by means other than the appropriation of what are known as "common law" or "technical" trade-marks have come to be referred to as "unfair competition" cases. This use of the word "competition" doubtless arose from the fact that during the early development of this branch of the law the cases all involved parties who were dealing in the same commodity and were therefore in direct competition. A study of the cases gives ground to the belief that the use of the word "competition," used originally merely as descriptive of the class of cases embraced in the phrase "unfair competition cases," has come to be accepted in many instances as a word of limitation, with the effect of sometimes withholding legal relief in cases where the misappropriation of good-will has been accomplished by means not involving direct competition in the sale of goods.

In the instant case the court below says (R. Vol. V, p. 2701), with reference to the parties to the suit: "There was, therefore, no competition between them unfair or otherwise." It is quite obvious that if these cases are to be reasoned in words rather than in substance, the conclusion that there can be no unfair competition if there is no competition of any kind ends the matter. Of course, it might be said that there is competition between the parties as to which of them has the right to use the word "Beech-Nut" in the tobacco business, but we do not consider that any argument that consists in attempting to conform the facts to words reaches the root of the matter. The only sound and thorough analysis of the subject is one that starts with a definition of the right to be protected and proceeds with a dissection of the substance, uncontrolled by refinements and distinctions of termin-

ology. Such an analysis is found in the opinion of this Court by Mr. Justice Pitney in *Hanover Star Milling Company* v. *Metcalf*, 240 U. S. 403, from which we quote the following:

> "The redress that is accorded in trade-mark cases is based upon the party's right to be protected in the good-will of a trade or business." (240 U. S., p. 412.)
>
> . . . . . .
>
> "Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another [citing cases].
>
> "This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact the common law of trade-marks is but a part of the broader law of unfair competition [citing cases].
>
> "Common law trade-marks, and the right to their exclusive use, are of course to be classed among property rights, *Trade-Mark Cases*, 100 U. S., 82, 92, 93; but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good-will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality. (240 U. S., pp. 412-413.)
>
> . . . . . .
>
> "In short, the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business." (240 U. S., p. 414.)

The opinion from which the foregoing passage is quoted was written in a case where the contesting parties dealt in the same commodity, flour, but the reasoning upon which the analysis proceeds is independent of the nature of the commodities the parties dealt in. The reasoning

of the Court is not based upon the substitution of one man's goods for the goods of another man and the consequent loss of sales, but is based upon the broader ground of impairment of the good-will of a trade or business. In saying, as quoted above, that "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another" it is quite probable that this Court had in mind only the facts of the case before it, where both parties were selling the same commodity, but both the words and the reasoning to which they give expression are applicable with equal force to a case in which the parties deal in different commodities. The basic right is the right to protection of the good-will of a business. If a stranger falsely represents his goods to be the product of that business and thereby impairs or destroys its good-will, the right of the owner of the business to protection of the good-will attached to it has been violated, regardless of the character of the goods dealt in by the stranger. If the stranger deals in the same kind of goods that are dealt in in the business which he has impersonated, then there will be specific injury in the diversion of particular sales, but injury to the good-will of a business may be caused without direct competition in the sale of goods.

In the instant case we have proved injury in the impairment of the reputation of the Beech-Nut Company as a producer of goods of the highest grade and best quality only, and have proved special damage in the loss of the trade of people who ceased dealing with the Beech-Nut Company on account of their antagonism to any company that they thought dealt in chewing tobacco and cigarettes (*ante*, pp. 76-80). But we believe that, when a party shows that a stranger has impersonated him, and is conducting a business under his name, with resulting deception of the public which makes that party responsible in

the mind of the public for a business in which he has no interest and over which he has no control, there is a complete cause of action calling for legal redress regardless of whether special damage is or is not shown. That general damage to the Beech-Nut Company resulted from the impairment of its reputation by the cheap and inferior quality of the Lorillard Beech-Nut cigarettes is apparent from the testimony reviewed in the Statement of the Case (*ante*, pp. 102 to 112). An interesting paper which contains a discussion of this point appears in the Columbia Law Review for February, 1925. The writer, under the title "Appropriation of Trade Symbols by Non-competitors," comments on the decision of the Sixth Circuit Court of Appeals in *Vogue Co.* v. *Thompson-Hudson Co.* (300 Fed. 509, which case is discussed *ante* at page 201). The entire article is interesting and instructive, but we shall refer here only to the points directly involved in the instant case. After referring to the fact that in the Vogue case there was no direct competition between the parties the writer says:

> "The plaintiff obviously could not lose the sale of a hat to the defendant. Thus the case is not one which can be justified under the ordinary principles which govern the law of unfair competition in this limited sense. On the other hand, the plaintiff is in a position where he may lose something just as valuable from his point of view. This is what the court seems to have had in mind. It founded its decision on the assumption that because the plaintiff's magazine was generally known as an authority on style there was reasonable likelihood of injury to the plaintiff through the defendant's misrepresentation, since persistence in marking with this name articles which might be unfit, undesirable or out of style, might drive away vast numbers of those who customarily purchased the plaintiff's magazine. The forcefulness of this contention is at once apparent. Thus if X manufactures an inferior grade of automobile tires and calls them Overland tires,

a falling off in the sale of Overland automobiles is likely to reflect the practice." (Columbia Law Review, February, 1925, pp. 200-201.)

Following the passage above quoted the writer states that if the doctrine of trade names is to be carried over bodily into the field of disparagement of goods, as opposed to defamation of the person, account must be taken of the fact that in actions at law for disparagement of goods courts insist that there be an allegation of special damage. The author then puts the question whether the Vogue case can be taken to represent a relaxation in equity of the rule which requires special damage, and observes that such a tendency has appeared before in *Elgin Nat. Watch Co.* v. *Loveland*, 132 Fed. 41, in the Overland case, the Aunt Jemima case, the Peninsular Chemical Co. case (the three cases last referred to are discussed *ante* at pages 206, 192 and 186), *Eastman Co.* v. *Kodak Cycle Co.* (English), 15 R. P. C., 105, and *Walter* v. *Ashton*, [1902], 2 Ch. 282 (discussed *ante* at pages 194, 197 to 200). The author then continues as follows:

> "But, even if it be conceded that the plaintiff may obtain an injunction merely upon proof of general damage, the problem is not without its difficulties. Obviously, a mere falling off in business would not be sufficient to ground an injunction. Some connection between the plaintiff's loss and the defendant's conduct must be shown. It would seem to follow, therefore, that the plaintiff would be unable to show general damage unless the defendant's goods were of an unsatisfactory quality. This raises a question not easy of solution. On the other hand, the plaintiff may well argue that even though the defendant is not now making goods of a quality which can be complained of, yet he should be restrained from getting into a position where he can at any moment cause the market to be flooded with an inferior grade of merchandise which, in the minds of the public, will be associated with the plaintiff, to his irreparable injury.

> "A third point remains to be considered. The possibility of expansion is an important item. Ford may at any time decide to manufacture tires; Childs may wish to operate a group of restaurants in Wyoming. . . . The rule should be formulated as follows: One who is using a trade name is entitled to protection against its use by others upon articles which in their general characteristics, construction or use are so closely allied with the products of the user as to render it likely that the user himself may desire to manufacture such articles." (Columbia Law Review, Feb'y, 1925, pp. 202-203.)

In the concluding paragraph of the article in the Columbia Law Review, the author states that the injunction in the Vogue case could not be supported on the theory of the protection of the plaintiff's right to expansion of its business, and that in this respect the Vogue case differs from most of the previous cases tending to dispense with the requirement of special damage. The article concludes with the following passage:

> "The plaintiff [in the Vogue case] was making use of a symbol which was admittedly of great practical value to him; the defendant appropriated this symbol to himself. In determining whether or no a practice such as this should be restrained, the court should ask, 'Does the defendant's conduct tend to make the plaintiff any poorer? True, he has obtained something without the expenditure of any effort on his part, but is the plaintiff a loser or is he likely to lose anything thereby?' Leaving aside all consideration of the question of disparagement, in the instant [Vogue] case, the value of the plaintiff's symbol depended in large part upon its uniqueness. Employed in the manner described, it was indicative in the public mind of the plaintiff's magazine. The direct tendency of the defendant's action was to destroy this association. If lack of precedent alone offered an obstacle to relief, it is difficult to quarrel with the decision. Relaxation which is healthy growth is always to be commended." (Columbia Law Review, February, 1925, page 204.)

The decrees in all of the cases discussed herein on pages 186 to 221 and in the English cases which we have referred to were grounded upon general damage. But in addition to the fact that the courts which decided these cases based their decisions upon the general principles of equity, we believe that there is specific statutory authority for the grant of such injunctions upon proof of general damage.

Section 19 of the Trade-Mark Act of 1905 (33 Stat. L. 729), as heretofore stated (*ante*, pp. 127-128) provides that the courts "shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this act, on such terms as the court may deem reasonable." The expression "any right" must have been used advisedly and with intent to accord redress for *any* wrong, for in Section 16, which provides the remedy in actions at law, the wrong is strictly defined as consisting in the use of the trade-mark "in connection with the sale of merchandise of substantially the same descriptive properties," and the verdict is referred to as for "actual damages" which may be increased three-fold by the court. To limit the injunctive relief provided by Section 19 to cases in which the violation of right has caused special damage would impose upon the statute a limitation inconsistent with the phrase "violation of any right," and withhold the power to enjoin a threatened and impending injury in the absence of previously inflicted special damage.

Coming now to the fact that the word "Beech-Nut" is the dominant element of the Beech-Nut Packing Company's corporate name, and is the trade-name by which its line of products is universally known, it is apparent that the use of the word "Beech-Nut" by the Lorillard Company is not only a trespass upon the Beech-Nut Com-

pany's property right in its trade-mark, but is also an offense of the kind classified under the term "unfair competition." This aspect of the case is one that has been treated in the past as a tort. While the point is not material here, since damage has been proved, it appears that a property right is as fully involved in the misappropriation of a corporate or trade-name as in the misappropriation of a trade-mark. The property right resides in the good-will of the business, and a trade-mark, or a corporate or trade-name are but symbols of that right—instrumentalities for publishing the fact that the goods upon which it appears, or in connection with which it is used, are goods to which the good-will attaches. The property right is equally misappropriated whether it be misappropriated by the wrongful use of a trade-mark, a trade-name or a corporate name. In this particular any distinction between a trade-mark case and an unfair competition case seems to be merely a distinction between different instrumentalities by the misappropriation of which the same wrong is committed. We therefore believe that, aside from the Lorillard Company's appropriation of the Beech-Nut trade-mark, the use by the Lorillard Company of the Beech-Nut Company's corporate and trade-name has been a wrongful invasion of the Beech-Nut Company's property right in the good-will of its business.

In the passage above quoted from this Court's opinion in the Hanover Star Milling case the statement is made that "The essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement," a conclusion which flows inevitably from the analysis of the wrong as a violation of a party's right of property in the good-will of his business. Our contention that a property right is involved in unfair competition cases as fully as in strictly

trade-mark cases also finds support in the statement in the passage above quoted from the opinion in the Hanover Star Milling case where this Court says that common law trade-marks are to be classed among property rights, "but only in the sense that a man's right to the continued enjoyment of his trade reputation and the good-will that flows from it, free from unwarranted interference by others, is a property right, for the protection of which a trade-mark is an instrumentality." That which is thus defined as giving a trade-mark right the status of property, *i. e.* association with the good-will of a business, confers the same status on a trade-name and often, as in the instant case, on a corporate name, in precisely the same way that it does upon a trade-mark. The word "Beech-Nut" is associated by the public with the business of the Beech-Nut Packing Company. Whether the association of the word with the business has arisen from its use as a trade-mark, a trade-name, or as the salient part of a corporate name, relates only to the means by which the association has been instilled in the public mind. It is the fact of the association of the word with the business that makes the word a symbol of a property right, and no sound reason is apparent for considering the right in the use of the word a property right when considered as a trade-mark, and only as the basis for an action in tort, or of a suit to enjoin the continuance of a tort, when considered as a trade-name or the salient part of a corporate name.

The special damage which we have proved, showing the loss of trade of people who are opposed to business houses that deal in chewing tobacco or cigarettes, constitutes, of course, only a part of the total injury inflicted upon the Beech-Nut Company by the Lorillard Company's use of the Beech-Nut trade-mark. But, in cases where the opposing parties deal in the same

commodity, the showing of special damage is almost invariably of the most insignificant amount compared to the total damage. Trade-marks find their greatest utility and widest use in connection with goods that are sold at retail in small amounts, and where the price is not sufficient to cause the purchaser to exercise the degree of care that he would exercise in larger transactions. Taking the Hanover Star Milling case as an illustration, the profits of the parties grew out of thousands of retail sales of flour per month. A litigant could not produce and a court could not consider evidence of more than a few illustrative instances of the loss of retail sales of flour, a number of instances that in the aggregate could hardly involve a sufficient amount of profits to rise above the plane of the trivial. Therefore the instances shown in the Record here of loss of sales resulting from the damage to the good-will of the Beech-Nut Company, while few in number, are sufficiently numerous to show the existence of special damage, and this is the only purpose served by the relatively few instances of loss of trade by which special damage is proved in cases where both parties deal in the same commodity and there is a loss of sales by substitution of the goods of one party for those of the other. The impossibility of proving the total damage resulting from the loss of hundreds of thousands of small retail sales is the principal reason underlying the award of a defendant's profits to the plaintiff who has lost sales by the substitution of the defendant's products for his own. Proof of actual damage in cases involving a vast number of small retail sales is never required as a measure of damage, but solely to establish the existence of actual damage. Therefore, whether the Lorillard Company's appropriation of the Beech-Nut Company trade-mark be considered a trespass on property rights or a tort the proof of the wrong is complete.

While no hard and fast rule can be laid down for determining the precise commodities upon which a party has the exclusive right to use his trade-mark or trade-name, it has long been established law, laid down in cases where the parties dealt in the same commodity, that a party's right in his trade-mark extends to any mark sufficiently similar to cause the public to believe that it is his (*ante*, p. 165). The same logic demands that a party's right in his trade-mark or trade-name should extend to the use of that mark or name upon any goods of such character, or so handled in trade, that the appearance of his mark or name on those goods causes the public to believe that they are his. The only element of importance in the use of any trade-mark or trade-name is the message conveyed to the public by its use, and both reason, and the just regulation of business conduct, demand that a party's right to the exclusive use of his trade-mark or trade-name be commensurate with that use which is understood by the public to be his.

In the very nature of things, the extent of the rights of a party in the good-will symbolized by his trade-mark or trade-name is a question individual to each case. Whether a party's trade-mark or trade-name is associated with him by the public in connection with a certain business or the sale of certain goods can be established only by direct proof of the fact or by inference from proved facts. But study of the decision of the court below in the instant case indicates that the court did not conclude from the facts that the good-will of the Beech-Nut Company, and the significance of the word "Beech-Nut" as a symbol thereof, do not extend to tobacco products. Such a conclusion would have been impossible in the face of the proved contrary. The court below simply ignored the good-will of the Beech-Nut Company as having any bearing on the suit. That the court so

ignored the element of good-will is plainly shown in its statement (R. Vol. V, p. 2702) that the difference between the labels is "so great and distinct that any purchaser paying ordinary attention need not and should not be mistaken and certainly not deceived." In taking this position the court below substitutes its own judgment of what the public *ought* to think for proof of what the public *did* think. In the view of the court below the meaning of a trade-mark or trade-name upon goods is not the meaning conveyed to the public, but is the meaning which the court thinks the public *ought* to derive from the trade-mark. Our proof that the public was universally deceived is met by the court below with the statement that the public "need not and should not be mistaken and certainly not deceived." In effect the court below rules that the universal deception of the public has resulted solely from the carelessness or stupidity of the hundred million inhabitants of the United States in misunderstanding something that is rightly understood only by the Lorillard Company and the court below, and that the Lorillard Company, therefore, is neither responsible nor accountable for the wrong that has been done to the Beech-Nut Packing Company.

Conclusion.

We contend that the law and the facts established by the evidence support the following conclusions:

1. That since a time prior to the year 1915 and continuously thereafter plaintiff has used the word "Beech-Nut" and its Beech-Nut trade-mark upon and in connection with the sale of a large number of commodities of the kind sold in grocery, drug, tobacco and delicatessen stores and stores dealing in general merchandise, and that by maintaining a high standard of quality in the goods so sold and by extensively advertising the same plaintiff has caused the Beech-Nut name and trade-mark to be widely recognized by the purchasing public as a symbol of goods of superior quality produced by plaintiff.

2. That the word "Beech-Nut" is, and since the year 1899 has been, the dominant and identifying element of plaintiff's corporate name.

3. That in the year 1912 plaintiff registered in the Patent Office its trade-mark, whereof the word "Beech-Nut" is the dominant and principal identifying element, for upwards of sixty-seven different commodities of the kind ordinarily sold in grocery, drug, tobacco and delicatessen stores and stores dealing in general merchandise.

4. That since a time long prior to the year 1915 plaintiff has put new products upon the market under its Beech-Nut name and trade-mark, such new products being of the kind ordinarily sold in grocery, drug, tobacco, delicatessen and general merchandise stores.

5. That by reason of the large number of different commodities dealt in by plaintiff under its Beech-Nut name and trade-mark, and its established and well known

custom of frequently placing new Beech-Nut products on the market, the purchasing public believed that new products bearing the Beech-Nut name and trade-mark, and offered for sale in stores of the kind where the other Beech-Nut goods were ordinarily sold, were products of the same origin as the Beech-Nut goods with which they had previously been familiar.

6. That defendant, for the purpose, and with the effect, of wrongfully appropriating to its own use and profit the good-will of plaintiff's business used the word "Beech-Nut" and plaintiff's Beech-Nut trade-mark in connection with the sale of its Beech-Nut chewing tobacco and cigarettes, and has thereby caused the purchasing public to believe that said tobacco and cigarettes were produced and sold by plaintiff, and to purchase the same by reason of their knowledge of the high quality and purity of the products dealt in by plaintiff.

7. That defendant's intention and purpose to wrongfully appropriate the good-will and reputation of plaintiff's business is shown not only by the fact that the significance of the Beech-Nut name and trade-mark as a symbol of plaintiff's goods and business was generally known, but by the further fact that defendant in its use of the word "Beech-Nut" upon its tobacco products surrounded said word with a substantially exact copy of all of the ornamental and distinctive elements of plaintiff's Beech-Nut trade-mark.

8. That defendant's use of plaintiff's Beech-Nut name and trade-mark impairs the significance thereof as a symbol of plaintiff's identity and as a guaranty that goods bearing said name or mark, and offered for sale in stores of the kind where plaintiff's goods are ordinarily sold, are goods of plaintiff's production, and that the continued use by defendant of plaintiff's name and trade-mark, and by others who may be encouraged so to

do by defendant's use thereof, will injure plaintiff's business and ultimately destroy the significance and value of plaintiff's Beech-Nut name and trade-mark.

9. That defendant has injured plaintiff by causing the public to believe that plaintiff is the producer of the inferior Beech-Nut cigarettes.

10. That defendant has injured plaintiff by causing the large class of people who are opposed to the use of chewing tobacco and cigarettes to believe that plaintiff is engaged in the chewing tobacco and cigarette business.

11. That such appropriation and use by defendant of the word "Beech-Nut" in connection with chewing tobacco and cigarettes constitute infringement of plaintiff's common-law trade-mark rights, and of plaintiff's statutory rights as defined in Section 19 of the Act of February 20, 1905, ch. 592; 33 Stat. L. 728.

12. That such appropriation and use by defendant of the word "Beech-Nut" are in violation of plaintiff's right to the exclusive use of its corporate and trade name.

13. That in the year 1915 defendant made a false statement of fact to plaintiff for the purpose, and with the effect, of making it appear that defendant had a legal right to use the word "Beech-Nut" or "Beechnut" as a trade-mark for chewing tobacco; that by said misrepresentation of fact defendant concealed the wrongfulness of its use of the Beech-Nut name and trade-mark and induced plaintiff to refrain from asserting its rights until after the discovery of the true state of facts by plaintiff in the year 1920.

We contend under the law applied to the facts:

1. That plaintiff is entitled to a perpetual injunction enjoining defendant from using the word Beech-Nut, either alone or accompanied by the other elements of plaintiff's trade-mark, in trade upon or in connection

with or with reference to cigarettes and tobacco in any form for chewing or smoking.

2. That plaintiff is entitled to a decree awarding to it all of the gains and profits realized by defendant from the manufacture and sale of scrap tobacco and cigarettes to which defendant has applied or in connection with which defendant has used the word Beech-Nut.

3. That plaintiff is entitled, as provided in Section 19 of the Trade-Mark Act of February 20, 1905 (33 Stat. L. 728), to a decree for damages in an amount equal to three times the actual damages caused by defendant's said wrongful acts, by reason of said acts having been committed intentionally, and with full knowledge of the wrongful and injurious consequences thereof, and by reason of the fraudulent misrepresentation made by defendant to plaintiff for the purpose of preventing, and with the effect of delaying, plaintiff's assertion of its rights.

Respectfully submitted,

CHARLES E. HUGHES,
WALTER A. SCOTT,
JAMES R. OFFIELD,
H. MCCLURE JOHNSON,
Counsel for Petitioner.

[redacted]

APPENDIX A, DECEPTION PROVED BY PLAINTIFF'S WITNESSES.

[Page numbers of the brief where Appendix A is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

Extracts From Testimony of Witnesses Who Dealt in Or Used Beech-Nut Scrap Tobacco Or Beech-Nut Cigarettes In the Belief That These Articles Were Products of the Beech-Nut Packing Company.

WILLIAM I. THOMAS, of Chicago, Illinois, a grocer (Record, Vol. I, page 469):

"Q. 3. Do you chew tobacco, Mr. Thomas?

"A. Yes.

"Q. 4. How long have you chewed tobacco?

"A. About twenty-thirty years.

"Q. 5. I show you a package of scrap tobacco, being a package of Beech-Nut scrap tobacco, Plaintiff's Exhibit No. 3 in this case. Have you ever chewed this brand of tobacco, and if so, for how long?

"A. Tobacco?

"Q. 6. Yes.

"A. I have chewed that off and on for the last five years.

"Q. 7. Prior to the spring of 1921 whose product did you think this was?

"A. I supposed it was the Beech-Nut people that put out stuff such as bacon and chili sauce and all that class of stuff.

"Q. 8. During the time that you have chewed this tobacco have you carried it around with you in your pockets, and taken it out when you wanted a chew?

"A. Yes.

"Q. 9. Do you now think that this tobacco is put out by the Beech-Nut Packing Company?

"A. Do I now?

"Q. 10. Yes.

"A. No. Not since I have been made wise to it last spring.

"Q. 11. And do you know who put you wise to it last spring?

"A. Some young fellow; I don't know who he was; come into the store there one day and he said he represented the Beech-Nut people, and I told him that we handled the Beech-Nut people's goods. He says, 'Do you handle Beech-Nut chewing tobacco?' I says, 'No, but I use it.' He says, 'Do you use it?' I says, 'Yes, I have been using it over'—I told him then, I believe, about four years. 'Do you think we put this out?' he says. I says, 'Yes, don't you?' He says, 'No, it is not our goods.' "

A. V. BOBB, of Chicago, Illinois, proprietor of a meat market (Record, Vol. I, page 473):

"Q. 5. Do you chew tobacco, Mr. Bobb?

"A. Yes, sir.

"Q. 6. What brand have you chewed for the last four or five years, do you remember?

"A. Why, Beech-Nut was one of them, and Golden Twins, Climax.

"Q. 7. Is the Beech-Nut that you refer to the Beech-Nut scrap tobacco which I now show you, and which is in this case as Plaintiff's Exhibit No. 3; is that the Beech-Nut scrap?

"A. Yes, sir.

"Q. 8. How often, do you suppose, in the last five years you have purchased this Beech-Nut scrap tobacco; I mean, how many times a week?

"A. Now, I would not say whether it is four years or not—five years, but it is pretty close to it; about four years that I can remember; the year before I went into the army; around four years.

"Q. 9. I want an idea of how frequently you would purchase this tobacco?

"A. About once a week, maybe twice a week.

"Q. 10. And by whom did you believe that this product was put out?

"A. By the Beech-Nut Packing Company, Canajoharie, New York.

"Q. 11. And how long did you continue to believe that?

"A. Up until about—well, three months ago.

"Q. 12. And how did you find out that that was not true?

"A. By one of the salesmen, one of the Beech-Nut salesmen; he come into the store and I asked him about it; I asked him who puts up the Beech-Nut cigarettes, and he told me Lorillard's. I said, 'I thought you was putting it out,' and he said, no he didn't.

"Q. 13. I show you a package of cigarettes, being Plaintiff's Exhibit No. 1, Beech-Nut cigarettes. Have you seen these cigarettes before?

"A. Yes, sir.

"Q. 14. When, and how was your attention first directed to these cigarettes, do you remember?

"A. Why, yes, I was out at Jones' pharmacy, 63rd street, and standing at the counter there, and I says, 'Beech-Nut cigarettes,' and he says, 'Yes, I got some Beech-Nut cigarettes here, put out by the Beech-Nut Company.' I says, 'It isn't the same one that makes bacon?' He says, 'Yes.'

"Q. 15. And did he mention any other product that was made by these same people?

"A. Why, chewing tobacco; that was what I was after when I was in there.

"Q. 16. Do I understand he told you the chewing tobacco was made by the same people?

"A. By the Beech-Nut Packing Company.

"Q. 17. What made you think that this scrap tobacco was a product of the Beech-Nut Packing Company?

"A. It had the two beech-nuts on there, the same as the bacon, and it was in an oval shape, the same as the bacon does, and red letters and blue letters, just exactly the same as it is on the bacon. I never thought of looking at what was on the package.

"Q. 18. When did you first see the name of the manufacturer on this package, do you remember?

"A. About three months ago, when I had a package and looked at it, and it said 'Lorillard's' across the top.

"Q. 19. On the back of the scrap?

"A. Yes.

"Q. 20. This was after you were advised?

"A. After I was told it was not a Beech-Nut product. That is the reason I have been chewing it all the time, because I know the Beech-Nut bacon is good, and that the tobacco ought to be the same, and

I liked the taste of it very much, being in the business I am in.

. . . . . .

"X-Q. 29. I understand you have been chewing this tobacco for five years?

"A. About four years; I would not say five.

"X-Q. 30. About four years.

"A. About four years.

"X-Q. 31. And you had never taken the trouble to look to see whose name was on there?

"A. Never looked at the name; just stuck it in my pocket and when I wanted a chew just took a handful out."

CARL W. NEMETZ, of Milwaukee, Wisconsin, proprietor of a grocery store in which he sells tobacco products (Record, Vol. I, page 550):

"Q. 3. Do you sell tobacco products in your store?

"A. Yes, sir.

"Q. 4. I show you a package of scrap tobacco which is in this case as Plaintiff's Exhibit No. 3. Have you ever sold this tobacco in your store?

"A. Yes, sir.

"Q. 5. How long have you sold it there?

"A. Fourteen months.

"Q. 6. During the time you sold this tobacco from fourteen months ago up to very recently, whose product did you think it was?

"A. The Beech-Nut products, same as peanut butter and the likes of that.

"Q. 7. What made you think that, do you know?

"A. The name itself is the only reason.

"Q. 8. Do you now believe this is a product of the Beech-Nut people?

"A. Well, not since it has been explained to me, I don't.

"Q. 9. How long ago was it explained to you to the contrary?

"A. Oh, in the last month.

"Q. 10. Do you know who explained it to you—whom he represented?

"A. The Beech-Nut Products.

"Mr. Hinton: Direct examination closed.

Cross-Examination by Mr. Cavanagh.

"X-Q. 11. Do you handle the line of the Beech-Nut Packing Company's food products?

"A. Do you mean peanut butter?

"Q. 12. Yes.

"A. Yes.

"X-Q. 13. Do you handle the chewing gum?

"A. Yes.

"X-Q. 14. Candies?

"A. No Beech-Nut candies, no.

. . . . . .

"X-Q. 22. Did you ever hear of P. Lorillard Company?

"A. Never until Stein Brothers told me, that was after he dropped in the same day your representative was in. In fact, twenty minutes afterwards, we discussed the same thing over with him.

"X-Q. 23. What did he tell you?

"A. He told me that was made by that firm.

"X-Q. 24. P. Lorillard Company?

"A. The one made Turkish cigarettes. And in fact, I never knew who made them until he told me.

"X-Q. 25. You never took the trouble to find who they were made by, did you?

"A. No, sir, never.

Redirect Examination by Mr. Hinton.

"R-D. Q. 45. Where do you get your Beech-Nut gum?

"A. Oh, from Stein Brothers and others.

"R-D. Q. 46. They are the people you get your Beech-Nut scrap tobacco from?

"A. Same people.

"R-D. Q. 47. Do you know whether the wholesale grocers, or some of them, are handling tobacco?

"A. Oh, yes; in fact, I think all of them do.

"R-D. Q. 48. Do you know whether they sell this Beech-Nut scrap?

"A. I don't know. The only reason I got Beech-Nut gum from Stein Brothers, at a time there it was pretty scarce to get and we used to gobble it up wherever we could get it from.

"R-D. Q. 49. They are tobacco jobbers?

"A. They are a tobacco and candy concern.

Recross-Examination by Mr. Cavanagh.

"R-X Q. 50. Their business isn't confined exclusively to tobacco?

"A. No, they are the same as all other tobacco concerns in this town; every one of them carries gum and candy.

"R-X Q. 51. You mean the jobbers?

"A. Yes, tobacco jobbers; they carry it as side line."

WILLIAM C. WEIGEL, of Milwaukee, Wisconsin, retail grocer who sells tobacco in his store (Record, Vol. I, page 560):

"Q. 4. Do you sell tobacco products in your store?

"A. Yes, sir.

"Q. 5. I show you a package of Beech-Nut scrap tobacco, being Plaintiff's Exhibit 3 in this case. Have you sold this tobacco in your store?

"A. Yes, sir.

"Q. 6. How long have you sold it?

"A. Oh, around two years, somewheres around there.

"Q. 7. Did the man come and sell you this tobacco, put it in your store?

"A. Yes.

"Q. 8. I wish you would tell me, if you can remember, what was said on that occasion, when he came and put the tobacco in the store.

"A. I don't know whether I asked him directly, or whether he told me, but I was given to understand that this was a label that was only permitted on the very best products and was leased by the different companies that put out this product.

"Q. 9. Did you order tobacco from this man?

"A. Yes, I bought it right from the man himself, I believe they carried it around with them, if I am not mistaken now.

"Q. 10. You paid him cash for it?

"A. Yes, sir.

. . . . . .

"Q. 13. Now, whose product did you think this was, Mr. Weigel, or who did you think was responsible for the product?

"A. I naturally supposed that the Beech-Nut label was owned by some man or some company and then leased out to the people that put it out in a very high-class product.

"Q. 14. How long did you continue to believe that?

"A. Until about two or three or four weeks ago.

"Q. 15. And by whom were you then advised to the contrary, do you remember?

"A. By the Beech-Nut gum and dried beef people, Beech-Nut Packing Company, I guess it is.

"Q. 16. Do you sell Beech-Nut chewing gum in your store?

"A. Yes.

"Q. 17. Do you sell other Beech-Nut products?

"A. Dried beef."

Oscar Joseph, of Toledo, Ohio, proprietor, with Mike Saba, of a grocery and meat market in which they sell tobacco products (Record, Vol. I, page 617):

"Q. 4. Do you sell tobacco products in this store?

"A. Yes.

"Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case, Plaintiff's Exhibit No. 3; have you sold this product in your store?

"A. A number of years.

"Q. 6. How long have you sold it?

"A. Between six and seven years.

"Q. 7. How much have you sold, approximately, —is it a good deal or little?

"A. Oh, quite a bit. I cannot remember how much, but we sell an awful bunch of it.

"Q. 8. During this six or seven years that you have been selling this product, whose product did you think it was?

"A. Of course, the Beech-Nut people.

"Q. 9. Do you know who makes that product?

"A. I did not really know that always,—I thought the Beech-Nut people.

"Q. 10. I was in here about fifteen minutes ago

and we have just come back to take this deposition. Did you in the meantime, ask a customer anything about this?

"A. Yes.

"Q. 11. And what did you ask him?

"A. I asked him, 'Who do you think makes the Beech-Nut tobacco?' He said, 'Of course, the Beech-Nut people.'

"Q. 12. Have you previously heard this matter discussed by the customer?

"A. Quite a few.

"Q. 13. What have they said?

"A. They all say—they talk about who is making the tobacco, they don't stop to think to read the name, they think it is the Beech-Nut people.

"Q. 14. Have you heard this discussed a little or a good deal?

"A. Quite often.

"Q. 15. During the past six or seven years?

"A. During the time I was doing business.

"Q. 16. Do you know the name of this customer whom you just asked about this?

"A. No, I can get you his name easy, he used to work for B. A. Berry; he is working for Wilson Company now.

"Q. 17. What is their line?

"A. Meat business.

"Q. 18. You know him personally?

"A. Yes.

. . . . . .

"X-Q. 30. You never bought any of the Beech-Nut Packing Company's goods, that is, their food products, or chewing gum, that was put up like a package of scrap tobacco?

"A. Not like the package—same name, everybody thinks it is the same firm.

"X-Q. 31. You never saw that name, Lorillard's?

"A. No."

MIKE SABA, of Toledo, Ohio, partner of Oscar Joseph in a grocery and meat market in which they sell tobacco products (Record, Vol. I, page 622):

"Q. 4. Do you handle tobacco products in this store, Mr. Saba?

"A. Yes.

"Q. 5. I show you a package of Beech-Nut scrap tobacco, in this case Plaintiff's Exhibit No. 3; have you sold this tobacco over the counter?

"A. Yes, lots of it.

"Q. 6. How long have you sold it over the counter?

"A. Six or seven years, I used to be on the corner over there, and I moved here.

"Q. 7. Now, during those six or seven years you sold this tobacco over the counter, whose product did you think it was?

"A. I thought it was the same people—Beech-Nut chewing gum, all the same company.

"Q. 8. Did you ever hear any of your customers talk about this tobacco, and who made it?

"A. I heard some time one fellow, he thought chewing gum and Beech-Nut tobacco all one kind, the same people make it, that is all I heard, all I know.

"Q. 9. I understand the others did not discuss the question with you, the other customers?

"A. Yes.

"Q. 10. Have you ever told your customers about who makes this tobacco?

"A. No, I did not tell them—I thought the same company made them. You asked me if I thought the Beech-Nut chewing gum and tobacco were made by the same people. I said I do not know, I think it is one people. You told me yesterday. I said I did not know that before."

"Direct examination closed.

Cross-Examination by Mr. Cavanagh.

"X-Q. 11. You never took the trouble to find out who made the tobacco, did you?

"A. No.

"X-Q. 12. You never read the package?

"A. No, I do not read very much, and I did not look.

"X-Q. 13. You did not pay any attention to it at all?

"A. No."

JOHN JOZSA, of Toledo, Ohio, meat cutter and grocery clerk in Saba & Joseph's store in which tobacco products are sold (Record, Vol. I, page 625):

"Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Have you in the course of your working in these various stores, including this one, sold this tobacco over the counter?

"A. Yes, sir, a lot of times.

. . . . . .

"Q. 15*a*. Now, during this time that you have been selling this scrap tobacco over the counter, whose product did you think it was?

"A. I thought it was the Beech-Nut people; I never looked at the name, but Beech-Nut, I heard of those products before.

"Q. 16. You have heard of Beech-Nut products before?

"A. Yes.

"Q. 17. Can you name some of these other Beech-Nut products?

"A. Oh, they have bacon, and dried beef, and hams, and chewing gum.

"Q. 18. Do you know now who makes this product?

"A. I do not know of any one else than the Beech-Nut people.

"Direct examination closed.

Cross-Examination by Mr. Cavanagh.

"X-Q. 19. What is the name of the concern that makes the Beech-Nut ham and bacon, what is their names, do you know?

"A. No, I cannot remember that, because I did not handle any of their products for quite a while.

"X-Q. 20. So you do not know really who makes the Beech-Nut bacon?

"A. No.

"X-Q. 21. You never took the trouble to read the printing on the package to see who made the Beech-Nut scrap, did you?

"A. No, generally when somebody wants tobacco in a hurry, I just grab it and give it to them.

"X-Q. 22. You never even took the trouble to look at it to see who made it?

"A. No.

"X-Q. 23. You see the name Lorillard on there, don't you.

"A. Yes."

LLOYD SCHULTZ, of Toledo, Ohio, grocery clerk, employed by Saba & Joseph who sell tobacco products (Record, Vol. I, page 628):

"Q. 5. Do you sell tobacco products in that store?

"A. Yes.

"Q. 6. I show you a package of Beech-Nut scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3; have you sold this tobacco in this store?

"A. Yes.

"Q. 7. For how long?

"A. Ever since I was here, that they handled it.

"Q. 8. How many years would that be approximately, or roughly?

"A. Six or seven years.

"Q. 9. Have you yourself personally handed it to customers over the counter?

"A. Yes.

"Q. 10. Have you handed it a good deal or little?

"A. Quite a bit.

"Q. 11. Now, whose product did you thing it was all this time?

"A. I thought it was all the same thing, Beech-Nut, I never knew the difference. I never looked at it and never knew the difference but what it was Beech-Nut, all comes from the same place.

"Q. 12. Can you name any other Beech-Nut things?

"A. Yes, Beech-Nut bacon, Beech-Nut peanut butter, Beech-Nut beans, and quite a few things.

"Q. 13. And chewing gum?

"A. Yes, I always said tobacco, but I know better, it ain't now.

"Q. 14. Do you know now who made this product?

"A. I know you don't make it. Before I thought it was the same people that made the gum and tobacco.

"Q. 15. Who told you?

"A. The gentleman out there the salesman, Mr. Atkinson.

"Q. 16. When did he tell you he did not make this product?

"A. Yesterday.

"Q. 17. Had he told anybody else in the store at the same time he told you?

"A. Yes, the two bosses.

"Q. 18. Mr. Saba and Mr. Joseph?

"A. Yes.

"Q. 19. Were you in the store in approximately the fifteen-minute interval between the time I first came in this morning up to the time I came back, and did you hear Mr. Joseph ask a customer about this scrap tobacco?

"A. Yes.

"Q. 20. Who was this customer?

"A. A meat salesman.

"Q. 21. Do you know him?

"A. Yes.

"Q. 22. What is his name?

"A. We call Otke, Otkenheimer is his name.

"Q. 23. By whom is he employed?

"A. By Wilson & Co.

"Q. 24. What did Mr. Joseph ask him?

"Mr. Cavanagh: That is objected to; it is calling for hearsay.

"Mr. Hinton: This is offered in corroboration of Mr. Joseph's statement.

"Q. 25. Now, what did Mr. Joseph ask him, and what did he say?

"A. He was talking about tobacco and he thought the tobacco and gum all come from one company.

"Q. 26. Who said this?

"A. This meat salesman.

"Direct examination closed.

Cross-Examination by Mr. Cavanagh.

"X-Q. 27. What is the name of the concern that makes peanut butter?

"A. The Beech-Nut?

"X-Q. 28. Yes; what is the name of the concern?

"A. I never paid attention particularly to the name itself.

"X-Q. 29. So you don't know what concern made it?

"A. No.

"X-Q. 30. Same as to the bacon and gum?

"A. Yes.

"X-Q. 31. Did you ever hear of P. Lorillard Company? Tobacco people?

"A. I may have heard of them, but not paid any attention to it.

. . . . . .

"X-Q. 41. You never took the trouble to read the wording on this package?

"A. No; never paid any attention to it.

"X-Q. 42. So you wouldn't know whether it was Smith, Jones or Brown's tobacco.

"A. I know it was the Beech-Nut people; that is all I know about it.

"X-Q. 43. You went by that name 'Beech-Nut'?

"A. Yes.

"X-Q. 44. That is all?

"A. Yes.

"X-Q. 45. You did not pay any attention to who manufactured it or where it came from, or anything?

"A. No."

FRANK O'CONNELL, HENRY DIECKMAN, W. SHAFFER and H. A. NEFF, all in the grocery business at Toledo, Ohio, and ISABEL SHAFFER, employed in a drug store in the same city, in all of which stores tobacco is sold (Record, Vol. I, page 633):

These witnesses testified that in the five separate stores where they are employed, they stocked and sold Beech-Nut scrap tobacco for periods ranging from one to

two years, that they always believed that this tobacco was a product of the Beech-Nut Packing Company until advised in November, 1921, (the month during which they testified) by a representative of the Beech-Nut Packing Company that this tobacco was not a product of that company. They all said that they purchased the tobacco through a jobber in Toledo.

ALEXANDER C. GARDNER, of Milford, Connecticut, proprietor of a grocery and confectionery store in which he sells tobacco (Record, Vol. I, page 309):

"Q. 4. Do you sell tobacco products in this store?
"A. Yes.
"Q. 5. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Plaintiff's Exhibit No. 1. Do you remember when you first stocked these cigarettes in this store?
"A. When I did?
"Q. 6. Yes.
"A. I don't remember exactly.
"Q.7. Do you remember whether it was spring, summer, or fall?
"A. Well, let's see; I should say we got these in about the middle of winter, probably a little later.
"Q. 8. In the early spring?
"A. Yes, in the early spring.
"Q. 9. This year?
"A. Yes.
"Q. 10. When you first saw these cigarettes, by whom did you believe they were made?
"A. The Beech-Nut Packing Co.
"Q. 11. Why did you believe that?
"A. From the label, the Beech-Nut label.
"Q. 12. Do you refer to this oval device on the front of the package of cigarettes?
"A. Yes.
"Q. 13. Do you now believe they are made by the Beech-Nut Packing Company?
"A. No.

"Q. 14. When did you first find out they were not made by the Beech-Nut Packing Company, do you remember?

"A. There was a salesman, who informed me they were not a Beech-Nut product.

"Q. 15. Have you ever had any customers make any remarks to you over the counter about these cigarettes; if so, will you state the nature of the remarks?

"A. Why, they said if they were as good as the other Beech-Nut products they would be all right.

"Q. 16. Can you remember any other remarks that was made over the counter?

"A. Well, let's see, my mind is so full of other things—I was just trying to get these orders out.

"Q. 17. All right. Never mind that. Have you, since you knew who made these cigarettes, ever told customers they were a product of the Beech-Nut Packing Company?

"A. No, but I have had to inform them they were not a product of the Beech-Nut Packing Company.

"Q. 18. How often has this happened; I don't mean the exact number, but it has been freqeunt or not?

"A. Quite frequent, when they first came out.

"Q. 19. Yes. Have you ever seen a package of this scrap tobacco which is in this case, marked for identification as Defendant's Cross Exhibit No. 1 (Mr. Hinton shows witness package of Beech-Nut chewing tobacco), before I showed you one the other day?

"A. Not until you showed it to me.

"Q. 19*a*. I call your attention to the oval panel on the front of this package of scrap tobacco. Have you ever seen that device before?

"A. On all Beech-Nut products.

"Q. 20. Whose product would you take this to be?

"A. Beech-Nut Packing Company from the label.

. . . . . .

"X-Q. 51. You don't find on that scrap tobacco a wide red oval band, with a single beech-nut, do you?

"A. No.

. . . . . .

"X-Q. 55. That cigarette package hasn't that wide red band, with the name shown on it, has it?

"A. No, but I didn't remember the Beech-Nut having a red band until you called my attention to it.

"X-Q. 56. You know the oval is very old in the business?

"A. Yes, but an oval with a beech-nut is very different from an oval without a beech-nut.

"X-Q. 57. But I understood you to say you never knew of the Beech-Nut people to put out any tobacco.

"A. No.

"X-Q. 58. You have never sold any of their tobacco?

"A. No, but they have put out so many new articles lately that it was no surprise to me to see a Beech-Nut cigarette. I classed it as a Beech-Nut product."

SOLOMON S. KRAMER, of Hartford, Conn., proprietor of a delicatessen grocery and tobacco store. (Record, Vol. I, page 334):

"I am of legal age, and keep a delicatessen grocery and tobacco store at 84 Church Street, Hartford, Connecticut. I have been the proprietor of this store for five months. I have stocked and sold in this store a line of Beech-Nut products, such as jellies, jams, chewing gum and the like. I have also stocked and sold Beech-Nut chewing tobacco, similar to Plaintiff's Exhibit No. 3, and Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1.

"I believed, until this morning, that the scrap tobacco and the cigarettes were a product of the Beech-Nut Packing Company, the same people that make the rest of the Beech-Nut products that I carry. Customers frequently come in and ask me for Beech-Nut, and I ask them whether they want the Beech-Nut chewing gum, Beech-Nut chewing tobacco, or Beech-Nut cigarettes. One customer came in here and asked me for some cigarettes, and I said, 'why not try Beech-Nut cigarettes, they ought to be good, because I carry the rest of the line.'"

NEWTON HARRISON, of Milford, Conn., proprietor of a dry goods store and editor of an electrical trade paper, (Record, Vol. I, page 317):

"Q. 3. I show you a package of cigarettes (Mr. Hinton shows witness a package of Beech-Nut cigarettes) which is in this case, marked as Plaintiff's Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when you first saw them?

"A. Some time in the spring in Mr. A. C. Gardner's store.

"Q. 4. Do you remember the month?

"A. Yes, April, and I purchased a package.

"Q. 5. Why did you buy these cigarettes when you first saw them?

"A. Because I saw the character of the name and believed it to be a Beech-Nut product. I thought it was good, and I thought I would try them.

"Q. 6. You thought it was good before you bought the cigarettes?

"A. I thought it was a Beech-Nut product, I thought the package was a good package, so I tried it, believing it was a Beech-Nut product.

"Q. 7. You subsequently bought other packages?

"A. Yes, other packages.

"Q. 8. When did you first buy these cigarettes; was that in the spring?

"A. Some time in the spring, I presume; I couldn't give you the exact date, but believe it was in Gardner's store, but I have seen them in other places since then, believing it was a Beech-Nut product.

"Q. 9. Do you now believe it is a Beech-Nut product?

"A. Not since I have heard from your representatives quite recently that the Beech-Nut people have nothing to do with it.

"Q. 10. Do you remember seeing myself and another man get out of an automobile in front of Mr. Gardner's store?

"A. Last week?

"Q. 11. Last week.

"A. Yes, and I said first, 'Why don't you bring out a good grade of near beer as long as you have so many other good products?' Then you spoke to

me and I discovered in a very short time that the Beech-Nut cigarette was not made by you, at which I was very much surprised.

"Q. 12. What was on this automobile we got out of?

"A. Beech-Nut stamp, the Beech-Nut trade-mark.

"Q. 13. And was it that—

"A. That was what attracted my attention.

"Q. 14. And then you said to me, 'Why don't you put out a near beer?'

"A. I was thinking of the other companies that had made near beer, and I thought in these prohibition days you might develop a nice branch of your business by use of the Beech-Nut trade-mark.

"Q. 15. Do you remember what I asked you exactly?

"A. You told me at the time, as nearly as I can recollect, that had I any particular brand in mind. I said, 'you recently came out with a Beech-Nut cigarette.' I think that was what I said as nearly as I can remember.

"Q. 16. Yes, that is my recollection. You have bought Beech-Nut products before, have you?

"A. Yes, jellies.

"Q. 17. And what has been your experience with them?

"A. They were excellent, always excellent, good quality, what we call a good brand. The name Beech-Nut seems to speak well for their ginger ale and jellies and such products as I have bought.

"Q. 18. I show you a package of scrap tobacco (Mr. Hinton shows witness package of Beech-Nut chewing tobacco), which is in this case as Defendant's Cross Exhibit No. 1. Have you ever seen that brand or panel on that before; I mean have you ever seen that label before?

"A. Yes.

"Q. 19. Where have you seen it?

"A. I have seen it in Bridgeport in a tobacco store.

"Q. 20. Have you ever seen this label on any other product?

"A. Why, that particular label—

"Q. 21. Or one like it?

"A. I have looked at that label and believed it to

be a label belonging to the Beech-Nut Company because the name Beech-Nut seems to be comprehensive. I naturally concluded it was a Beech-Nut product, that was my impression of it, also the cigarettes.

Cross-Examination by Mr. Cavanagh.

"X-Q. 22. How often did you purchase these Beech-Nut cigarettes?

"A. Well, we will say half a dozen times. I smoke various brands. I buy Murads, Pall Malls, Chesterfields, or Egyptian, and I have been buying Salisburys lately. I tried the Beech-Nut. I have had Beech-Nut cigarettes in the house; we gave them to friends and they smoked whatever we had there.

"X-Q. 23. Have you ever heard of P. Lorillard Co.?

"A. Yes.

"X-Q. 24. You know them to be large tobacco manufacturers?

"A. Yes.

"X-Q. 25. Do you notice the name P. Lorillard Co. now?

"A. Yes, I notice it now but would not have otherwise.

"X-Q. 26. Do you notice the name Beech-Nut on there?

"A. Yes.

"X-Q. 27. If you had taken the trouble to notice the name Lorillard—

"A. I would have noticed it was not a Beech-Nut product, but the Beech-Nut trade-mark is so conspicuous that I didn't draw any other conclusion but that it was a Beech-Nut product.

"X-Q. 28. That is, that word Beech-Nut?

"A. That is sufficient.

"X-Q. 29. And if you had taken the trouble to examine the package and noted the P. Lorillard Co. on it you would have known it was the tobacco company's product and not the Beech-Nut Company's?

"A. Yes, but the Beech-Nut is very conspicuous and the Lorillard very inconspicuous.

"X-Q. 30. On this scrap tobacco (Mr. Cavanagh

shows witness package of Beech-Nut chewing tobacco), can you find the name Lorillard on that?

"A. Yes, if you know where to look for it.

"X-Q. 31. You have never seen any Beech-Nut products with any of those red radiating lines on it like that, have you?

"A. To my recollection they have a simple oval trade-mark, that is as far as I saw the goods, that is the way I remember their product. It just has a red oval with Beech-Nut in it.

"X-Q. 32. Do you know that in trade-marks it is very customary to use an oval on packages?

"A. Yes, it seems to be convenient for them.

"X-Q. 33. Did you ever hear of the Beech-Nut Packing Company putting out any tobacco product whatsoever?

"A. Not since I have been informed, I realized they haven't put out any tobacco products. It was a surprise to me to know it wasn't their product.

"X-Q. 34. You never made any particular inquiries to find out whether or not it was their product?

"A. I took it as a matter of course that it was their product.

"X-Q. 35. Because of the name Beech-Nut?

"A. Yes, because of the name Beech-Nut."

JOSEPH DE RAGO, of Hartford, Connecticut, proprietor of a general store in which he sells tobacco (Record, Vol. I, page 329):

"Q. 2. Do you handle tobacco in this store, Mr. De Rago?

"A. Yes.

"Q. 3. I show you a package of cigarettes (Mr. Hinton shows witness package of Beech-Nut cigarettes) which is in this case as Beech-Nut Exhibit No. 1, being a package of Beech-Nut cigarettes. Have you sold these cigarettes in this store?

"A. Yes.

"Q. 4. How long, about?

"A. Since they came out, when they come was in the spring.

"Q. 5. Yes. Mr. De Rago, who did you believe made these cigarettes?

"A. Always believe Beech-Nut make it; also call same name, that's Beech-Nut.

"Q. 7. Yes. Is that the people who make the gum?

"A. Yes, that's it.

"Q. 8. Do you sell the Beech-Nut gum?

"A. Yes.

"Q. 9. Mr. De Rago, have you sold Beech-Nut scrap tobacco in this store?

"A. Yes, I have been selling for six years here.

"Q. 10. Who did you believe made the Beech-Nut scrap tobacco?

"A. I believe just the same, Beech-Nut make Beech-Nut scrap tobacco.

"Q. 11. Is this the scrap tobacco I show you? (Mr. Hinton shows witness package of Beech-Nut chewing tobacco.)

"A. Yes.

"Mr. Hinton: The package shown the witness is produced and offered in this case as Beech-Nut Exhibit No. 3, Beech-Nut scrap tobacco.

"Q. 12. Mr. De Rago, did you ever tell people in this store that this scrap tobacco was made by the Beech-Nut people?

"A. They ask me who makes; I say I think Beech-Nut people make the same thing, they say that is right, Beech-Nut makes every thing, that's all.

"Q. 13. Now, when, if at all, when did you first find out; when was the first time you found out?

"A. Today.

"Q. 14. That the Beech-Nut people did not make this product?

"A. Today.

"Mr. Hinton: You may cross-examine.

"Direct examination closed.

Cross-Examination by Mr. Cavanagh.

. . . . . .

"X-Q. 24. During the last six years about how often have you sold this scrap tobacco? (Mr. Cavanagh indicates a package of Beech-Nut chewing tobacco.)

"A. I can't tell you that, about every week, when I run short, I buy every week.

. . . . . .

Redirect Examination by Mr. Hinton.

"R-D. Q. 38. Mr. De Rago, can you tell me why it was you supposed that these things were made by the Beech-Nut people?

"A. I thought it was, it looked the same thing (witness points to oval brand on two packages), but I never looked at the name, as I told you, because I can't read and never bother with them. People say Beech-Nut makes, and I say I think so, I don't know. Beech-Nut always make them, because the same name."

JOHN MEAD (Record, Vol. I, page 342):

"My name is John Mead; I am of legal age, and am employed as a clerk in Preston's market on Asylum Street, Harford,, Connecicut. I have seen the Beech-Nut scrap tobacco on display and have bought a few packages of it and always thought it was a Beech-Nut product, made by the same people that makes the gum and other Beech-Nut products. I have seen the Beech-Nut cigarettes, similar to Plaintiff's Exhibit No. 1, advertised and on display in Hartford, Connecticut, since the spring of 1921 and thought that these were made by the same people who made the Beech-Nut gum and other food products. I was first informed that neither the Beech-Nut scrap tobacco or the Beech-Nut cigarettes were a product of the Beech-Nut Packing Company, on August 30th, 1921, by Mr. Ray, a representative of the Beech-Nut Packing Company."

GEORGE F. MOULTON, retail druggist, South Norwalk, Conn., who sells tobacco products (Record, Vol. I, page 376):

"Q. 3. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Have you handled these here?

"A. Yes.
"Q. 4. How long have you handled them?
"A. Several months.
"Q. 5. Whose product did you think these cigarettes were prior to yesterday?
"A. Beech-Nut people, of course.
"Q. 6. Do you now think they are a Beech-Nut product?
"A. From what you told me, no.
"Q. 7. When did I tell you that they were not?
"A. Yesterday.
"Q. 8. Have you yourself sold these cigarettes over the counter?
"A. I have, yes.
"Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3. Whose product would you take that to be?
"A. Beech-Nut, of course.
"Q. 10. What do you mean by Beech-Nut?
"A. Made by the Beech-Nut Packing Company.
"Q. 11. Why would you take that to be a Beech-Nut product?
"A. From the name and label on it and the trademark.
"Q. 12. Have you ever seen this scrap tobacco before today?
"A. No.
"Q. 13. Have you ever seen it displayed around anywhere in this town or elsewhere?
"A. No, I have not."

Cross-Examination by Mr. Cavanagh.

"X-Q. 14. From whom do you buy these Beech-Nut cigarettes?
"A. Jobers.
"X-Q. 15. Ever hear of the P. Lorillard Company?
"A. Yes, tobacconists.
"X-Q. 16. You notice P. Lorillard Company's name on the package?
"A. I do now, yes.
"X-Q. 17. You notice the name Lorillard on the scrap tobacco?
"A. I do now, yes.

"X-Q. 18. So when you first saw that package, or when you handled them first, you didn't pay any attention to the name, just glanced at the package?

"A. Well, Beech-Nut was the prominent name."

TRACY N. COLLINS, proprietor of a grocery and restaurant at Noroton, Conn., in which he sells tobacco goods (Record, Vol. I, page 378):

"My name is Tracy N. Collins; I am of legal age, and the proprietor of a grocery and general store, and restaurant, located in Noroton, Conn. I have stocked and sold Beech-Nut scrap tobacco similar to Plaintiff's Exhibit No. 3 for about two years, and I have stocked and sold Beech-Nut cigarettes similar to Plaintiff's Exhibit No. 1 since these cigarettes came out in this territory, which was in the spring of 1921. I always believed that both the scrap tobacco and the cigarettes were made by the Beech-Nut Packing Company, the same people who make the chewing gum and other food products, until I was told by Mr. Hinton, on September 7, 1921, that the Beech-Nut Packing Company did not make either of these two products."

JOHN E. WATSON, druggist, of Chicago, Ill., who sells tobacco products (Record, Vol. I, page 411):

"Q. 9. I show you a package of scrap tobacco, which is in this case as Plaintiff's Exhibit No. 3, being a package of Beech-Nut scrap tobacco. Have you ever sold this product over the counter?

"A. Yes, sir.

"Q. 10. How long have you sold it over the counter?

"A. I would be right in saying five years and perhaps more.

"Q. 11. I wish you would tell me whether you have sold very little of it or a good deal.

"A. I have had in most places good business on it.

"Q. 12. Do you now know who makes this Beech-Nut scrap tobacco?

"A. No.

"Q. 13. Prior to a few weeks ago, who did you believe made this Beech-Nut scrap tobacco?

"A. I presumed it was put out by the Beech-Nut Company, like the chewing gum.

"Q. 14. Have you ever had occasion to talk about this scrap tobacco to your customers and, if so, what would you tell them about it?

"A. I would tell them it was put out by same company as Beech-Nut gum was.

"Q. 15. Was this true for the whole period of the five years?

"A. Yes, sir.

"Q. 16. Do you now believe that this scrap tobacco is made by Beech-Nut Packing Company—now this minute?

"A. Well, I really don't know, because I never looked up on it. I always sold it.

"Q. 17. Do you now believe that this is a Beech-Nut product or not? What do you believe about it now?

"A. I suppose that it is.

. . . . . .

"Q. 24. Did a representative of the Beech-Nut Packing Company recently come to see you, do you remember?

"A. Yes.

"Q. 25. Did he tell you whether or not the Beech-Nut people made this tobacco?

"A. I don't remember who he said made it. The best I remember he said cigarettes and tobacco weren't put up by the same people.

"Q. 26. Were or were not?

"A. Were not.

"Q. 27. How long ago was that?

"A. Perhaps three weeks ago.

"Q. 28. Now, I direct your attention, Mr. Watson, to Beech-Nut cigarettes in this case as Plaintiff's Exhibit No. 1, and show you a package thereof. Whose product did you think these were?

"A. I presumed they were put up by same people as Beech-Nut scrap tobacco and gum.

"Q. 29. How long have you handled these cigarettes?

"A. A short while.

"Q. 30. Have you yourself sold them over the counter?

"A. I have sold a few.

"Q. 31. Who makes the cigarettes, do you know?

"A. I cannot say that I do.

"Direct examination closed.

Cross-Examination by Mr. Cavanagh.

"X-Q. 1. Do you smoke, Mr. Watson?

"A. Yes, sir.

"X-Q. 2. What do you smoke?

"A. Cigars and cigarettes, both.

"X-Q. 3. Do you chew?

"A. No.

"X-Q. 4. Did you ever buy any of that Beech-Nut scrap tobacco?

"A. No.

"X-Q. 5. You have bought it from wholesaler for drug company?

"A. Yes.

"X-Q. 6. Did you ever buy any Beech-Nut Packing Company products?

"A. I bought scrap tobacco and the gum.

"X-Q. 7. I am asking you did you ever buy any products of the Beech-Nut Packing Company?

"A. I want to get you right. Is Beech-Nut scrap tobacco the Beech-Nut Packing Company products?

"Mr. Cavanagh: Mr. Watson, I cannot answer that question for you, but I will try to clarify the situation. You have bought Beech-Nut chewing gum. From whom did you buy that?

"A. I bought Beech-Nut gum from several stores.

"X-Q. 8. Did you buy from Beech-Nut Packing Company man?

"A. I cannot say that I did. Usually buy from jobbers."

JOSEPH S. AISENBERG, of Worcester, Mass., wholesale grocer who deals in tobacco goods (Record, Vol. I, page 148):

"Q. 2. Does your firm handle tobacco products for its grocery trade?

"A. Yes.

"Q. 3. What is the name of your firm?

"A. United Wholesale Grocery Company.

"Q. 4. What is your position with that firm?

"A. I am general manager and buyer.

"Q. 5. I show you a package of cigarettes which is in evidence in this case as 'Beech-Nut Exhibit 1.' Have you ever seen these cigarettes before?

"A. Yes.

"Q. 6. State, if you can remember, about when you first saw these cigarettes?

"A. Well, that I don't know.

"Q. 7. Well, approximately?

"A. I couldn't tell you. I remember seeing the ads in the paper when they first came out. Exactly when I don't remember; I don't know whether it is this year or less than a year ago.

"Q. 8. When you first saw these cigarettes, or ads to which you refer, by whom did you think this product was made?

"A. Well, my first impression was that they were made by the Beech-Nut Packing Company.

"Q. 9. And do you know what led you to that belief?

"A. Well, the fact was that the Beech-Nut people, as we always knew them, were in the jams, jellies and meat business, and then they went into the candy business. I thought they just added another line to their products and had gone into the tobacco business.

"Q. 10. Can you tell me anything further about the impression you received when you first saw these Beech-Nut cigarettes, with respect to the Beech-Nut people or the rest of their line or anything of that character?

"A. Well, knowing the Beech-Nut people as I knew them, and the quality they manufacture, from the line we handle in our own business, I was very much disappointed with the appearance of the pack-

age and the price of the cigarettes. I did not think that the quality and the appearance were in line with the general character of the quality of their products.

"Q. 11. Do you now believe that these cigarettes were made by the Beech-Nut Packing Company?

"A. Well, I did believe that until I found out otherwise upon making inquiry.

"Q. 12. And do you remember, Mr. Aisenberg, how long after you first saw the ads or the cigarettes it was that you learnt upon inquiry that these cigarettes were not made by the Beech-Nut Packing Company?

"A. Why, I believe it was over a month or so later that I happened to be in one of the tobacco stores and I asked various things, and amongst them I asked whether the Beech-Nut cigarette was being made, or being put out, by the Beech-Nut Packing Company and I was informed to the contrary.

. . . . . .

"X-Q. 20. How many people are employed by your concern?

"A. You mean salesmen?

"X-Q. 21. Entirely.

"A. I believe we employ about thirty.

"X-Q. 22. Where is your business located?

"A. 133-135 Grafton Street.

"X-Q. 23. You employ about thirty people all told?

"A. Yes.

"X-Q. 24. In what region do you sell your products?

"A. We ship as far as Maine; we ship New Hampshire, Rhode Island, Connecticut—of course, Massachusetts; we also make some shipments into New York State, and occasionally into Pennsylvania.

"X-Q. 25. Do you do a general grocery business?

"A. Yes.

. . . . . .

"X-Q. 30. Do you handle any Beech-Nut tobacco?

"A. We have, off and on. We handle the cigarette.

"X-Q. 31. You do handle Beech-Nut cigarettes?

"A. Occasionally we have had orders, and filled our orders.

. . . . . .

"R-X Q. 86. You know it is customary to put that wrapper on the cigarettes?

"A. Yes, but I believe I appreciate, and you do, that it is hard to find the name through tissue paper.

"R-X Q. 87. And the same way with an Arrow collar—you would see this name on it?

"A. Yes. I just want to say this word for a matter of explanation. I don't consider myself an expert as a tobacco buyer because tobacco is one of our side lines. Our large and chief line is food products, groceries, and we handle tobacco because all grocers handle it and we like to give our grocers a complete line. I don't want to appear in the light of being an expert or big tobacco man. I am not. I want to say we buy from Worcester Tobacco Company, but also Henry Freeman in town; in case one is short, we naturally go to the other. We buy from both of these men and our profit on our merchandise is always as large as if we bought direct.

Re-Redirect Examination by Mr. Hinton.

"R-D. Q. 88. Mr. Aisenberg, whom do you sell tobacco products to when you sell them?

"A. Mostly grocery stores.

Re-Recross-Examination by Mr. Cavanagh.

"R-X Q. 89. Do you sell to tobacco stores, too?

"A. Why, our percentage of sales to tobacco stores is very, very small.

"R-X Q. 90. But you do sell to them?

"A. Yes, we do, but we have about two thousand accounts on our books and I don't believe a hundred of them would be and have been of the tobacco stores on our books, but they buy very little tobacco unless they should happen to run short on their regular jobber."

BRYAN O. FOSTER, clerk at Pembroke, Kentucky, in a grocery where tobacco products are sold (Record, Vol. I, page 682):

"Q. 6. Have you handled Beech-Nut Packing Company's products?

"A. Yes.

"Q. 7. Will you name some of them you have handled please?

"A. Handled Beech-Nut pork and beans, and peanut butter and chewing gum and mints.

"Q. 8. Are you familiar with the Beech-Nut Packing Company's label?

"A. Yes, sir, I think so.

"Q. 9. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3—did you ever see a package of this tobacco before?

"(Witness examines the package handed him by attorney.)

"A. Yes, sir.

"Q. 10. When?

"A. The first time I remember was along in the summer.

"Q. 11. When you saw it, who did you think was putting it out?

"A. I thought the Beech-Nut Packing Company was putting it out.

"Q. 12. Why did you think that?

"A. Well, from the name and label I just supposed they were putting it out.

"Q. 13. I show you a package of cigarettes, now in evidence in this case as Plaintiff's Exhibit No. 1; have you ever seen a package of those cigarettes before?

"A. Yes, sir.

"Q. 14. When?

"A. Well, the first time that I remember for sure was along in the fall.

"Q. 15. When you saw it, who did you think was putting them out?

"A. I thought the Beech-Nut people—Beech-Nut Packing Company was putting them out.

"Q. 16. Why did you think that?

"A. From the name of the cigarettes and label on them.

"Q. 17. How long did you think this tobacco and cigarettes were put out by the Beech-Nut Packing Company?

"A. Until the 21st day of November—I found out it was a different concern.

"Q. 18. How did you happen to learn differently then?

"A. Well, the Beech-Nut man—that is the tobacco man came in, and it happened that the Beech-Nut Packing Company's man was here the same day, and I asked Mr. Roach how come two men representing the Beech-Nut people were here the same day, and so he told me."

WILLIAM H. SAGE, of Wheaton, Ill., druggist employed in Chicago in a drug store where tobacco goods are sold (Record, Vol. I, page 417):

"Q. 8. Well, in the last two years that you have been selling tobacco and cigarettes, have you been personally handing these goods out to the customer?

"A. Yes, sir.

"Q. 9. Have you in the past two years sold over the counter Beech-Nut chewing tobacco, similar to the package I now show you, Plaintiff's Exhibit No. 3?

"A. Yes, sir.

"Q. 10. Will you please state by whom you believed this chewing tobacco to be put out, up to the past few weeks?

"A. I always supposed it was put out by the same people who manufactured chewing gum called Beech-Nut chewing gum.

"Q. 11. Do you now believe that this product is manufactured by the same people who manufacture the chewing gum?

"A. I understand it is manufactured by Lorillard Company.

"Q. 12. How and when did you obtain the information that this product was manufactured by the Lorillard Company?

"A. In a conversation with a customer some two or three weeks ago my attention was called to the Beech-Nut cigarettes now put out by Lorillard Com-

pany. In that conversation I was informed that they were not put out by Beech-Nut people. Up to that time I was under the belief that all three of the products, the chewing gum, chewing tobacco and Beech-Nut cigarettes were all manufactured by the same people.

"Q. 13. Do you remember ever having discussed the Beech-Nut scrap tobacco with your customers, and if so, do you remember what you told them about its origin?

"A. I recall in conversation talking about cigarettes. Some customer stated that the cigarettes were a superior quality of cigarettes, and also that the chewing tobacco was. I made the statement that all of the products manufactured by the Beech-Nut Packing Company were of superior quality, stating at that time that their chewing gum with us had the largest sale of any chewing gum on the market.

"Q. 14. Do you recollect whether or not at previous times you have made similar statements during the two years that you were handling the scrap tobacco?

"A. Yes, I suppose it's been something the same. I probably made the statement many times. I don't know how many times."

CHARLES P. COOK, of Paris, Kentucky, a grocer who sells tobacco products (Record, Vol. I, page 695):

"Q. 2. Under what name, and where, do you do business?

"A. Charles P. Cook & Company, 726 Main Street, Paris, Kentucky.

"Q. 3. How long have you been in the grocery business?

"A. Over twenty-two years.

"Q. 4. Have you handled Beech-Nut Packing Company products?

"A. Yes, sir.

"Q. 5. How long?

"A. Almost ever since I have been in business.

"Q. 6. Please name some of them that you have handled.

"A. Chewing gum, mints, breakfast bacon, peanut butter, jellies, macaroni, spaghetti.

"Q. 7. What have you found in your experience, to be the quality of Beech-Nut Packing Company's line of products?

"A. It is high class.

"Q. 8. How have they sold with you?

"A. Good.

"Q. 9. What does the Beech-Nut label on a line of goods mean to you?

"A. It means quality.

"Q. 10. Do you sell tobacco and cigars in your grocery store?

"A. Yes, sir.

"Q. 11. How long have you done this?

"A. Ever since I have been in business.

"Q. 12. Is it a common thing for grocery stores to sell tobacco?

"A. With all of them in this section of the country.

"Q. 13. Are you selling Beech-Nut chewing gum in your store at present?

"A. Yes, sir.

"Q. 14. Where do you expose this gum for sale?

"A. In a case on top of the cigar case.

"Q. 15. Are any other of the Beech-Nut products displayed for sale near your tobacco?

"A. Well, I have got some on the shelf behind it, and in front of it, too.

"Q. 16. How close is that to the tobacco?

"A. Well, I would say that the jellies are right directly behind it and peanut butter and breakfast bacon are right opposite the case, only a few feet.

"Q. 17. I show you a package of Beech-Nut scrap tobacco, in evidence in this case as Plaintiff's Exhibit No. 3. Have you ever seen packages of this tobacco before?

"A. Yes, sir.

"Q. 18. Do you handle it?

"A. Yes, sir.

"Q. 19. When did you first know of it?

"A. Why, four or five years ago; first time I ever saw it a salesman came into my place of business, and stated that he was selling Beech-Nut tobacco.

"Q. 20. What occurred between you and the tobacco salesman at that time?

"A. I told him that I didn't know that the Beech-Nut Packing Company put up tobacco, and he stated that this was a new product, or one of their new products.

"Q. 21. What was the effect on you of this conversation?

"A. Well, I am not certain that I bought Beech-Nut tobacco at that time, wouldn't say positive, but I think I did. We were perfectly willing to handle it, all right enough, because we had been handling other Beech-Nut stuff, and thought the quality would be like all other Beech-Nut stuff.

"Q. 22. What makes your memory of your conversation with the Beech-Nut tobacco salesman on the day you have told about, so clear in your mind?

"A. Well, Mr. Mattox, who sells Beech-Nut stuff, was in the store at the time, and I told him that I didn't know that the Beech-Nut Packing Company put out tobacco, and he stated himself that he didn't know it either, that it wasn't on his list, he would find out about it.

"Q. 23. Would you take this package for a Beech-Nut product?

"A. Well, I can't say that. I will say that the Beech-Nut name is what appealed to me. I never paid so much attention to the package as I did to the name that was on it. That's what impressed me."

ARTHUR E. FECHTER, proprietor of a drug store in Chicago, in which he sells tobacco products (Record, Vol. I, page 437):

"Q. 2. I show you a package of Beech-Nut scrap tobacco, in this case as Plaintiff's Exhibit No. 3. Have you ever sold this product over the counter in your store, Mr. Fechter?

"A. I have.

"Q. 3. How long have you sold it over the counter?

"A. About two years.

"Q. 4. Up to within very recently, whose product did you believe it was?

"A. Beech-Nut Company.

"Q. 5. Do you now believe that it is a product of the Beech-Nut Company?

"A. I know it is not.

"Q. 6. How did you get your information that it was not?

"A. One of the salesmen told me it wasn't.

"Q. 7. One of whose salesmen?

"A. I don't know who they are. I don't give salesmen much attention. I am bothered with them all day long. Don't know who he was.

"Q. 8. Do you remember, Mr. Fechter, whether he stated to you at the time what company he represented?

"A. No.

"Q. 9. Do you know now who makes this scrap tobacco?

"A. I do not.

. . . . . .

"X-Q. 22. If you went into a store and wanted a tobacco product, such as this scrap tobacco, or a package of cigarettes, could you be fooled into taking chewing gum in place of scrap tobacco or cigarettes?

"A. No, I shouldn't think so.

"X-Q. 23. Entirely different class of goods?

"A. I wouldn't take gum for tobacco or cigarettes.

"X-Q. 24. And if a man wanted to buy some cigarettes and asked you for cigarettes or scrap tobacco, you wouldn't hand him gum?

"A. What kind of a darn fool question is that? You don't take me for a damn fool, do you? I won't listen to that stuff."

"(Witness got up and walked out of room and left office. Said he wouldn't listen to such damn fool stuff.")

"Mr. Hinton: If Mr. Cavanagh desires to continue the cross-examination, an immediate subpoena will be served upon the witness, who was voluntarily attending, and he will be produced for further examination.

"Mr. Cavanagh: That is not necessary.

"Deposition closed.

"Signature waived."

JEFFERSON D. HAYDEN, of Columbia, S. C., a grocer who sells tobacco products (Record, Vol. I, page 754):

"Q. 8. Please name some of the Beech-Nut Packing Company's products that you have handled.

"A. Beech-Nut gum, pork and beans, Beech-Nut peanut butter. Those are three that I have handled.

"Q. 9. How have they sold for you?

"A. One hundred per cent.

"Q. 10. What does Beech-Nut Company's label mean to you?

"A. It means a great deal—that is, in the line of groceries—quality.

"Q. 11. Quality?

"A. Yes, sir.

"Q. 12. Do you keep a general line of groceries?

"A. I do.

"Q. 13. Do you sell tobacco and cigarettes along with your groceries?

"A. Yes, sir.

"Q. 14. Is that common in your part of the country, to sell tobacco and cigarettes alongside of groceries in the same store?

"A. It is.

"Q. 15. I show you a package of Beech-Nut scrap tobacco, now in evidence in this case as Plaintiff's Exhibit No. 3, and a package of Beech-Nut cigarettes, already in evidence in this case as Plaintiff's Exhibit No. 1. Have you this tobacco and these cigarettes on your shelves for sale?

"A. Yes, sir.

"Q. 16. Do you display them in the display section of your store along with the other tobacco and cigarettes that you handle?

"A. I do.

"Q. 17. Whereabouts in your store with reference to the tobacco and cigarette section do you display for sale the Beech-Nut chewing gum?

"A. In the same section, on the bottom shelf, just below the tobacco.

. . . . . .

"Q. 23. When was the first time you ever saw a package of this Beech-Nut tobacco—scrap tobacco?

"A. October 18, 1921, when a salesman came in to see me and sold me, and sold me.

"Q. 24. When you first saw the package who did you think was putting it out?

"A. The Beech-Nut people.

"Q. 25. What Beech-Nut people?

"A. The same people who were putting out the other Beech-Nut products.

"Q. 26. Why did you think that?

"A. From the appearance of the package, all looked the same, the label and the name Beech-Nut.

. . . . . .

"Q. 47. Did you buy that dozen packages of tobacco—of Beech-Nut scrap, believing that you were dealing with the same people that were putting out Beech-Nut butter?

"A. I did.

"Q. 48. Did you sell any of it to your customers, thinking it was put up by the same company that put up Beech-Nut butter?

"A. I did.

"Q. 49. Can you tell us what you said to some of them?

"A. I says, I have a new Beech-Nut product on the market, and it should be a good seller, that it was Beech-Nut, and it ought to be all right. Beech-Nut products were good sellers, and it should be a good product if it were as good as the others were.

. . . . . .

"X-Q. 85. When he came in here Larson did not tell you the tobacco was made by the Beech-Nut Packing Company, did he?

"A. He did not tell me who made it.

"X-Q. 86. But he gave you a receipt of P. Lorillard Company?

"A. That is the receipt he gave me.

"X-Q. 87. That receipt has no connection whatever with the Beech-Nut Packing Company?

"A. It has not, so far as the name on it.

"X-Q. 88. As an ordinary careful man, familiar with business, as you are, when that receipt was given to you, if you looked at it you would have seen P. Lorillard, and known it was a P. Lorillard receipt, would you not?

"A. If I had observed it carefully.

"X-Q. 89. If you had looked at it?

"A. I did not look at it. If I had I would not have known whether it was the manufacturer or the jobber.

"X-Q. 90. But you would have known that it was a receipt of P. Lorillard Company?

"A. I would have known that it was headed P. Lorillard Company, but I would not know him from anybody else. He did not explain whether he was the manufacturer or jobber when I bought this."

Boston Business Men.

The eight witnesses whose testimony is quoted below are business men, brokers, mill representatives and grain merchants doing business on the floor of the Boston Chamber of Commerce. This testimony relates to the impression created by the appearance of Beech-Nut cigarettes upon sale in Boston. Robert Skene, Jr., is the representative in Boston of Arkell & Smiths Company, manufacturers of paper and cotton sacks for flour and feed, of which company Mr. Arkell is president. Mr. Arkell is also president of the Beech-Nut Packing Company. Mr. Skene's business friends, knowing these facts, referred to him for information about the Beech-Nut cigarette, and their comments quoted below show accurately the impression made upon men of their class by the use of this word Beech-Nut upon cigarettes.

ROBERT SKENE, JR., representative at Boston, Mass., of Arkell & Smiths Company, of Canajoharie, N. Y. (Record, Vol. I, page 38):

"Q. 4. Are you known among your friends in Boston as being in some way connected or familiar with the Beech-Nut Packing Company?

"A. Everybody here, around the Chamber especially, persistently associates me with the Beech-Nut Company. They seem to think that I have something to do with it in some way, all the time.

"Q. 5. My 'Chamber' you mean the Chamber of Commerce?

"A. Yes, Chamber of Commerce.

"Q. 6. I show you a package of Beech-Nut cigarettes, Plaintiff's Exhibit No. 1 in this case. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

"A. Yes, I have seen these. I first saw them at the cigarette-stand here in the Chamber of Commerce.

"Q. 7. When was that?

"A. In the spring of this year.

"Q. 8. About what time?

"A. The early part of this year.

"Q. 9. Were they on sale at that stand when you first saw them?

"A. Yes, sir.

"Q. 10. Will you please state whether you had heard anything about these cigarettes prior to the time that you actually saw them offered for sale?

"A. On the floor of the Chamber quite a number of people came to me and said: 'I see that your people are getting out a new cigarette, the Beech-Nut cigarette.' And so many persisted in this, making this inquiry of me, 'Are you getting out a new Beech-Nut cigarette,' that I inquired about where they could be found and I went down to the cigar stand and got a package.

"Q. 11. When you first saw these cigarettes, by whom did you think they were made?

"A. I thought it was a Beech-Nut Packing Company product.

"Q. 12. What made you think that?

"A. Well, the Beech-Nut hyphenated, just the same as the Beech-Nut Packing Company do, and the form of the label, and the cluster under the 'Beech-Nut' and the whole color scheme, the whole general form of the label.

"Q. 13. Now, you stated you went down and bought a package of these cigarettes. Then what did you do?

"A. Of course, I examined it and found that the name Lorillard Company was on them.

"Q. 14. And what did you then conclude, Mr. Skene?

"A. So then I was not sure whether it was a Beech-Nut product or not, but I thought perhaps Lorillard might be putting it out for the Beech-Nut people, and I wrote down to Canajoharie to inquire before I gave any positive information to my friends about it one way or the other.

"Q. 15. And then what happened?

"A. The Beech-Nut people wrote me that it was not their product, and that they had nothing to do with it. And from that time I informed all friends who made inquiries of me, and who had spoken to me about it, that it was not our product at all.

"Q. 16. You said that several of your friends had spoken to you about these cigarettes. Will you state, if you remember, and as carefully as you can, exactly what these people said to you?

"A. Well, there were so many different forms that it would be hard, but generally it was 'I see that the Beech-Nut people are getting out a cigarette,' or, 'I see that you have a new brand of cigarettes,' or, 'Why don't you send us some of your Beech-Nut cigarettes.'

"Q. 17. Can you, Mr. Skene, give me the names of any of your friends in the Boston Chamber of Commerce, whom you can remember, who definitely made remarks of that character to you when the cigarettes came out?

"A. Well, Fred Godfrey——

"Q. 18. Will you please also state what these people do, so far as you know?

"A. Fred Godfrey, John F. Lapham, Dick Pope, Warren Torrey, John King, Billy Wise—is that enough?

"Q. 19. I would like to have you mention all you can.

"A. Fred Lamb, and a great many others. These gentlemen are in the flour and grain business, and all of them have offices in the Chamber of Commerce Building."

. . . . . .

"R-D. Q. 55. (By Mr. Hinton.) Mr. Skene, I wish you would state if you can remember, after you purchased this package of Beech-Nut cigarettes, and upon examination thereof, as you have testified,

found the name, P. Lorillard Company on there, what did you conclude?

"A. Either that they were being manufactured for the Beech-Nut people by Lorillard, or being distributed by P. Lorillard Company."

ARTHUR A. SKINNER, grain broker, trading on the floor of the Boston Chamber of Commerce (Record, Vol. I, page 55):

"Q. 3. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you ever seen these cigarettes before, and if so, when and where did you first see them?

"A. Why, I first saw them, probably, oh, somewhere in the spring. In fact, I bought a package down stairs.

"Q. 4. When you first saw these cigarettes by whom did you believe they were made?

"A. Why, I assumed that they were made by the Beech-Nut people, the gum people, the people that make candy and gum, and so forth.

"Q. 5. You may state, if you will, what led you to that belief.

"A. Why, because I had seen so much of the Beech-Nut gum, and if you knew the gum you would naturally think the Beech-Nut cigarettes were made by the same people.

"Q. 6. Did you continue to believe that the Beech-Nut people put out these cigarettes after you bought them?

"A. Why, yes; I never knew any different. I didn't know who made them, I assumed they were made by the same people, so far as I knew.

"Q. 7. When were you first informed that these cigarettes were not a product of the Beech-Nut Packing Company?

"A. Why, I never knew any different; in fact, I guess you were the first one that told me.

"Q. 8. And when was that?

"A. That was day before yesterday.

"Mr. Hinton: That is all the direct examination."

Cross-Examination.

"X-Q. 9. (By Mr. Cavanagh). Do you smoke, Mr. Skinner?

"A. Yes.

"X-Q. 10. Do you smoke Beech-Nut cigarettes?

"A. Why, I have smoked them. I smoke the Lucky Strike mostly. I smoke anything for that matter, pipe and cigars.

"X-Q. 11. About how often have you smoked these Beech-Nut cigarettes?

"A. Why, I don't think I ever bought but two packages. When they first came out a fellow had them on the floor, and I bought a package,—in fact, two packages.

. . . . . .

"X-Q. 18. When you purchased the package of Beech-Nut cigarettes like this Plaintiff's Exhibit No. 1, to which you have referred, did you examine the wrapper of it?

"A. No, I took them out and smoked them.

. . . . . .

"X-Q. 22. So when you purchased those cigarettes, after you examined them, you would have seen that name, P. Lorillard Co. on it, would you not?

"A. Oh, yes; if I examined them closely, but I didn't notice the cigarettes. I am not particularly interested in who makes them. I open them and smoke them. Of course, I don't know who makes the Fatimas, or the Camel, but I do know who makes Lucky Strike, because I smoke so many of them.

"X-Q. 23. You never really take the trouble to examine them?

"A. No."

JOHN J. KING, grain broker on the Boston Chamber of Commerce (Record, Vol. I, page 58):

"Q. 3. I show you a package of cigarettes which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you whether or not you ever saw these cigarettes before, and, if so, when and where did you first see them?

"A. I have seen them at the Chamber of Commerce cigar stand.

"Q. 4. When was that?

"A. Oh, it was some little time ago, I don't know just how long. To tell you frankly, I never paid much attention to them anyway.

"Q. 5. When you first saw these cigarettes by whom did you believe that they were made?

"A. I understood they were a Beech-Nut product. The only Beech-Nut product I knew was bacon, and so forth.

"Q. 6. Will you tell us what you mean by a Beech-Nut product?

"A. Why, something put out by the people who put out peanut butter, bacon and so forth.

"Q. 7. Please state, if you know, what it was that led you to that belief.

"A. Why, I simply thought that. I only knew that there was only one Beech-Nut Company, and that was the people who put out the other stuff.

"Q. 8. Did you ever smoke any of these cigarettes?

"A. One or two.

. . . . . .

"Q. 10. Do you now believe that these cigarettes are the product of the Beech-Nut Packing Company?

"A. No.

"Mr. Cavanagh: Objected to as leading.

"Q. 11. When did you first find that these cigarettes were not a product of the Beech-Nut Packing Company?

"A. Upon talk with Colonel Skene, about two months ago.

"Q. 12. Is Colonel referred to Robert Skene, Jr.?

"A. Yes.

"Q. 13. Did he give you this information before or after you had smoked these Beech-Nut cigarettes, do you remember?

"A. I believe it was after.

"Q. 14. Did you subsequently purchase any of these cigarettes?

"A. No."

RICHARD E. POPE, grain merchant trading on the floor of the Boston Chamber of Commerce (Record, Vol. I, page 62):

"Q. 4. Mr. Pope, I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1, and ask you if you have ever seen these cigarettes before, and if so, when and where did you first see them?

"A. Well, I would not remember the exact date. I bought some here in the building, I remember, when they were first put on sale.

"Q. 5. Could you tell me the approximate date?

"A. Well, three or four months ago, I guess.

"Q. 6. Was it in the spring or summer?

"A. It was in the spring.

"Q. 7. Would you be able to say it was early or late spring?

"A. No, I could not.

"Q. 8. When you first saw these cigarettes, Mr. Pope, by whom did you believe they were put out?

"A. The people who put out Beech-Nut bacon—I don't know who they are.

"Q. 9. Did you buy a package of these cigarettes with that belief?

"A. I did, yes, naturally.

"Q. 10. Do you now believe that the people who put out Beech-Nut bacon put out these cigarettes?

"A. No, I know they don't.

"Q. 11. When and how, if you remember, were you first informed that these people did not put out these cigarettes?

"A. Why, in conversation with Mr. Skene, he told me that they did not make them, which was a surprise to me.

"Q. 12. Is the Mr. Skene you have referred to, Mr. Robert Skene, Jr.?

"A. Yes.

"Q. 13. Who does business in this building, and on the floor?

"A. Yes.

"Q. 14. Mr. Pope, will you state, if you are able to, why you believed that this was a product of the same people who put out the bacon, if you remember?

"A. Well, because of the extreme popularity of the Beech-Nut bacon, it was a likely brand to attract popular attention. Therefore I supposed they were using it with a cigareete, as they had with their other products. It was a perfectly natural conclusion, I should say, that was.

. . . . . .

Cross-Examination.

"X-Q. 17. (By Mr. Cavanagh.) Did you ever hear or know of the P. Lorillard Company?

"A. Oh, yes.

"X-Q. 18. You know they are a large tobacco concern, do you not?

"A. Yes, I know they are.

"X-Q. 19. Will you examine this cigarette package, Plaintiff's Exhibit No. 1? What name appears on it?

"A. P. Lorillard Co.

"X-Q. 20. Would that indicate to you that it was a package of P. Lorillard Company?

"A. I would not notice it. I don't know who makes Lucky Strike, even.

"X-Q. 21. So you don't examine the label?

"A. No, I am like a Chinaman, I will take a chop without any knowledge of what goes with it."

THOMAS F. MALONEY, a salesman doing business at the Boston Chamber of Commerce (Record, Vol. I, page 68):

"Q. 5. I show you a package of cigarettes, which is in evidence in this case as Beech-Nut Exhibit No. 1. Have you seen these cigarettes before, and if so, will you please state when and where you first saw them?

"A. Why, I saw the cigarettes in the hands of another fellow at one time, and the next time I bought cigarettes I bought them myself. I don't know exactly at what store.

"Q. 6. When you saw and bought these cigarettes, by whom did you believe they were put up?

"A. Why, not having any interest in it, I natur-

ally associated the name of Beech-Nut with the ham products, and so forth.

"Q. 7. Did you continue to believe this after you had bought and smoked the cigarettes?

"A. Surely; I didn't give it any thought.

"Q. 8. Do you now believe that these cigarettes are put up by the same people who put out the gum?

"A. No, I know differently than that.

"Q. 9. Will you state how and when you first learned that these cigarettes were not put out by the people who put out the gum?

"A. The first I knew of it was when you came around the other day and told me about it. I don't know what the day was, Thursday or Friday,—Thursday, I think it was."

GEORGE CATLIN, a broker trading on the floor of the Boston Chamber of Commerce (Record, Vol. I, page 70):

"My name is George Catlin, and I am a member of the firm of Catlin & Company, brokers. I trade on the floor of the Boston Chamber of Commerce. I first saw Beech-Nut cigarettes, similar to Beech-Nut Exhibit No. 1, on the cigar stand in the Chamber of Commerce Building, Boston, early in the spring of 1921; when I first saw these cigarettes I believed that they were made by the Beech-Nut people, the same people that make the other Beech-Nut products, like the ham, chewing gum, and so forth. I never bought a package of these cigarettes, but have smoked them when my friends had them. I continued to believe that these cigarettes were made by the Beech-Nut people until I was told, on August 12, 1921, by Mr. Hinton, that they were not a product of the Beech-Nut Packing Company. My reason for believing that these cigarettes were the product of the Beech-Nut Packing Company was the name 'Beech-Nut,' and the appearance of the package."

W. G. TORREY, a miller representative trading on the floor of the Boston Chamber of Commerce (Record, Vol. I, page 71):

"Q. 4. I show you a package of Beech-Nut cigarettes, which is in evidence in this case as Beech-Nut No. 1. Have you ever seen this cigarette before? If so, when and where did you first see them?

"A. Why, I think I first saw them probably at the cigar stand on the street floor of the Chamber of Commerce.

"Q. 5. When was that?

"A. That I cannot say, some time last year, as I remember.

"Q. 6. Do you mean during the year 1920?

"A. I should say during the year 1920; it might have been before that—just as soon as they came out, I know, and were for sale, I saw them.

"Q. 7. When you first saw these cigarettes, by whom did you believe that they were put out?

"A. The Beech-Nut Packing Company, Arkell & Smiths Company—we say Arkell & Smiths, because they are familiar to us, thinking they are the same concern that handle the Beech-Nut lines.

"Q. 8. You have referred to the Beech-Nut products. Will you give an illustration of what you mean by Beech-Nut products?

"A. Why, we have a number of them that we use at home; I guess Beech-Nut bacon is one, and—I can't say right off-hand what they are; we have different things; I think they are jellies and jams, and things of that sort, if they make them.

"Q. 9. Will you state, if you can remember, and if you know, why you believed that these cigarettes were a product of the Beech-Nut Packing Company when you saw them?

"A. They are the only people that I ever connected the name with.

"Q. 10. Have you a general familiarity with the label which has appeared on various products of the Beech-Nut Packing Company?

"A. Yes.

"Q. 11. Did the dress of this package of cigarettes, by dress, it's general appearance, have any-

thing to do with your believing that it was a product of the Beech-Nut Packing Company?

"A. The name was the first thing that led me to think it was theirs, because I never connected the name with any other concern than the Beech-Nut people in Canajoharie. I have traveled through there many times and have seen their sign, and knew the members of the concern.

"Q. 12. The last question is repeated.

"A. Yes.

"Q. 13. Will you explain what you mean?

"A. Well, the brand on the cigarettes led me to believe that it was one of the products of the Beech-Nut Packing Company.

"Q. 14. Will you tell me, please, Mr. Torrey, whether you now believe that these cigarettes are a product of the Beech-Nut Packing Company?

"A. No, I do not.

"Q. 15. Will you state, if you can remember, when and how you first found out that these cigarettes were not a product of the Beech-Nut Packing Company?

"A. Why, I think after buying packages of them I discovered some tobacco company's name on the package, and, as I recall, I spoke of the matter to Mr. Skene, who represents Arkell & Smiths here, who are the same people as the Beech-Nut people, I spoke to him about it—I don't know that he knew it at the time until we talked the matter over, that there was such a cigarette on the market, and then I learned it had nothing to do with the Beech-Nut Company.

"Q. 16. Did Mr. Skene tell you this, do you remember?

"A. In conversation with him, I think he told me that they didn't."

W. J. BUCKLEY, of Boston, Mass., employed by the Southworth Company, brokers (Record, Vol. I, page 76):

"I am of lawful age, and am employed by the Southworth Company, brokers, who have offices here in the Chamber of Commerce Building, Boston, Massachusetts.

"I first saw cigarettes similar to Beech-Nut Exhibit No. 1 on the cigar stand in the Chamber of Commerce Building, Boston, Massachusetts; subsequently I remember that my friend, Thomas Maloney, who is employed in the same building, bought a package of these cigarettes and he had them on the table at lunch. I smoked some of the cigarettes. When I first saw the Beech-Nut cigarette, and when I smoked them, I believed that they were a product of the Beech-Nut Packing Company, the same people who make the ham, bacon, chewing gum, and other products. I continued to believe that these cigarettes were the product of the Beech-Nut Packing Company until Mr. Hinton told me, on August 12, 1921, that they were not."

APPENDIX B, LIST OF WITNESSES.

[Page numbers of the brief where Appendix B is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

Plaintiff's Witnesses Who Dealt in or Used Beech-Nut Scrap Tobacco or Beech-Nut Cigarettes in the Belief That These Articles Were Products of the Beech-Nut Packing Company.

Of the witnesses listed below Carlson, De Rago, Hammerman, Hayden, Kramer, Sage, Watson, Wedel and Yunkers, being themselves deceived, innocently deceived their customers by express statement to them that the Lorillard Beech-Nut cigarettes and scrap tobacco were products of the Beech-Nut Packing Company.

The witnesses Aisenberg, Branigan, Glynn, Godfrey, Housling, Huttner, Lynch, McFadzen, Neal and O'Connor either state that they found the Beech-Nut cigarettes inferior to the other Beech-Nut products, or state that they never bought any more of the Beech-Nut cigarettes after the first package.

(D)—Dealer; (C)—Consumer.

(D) Edward Abrams, of Stamford, Conn., proprietor of a hotel news and tobacco stand and of a cigar store—R., Vol. I, page 387.

(D) Joseph S. Aisenberg, of Worcester, Mass., wholesale grocer—R., Vol. I, page 148.

(C) R. J. Andrews, of West Hartford, Conn., clerk in the store of J. Burnham—R., Vol. I, page 341.

(C) Frank Arnold, Jr., of New York City, an advertising accountant employed by H. K. McCann & Co.—R., Vol. V, page 2499.

(C) J. F. Ballard, retail meat dealer, Chicago, Illinois —R., Vol. I, page 478.

(C) A. V. Bobb, proprietor of a meat market, Chicago, Illinois—R., Vol. I, page 483.

(C) D. L. Bottomly, of Worcester, Mass., a grocery clerk—R., Vol. I, page 166.

(C) T. J. Branigan, of New Haven, Conn., employed in a shoe store—R., Vol. I, page 285.

(D) J. E. Brimakow, manager cigar department of the Kiefer Drug Company, Milwaukee, Wisconsin—R., Vol. I, page 612 (for relations with customers, see Qs. 8-11).

(D) Robert N. Broughton, of Springfield, Mass., druggist—R., Vol. I, page 228.

(C) R. A. Brown, of Hartford, Conn., adjuster for the Ocean Insurance Company—R., Vol. I, page 336.

(C) W. J. Buckley, Boston, Mass., employed by the Southworth Company, brokers—R., Vol. I, page 76.

(D) A. H. Carlson, of Chicago, Illinois, formerly part owner of cigar store—R., Vol. I, page 423 (For express deception of customers see Qs. 11, 12, 13).

(D) George L. Carlton, grocer, Holyoke, Mass.,—R., Vol. I, page 232.

(D) James J. Cashman, Jr., of New Haven, Conn., a drug clerk—R., Vol. I, page 263.

(D) Tracy N. Collins, proprietor of a grocery and general store at Noroton, Conn.,—R., Vol. I, page 378.

(D) Charles P. Cook, of Paris, Kentucky, a grocer—R., Vol. I, page 695.

(D) Joseph De Rago, of Hartford, Conn., proprietor of a general store—R., Vol. I, page 329 (For express deception of customers see Q. 12).

(D) Henry Dieckman, grocer selling tobacco products at Toledo, Ohio—R., Vol. I, page 633.

(C) G. Frank Disbrow, of South Amboy, N. J., skilled laborer, employed by South Amboy Terra Cotta Company—R., Vol. V, page 2491.

(D) James Eustace, of Hartford, Conn., employed by the Sigourney Grocery Company—R., Vol. I, page 335.

(D) Arthur E. Fechter, of Chicago, Illinois, proprietor of a drug store—R., Vol. I, page 437.

(D) Henry W. Foote, proprietor of a delicatessen and grocery store, Milwaukee, Wis.,—R., Vol. I, page 565.

(D) Alexander C. Gardner, of Milford, Conn., proprietor of a grocery and confectionery store—R., Vol. I, page 309 (For relations with customers see Qs. 15-18).

(D) Charles E. Geary, clerk in drug store, Salem, Mass.—R., Vol. I, page 130.

(C) Edward J. Glynn, West Haven, Conn., a clerk—R., Vol. I, page 267 (Inferiority of Beech-Nut Cigarettes, Q. 15).

(C) A. W. Godfrey, Boston, Mass., mill representative —R., Vol. I, p. 49.

(D) Nathan Hammerman, of New Haven, Conn., a drug clerk—R., Vol. I, page 276 (For express deception of customers, see Qs. 11, 12).

(C) Newton Harrison, of Milford, Conn., editor of "The Central Station," an electrical journal and owner of a dry goods business—R., Vol. I, page 317.

(D) Jefferson D. Hayden, Columbia, S. C., a grocer—Vol. I, page 754 (For express deception of customers, see Qs. 48-49).

(C) C. Housling, of Hartford, Conn., clerk in the store of C. P. Case—R., Vol. I, page 339.

(D) MARGARET M. HUNT, clerk at cigar stand in the Chamber of Commerce Building, Boston, Mass. R., Vol. I, page 77.

(C) DANIEL HUTTNER, butcher, Chicago, Illinois—R., Vol. I, page 485.

(D) OSCAR JOSEPH, of Saba & Joseph, proprietor of a grocery and meat market, Toledo, Ohio—R., Vol. I, page 617 (For relations with customers, see Qs. 12-14).

(D) JOHN JOZSA, grocery clerk and meat cutter for Saba & Joseph, Toledo, Ohio—R., Vol. I, page 625.

(C) CLEMENT W. KIRKPATRICK, assistant to the general manager of the Fisk Rubber Company, Chicopee Falls, Mass.—R., Vol. I, page 210.

(D) S. S. KRAMER, of Hartford, Conn., proprietor of a delicatessen and tobacco store—R., Vol. I, page 334 (For express deception of customers, see page 334).

(D) F. J. LATZEL, proprietor of a delicatessen store at Oak Park, Illinois—R., Vol. I, page 491.

(C) HENRY LE CLAIR, of Holyoke, Mass., a grocer—R., Vol. I, page 241.

(D) LEO LEWIS, cigar clerk, Boston, Mass.—R., Vol. I, page 80 (For relations with customers, see Qs. 12-16).

(C) P. LYNCH, of West Hartford, Conn., clerk in Burnham's market—R., Vol. I, page 340.

(C) E. J. MCFADZEN, a grocer, West Allis, Wis.—R., Vol. I, page 555.

(C) THOMAS F. MALONEY, salesman, Boston Chamber of Commerce—R., Vol. I, page 68.

(C) JAMES F. MASTERSON, of Brooklyn, New York, writer of financial news, who published articles attributing Beech-Nut cigarettes and tobacco to plaintiff—R., Vol. V, page 2483.

(D) James Matreace, of West Hartford, Conn., clerk in grocery and general store of O. Matreace—R., Vol. I, page 343.

(C) John Mead, clerk, Hartford, Conn.—R., Vol. I, page 342.

(D) Edward Moscovitz, clerk in Shriver's Cigar Company, Salem, Mass.—R., Vol. I, page 126.

(D) George F. Moulton, retail druggist, South Norwalk, Conn.—R., Vol. I, page 376.

(D) Theodore Mueller, druggist, Milwaukee, Wisconsin—R., Vol. I, page 605.

(C) Franklin G. Neal, lawyer, Springfield, Mass.—R., Vol. I, page 201.

(D) H. A. Neff, grocer selling tobacco products at Toledo, Ohio—R., Vol. I, page 633.

(D) Carl W. Nemetz, retail grocer, Milwaukee, Wisconsin—R., Vol. I, page 550.

(D) Frank O'Connell, grocer handling tobacco products at Toledo, Ohio—R., Vol. I, page 633.

(C) Michael O'Connor, clerk in a general store, public market, Holyoke, Mass.—R., Vol. I, page 236.

(D) Mrs. Amelia Petersen, helps in her husband's grocery store at Manitowoc, Wis.—R., Vol. I, page 501.

(C) Richard E. Pope, grain merchant, Boston Chamber of Commerce—R., Vol. I, page 62.

(D) Mike Saba, of Saba & Joseph, proprietors of a grocery and meat market, Toledo, Ohio—R., Vol. I, page 622.

(D) John Sabelis, in charge of the commissary department of the International Harvester Company at their plant at West Pullman, Illinois—R., Vol. I, page 444.

(D) WILLIAM H. SAGE, of Wheaton, Illinois, employed as a druggist in Chicago, Illinois—R., Vol. I, page 417 (For express deception of customers, see Qs. 13-14).

(C) C. A. SATTIG, employed in the grocery and meat market of his father, Adam Sattig, at Milford, Conn.—R., Vol. I, page 316.

(D) LLOYD SCHULTZ, grocery clerk, employed by Saba & Joseph, Toledo, Ohio—R., Vol. I, page 628.

(D) ISABEL SHAFFER, clerk in drug store selling tobacco products at Toledo, Ohio—R., Vol. I, pages 633-635.

(D) W. SHAFFER, grocer selling tobacco products at Toledo, Ohio—R., Vol. I, page 633.

(C) ROBERT SKENE, JR., representative of Arkell & Smiths Company, Boston, Chamber of Commerce —R., Vol. I, page 38.

(C) ARTHUR A. SKINNER, grain broker, Boston, Chamber of Commerce—R., Vol. I, page 55.

(C) WILLIAM I. THOMAS, grocer, Chicago, Illinois—R., Vol. I, page 469.

(C) W. G. TORREY, miller representative, Boston, Chamber of Commerce—R., Vol. I, page 71.

(D) JOHN E. WATSON, druggist, Chicago, Illinois—R., Vol. I, page 411 (For express deception of customers, see Qs. 14-15).

(D) MRS. MATILDA WEDEL, proprietor of tobacco and candy stand in lobby of large downtown office building, Chicago, Illinois—R., Vol. IV, page 2208 (For express deception of customers, see Q. 10).

(D) WILLIAM C. WEIGEL, of Milwaukee, Wisconsin, a retail grocer—R., Vol. I, page 560.

(D) CLARENCE A. WILKINS, Lynn, Mass., retailer of confectionery, tobacco, and periodicals—R., Vol. I, page 107 (For relations with customers, see Q. 7).

(D) IDA W. WILKINS, Lynn, Mass., assists in her husband's confectionery and tobacco store and news stand—R., Vol. I, page 119 (For relations with customers, see Q. 10).

(D) ROY J. YUNKERS, manager of retail tobacco store (one of well-known chain) in large downtown office building, Chicago, Illinois—R., Vol. IV, page 2218 (For express deception of customers, see Q. 18).

APPENDIX C, DECEPTION OF PUBLIC PROVED BY DEFENDANT'S WITNESSES.

[Page numbers of the brief where Appendix C is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

Five of the witnesses from whose testimony quotations appear in this appendix are salesmen for the Lorillard Company and the others are dealers in tobacco. The five Lorillard salesmen are Schimmel, Marks, Hopewell, Degan and Burgeson. Burgeson, as will be seen from the part of his testimony quoted in this appendix, admits that deception of the public was expected, said that was natural on account of the similarity of name but that it did not occur as much as expected.

Defendant's witness, L. G. CAUTO, a cigar salesman at Boston, for L. K. Liggett & Co. (R., Vol. II, pages 977-978):

"X-Q. 15. Will you tell me during that moment, when you picked up the package of cigarettes and saw the Beech-Nut brand, and were in doubt about it,—who did you think might be the manufacturer?

"A. Some cigarette company, because I knew that the gum people manufactured gum, and right away I used my head and said that they were not made by the gum people, but some cigarette people.

"X-Q. 16. What suggested the gum people to you?

"A. Because they carry gum, the Beech-Nut gum on the counter.

"X-Q. 17. When you looked at the package of cigarettes, what did you think of, what gum company?

"A. When the cigarettes were put in, I had them on the counter and, why, I thought of the Beech-Nut people. I had about 25 customers question that, and that was a natural question; not that they cared who

made it, but they said this, 'Made by the people who make the gum?' And I corrected them. I said, 'The gum is made by the gum company, in Canajoharie, and Brooklyn, N. Y.,' and that is all. That adjusted the matter, when I told them that the gum and cigarettes were two different products.

"X-Q. 18. And you always put them straight on that?

"A. I put them straight, yes, because I wanted them to be straight about it, being in the business, and I wanted to be straight, because it is instant dismissal for misrepresenting any of the goods.

"X-Q. 19. Yes, but they are not all as strict as you people are in regard to that, are they?

"A. No, I don't believe they are."

Defendant's witness, BENJAMIN HURVITZ, manager of a tobacco business in Boston, Mass. (R., Vol. II, pages 1009-1010):

"Q. 16. State whether or not you ever had any inquiries or heard any comments from customers or others that would lead you to believe that they were under such an impression.

"A. Well, really, in the handling of cigarettes and gum,—or cigarettes, rather, from the time of its inception, and the gum at pretty nearly the same time.—and of course, that is almost a year and a half now; and the inquiries whether Beech-Nut cigarettes and the Beech-Nut gum were made by the same company haven't been over two or three,—they have been by retail consumers only.

. . . . . .

"Q. 23. Did you ever know the Beech-Nut Packing Company to put out any tobacco products?

"A. No; if they had put out tobacco products we would have been interested to buy their product.

"Mr. Hinton: What is that?

"The Witness: If we did know they put out tobacco products we would buy their tobacco products direct. But, so far as I know, they don't put it out."

Defendant's witness, MAX DUBLIN, manager of a wholesale and retail tobacco establishment in Boston (R., Vol. II, pages 1045-1046):

"X-Q. 49. It is very simple, isn't it? Now you said that you had an occasional inquiry from a customer about whether one concern that makes the gum, whether the same concern makes the cigarettes, indicating some doubt in the mind of the customer. Is that the fact?

"A. Why, I have had—yes, I have had very few retailers that I sell, which I sell to, small dealers, I don't sell to the big stores, and I have had perhaps a few consumers that I have heard them talking, but not while the purchase was made in the store. When the Beech-Nut cigarette first came out, I said, that is the same brand that they have had—they have had that brand for years. They had the Beech-Nut scrap, which I have always carried and I have always informed the public that one brand was the Beech-Nut Packing Company, and the other the P. Lorillard Co., that makes the Helmars and the Trophies, and so forth.

"X-Q. 50. But you say you have had this question come up with the retailers to whom you have sold the Beech-Nut cigarette?

"A. I have had one or two, or more. I wouldn't say definitely on it, and I satisfied them,—I showed them the name on the goods. In fact, I can't tell why they ask me, because the name 'P. Lorillard Co.' is there. The fact is, when I see this picture on the Murad, when I see the picture, I know it is very plain that it is Lorillard's. When you see that brand you know it is their brand."

Defendant's witness, BENJAMIN LESCOVITZ, retail storekeeper, sells tobacco, chocolates, etc., East Cambridge, Mass. (R., Vol. II, pages 1064, 1066-1067):

"Q. 10. Did you ever have any inquiries or comments from anybody who did believe it?

"A. Yes, sir; I had two fellows ask me, and they said, 'Benny, what is this? Is this made by the same

company (pointing to a package of Beech-Nut cigarettes) as the Beech-Nut chewing gum?' I says, 'No, this is made by the P. Lorillard Company (pointing to a package of Beech-Nut cigarettes), and this is made by the Beech-Nut Packing Company' (referring to a package of Beech-Nut chewing gum). Only them two fellows asked me that.

"Q. 11. How long ago was that?

"A. That was last winter. They didn't ask the question because they were interested, but because of curiosity they asked it.

"Mr. Hinton: The last part of the answer is objected to as a conclusion of the witness.

. . . . . .

"X-Q. 4. You didn't keep any notes of the names of people who asked you about whether or not the cigarettes were made by the gum people, did you?

"A. No, I didn't.

"X-Q. 5. You didn't make any effort to remember it at all?

"A. Absolutely no; because you see the customers are in the store, and they simply asked me, as a foolish question: 'Say, Benny, is this the same company, the Beech-Nut gum and the Beech-Nut cigarette?' And I said, 'No, the gum is made by the Beech-Nut Packing Company and the cigarettes are made by P. Lorillard Co.' "

Defendant's witness, GEORGE C. SMITH, manager of a tobacco store in Boston (R., Vol. II, page 1082):

"X-Q. 3. Now, Mr. Smith, did you make any particular note of the inquires that you referred to, about whether the cigarettes were made by the gum people,—did you make a note of it at the time?

"A. I made no note of it, no.

"X-Q. 4. Did you pay any particular attention to it?

"A. No.

"X-Q. 5. Did you make any effort to remember it?

"A. No, I didn't.

"X-Q. 6. But you can remember two cases?

"A. I can remember two cases, there may have been five or six, but I can't remember over two.

"X-Q. 7. There may have been others?

"A. There may have been others, but I don't remember it."

Defendant's witness, AARON ANSEL, owner of a cigar store in Boston (R., Vol. II, p. 1086).

"Q. 14. Will you state whether or not during your experience or service in your store you ever have had any questions come up, or heard any remarks or inquiries from customers, or others, which would leave you under the impression that they thought the gum people made the cigarettes?

"A. Well, just once; I recall one person."

Defendant's witness, GEORGE DOUGALL, manager of cigar department in a L. K. Liggett store in Boston (R., Vol. II, pp. 1090-1091):

"Q. 12. Will you state whether or not you were ever under the impression that the Beech-Nut cigarettes were made by the same people that make the Beech-Nut chewing gum?

"A. Why, I never was under the impression. There was only once that I can remember when a young fellow asked me, when they first started, he came in—

"Q. 13. I mean yourself—were you ever yourself under the impression that the Beech-Nut cigarettes were made by the same concern that makes the gum?

"A. No, sir.

"Q. 14. Well, will you please state whether or not you have had any questions, inquiries, or comments made by customers, or others, which would lead you to think that they were under the impression that these cigarettes were made by the gum people?

"A. I have just had one instance that I remember.

"Q. 15. Please state it.

"A. That is when the cigarettes first came out

somebody came in the store and asked me if they were made by the same people that made the gum.

"Q. 16. What was your answer?

"A. Why, I told them that the cigarettes were made by the P. Lorillard Co., and that the gum was made by the Beech-Nut Packing Company."

Defendant's witness, EDWARD ADELMAN, owner of a cigar store at Salem, Mass. (R., Vol. II, pp. 1116, 1119):

"Q. 15. In your experience in the tobacco business in stores have you ever heard any comments or any inquiries from customers or others which would lead you to believe that they were under the impression that the same concern that made the gum made the Beech-Nut cigarettes?

"A. No. I have had people ask me, 'Is it made by the same company?' But they were not impressed that it was. In fact, the name on the cigarette, or in the advertising I have seen always had the name Lorillard on it.

"Mr. Hinton: The witness' statement as to the impression of the people who asked him the question referred to is objected to as a conclusion of the witness, and the last part of the answer objected to as volunteered.

. . . . . .

"X-Q. 17. Now, how many customers do you suppose ever asked you whether the Beech-Nut cigarettes were made by the gum people?

"A. I don't think there was over one or two that I had any talk with about them."

Defendant's witness, DENNIS T. O'CALLAHAN, salesman in a tobacco store in Salem, Mass. (R., Vol. II, p. 1130):

"X-Q. 4. Now, how many people do you suppose you have discussed this question with as to who makes the Beech-Nut cigarette and the Beech-Nut chewing gum?

"A. I think about a half a dozen. It would be

only in conversation you know. Sometimes some one would be talking and the question would be brought up, and they would leave it to me as a tobacco man to decide, and I would try to tell them, so far as I knew, that there was a distinction between the parties who made the food products and the Beech-Nut tobacco products."

Defendant's witness, FERDINAND RIGALI, JR., owner of a fruit and tobacco store at Holyoke, Mass. (R., Vol. II, p. 1193):

"Q. 16. Will you please state whether or not you ever had any customers ask any questions or make any inquiry which would lead you to believe that they thought the Beech-Nut cigarettes were made by the same people that made the gum?

"A. I have had to my, I think I had about two people ask me. I couldn't say who the people were; just people that came into the store.

"Q. 17. How long ago was that?

"A. Quite a while after they came out one party asked me who made the Beech-Nut cigarette and went as far as to ask me if the Beech-Nut Packing Company made them. I told them certainly not, that's as far as the argument went. He didn't know probably.

"Q. 18. Those are the only two occasions?

"A. That's the only two occasions I have had unless the other boys have had."

Defendant's witness, WILLIAM D. LILLY, owner of a cigar store in Baltimore (R., Vol. II, pp. 1249-1250):

"When the cigarettes first came out I remember hearing a few questions from customers indicating that they thought that the same company made the cigarettes and the gum."

Defendant's witness, MICHAEL SPHEERIS, owner of a tobacco and candy store at Milwaukee, Wisconsin (R., Vol. II, p. 1435):

"X-Q. 57. But is it the usual thing for a customer to ask you who makes the article he is buying?

"A. Well, that I don't say; none ever mentioned to me, maybe it was once or twice, whether it is made by the same people make the Beech-Nut cigarettes, the gum was made by the same people or,—well, I always knew that. I explained it to him. Maybe there is one or two since I have been in business, there, asked if it was the same people made the Beech-Nut cigarette that made the Beech-Nut gum, but I never had that asked very often.

"X-Q. 58. Do you remember what these you mentioned who did ask,—do you remember what they said?

"A. I remember a fellow once asked me, he said: 'Is this the same people is making the Beech-Nut gum?' I said, 'Lorillard only makes tobacco; don't make any gum.' "

Defendant's witnes, MAURICE J. SCHIMMEL, salesman for the Lorillard Company at Milwaukee, Wisconsin (R., Vol. II, pp. 1453, 1455):

"X-Q. 61. Have you heard any question asked or any comments or inquiries as to whether the Beech-Nut cigarettes and scrap tobacco were made by the people that made the gum?

"A. Very little.

"X-Q. 62. But have you heard a few?

"A. Once or twice, but very seldom. I did hear once in a while something.

"X-Q. 63. Can you tell any of the things that you heard?

"A. No, sir.

. . . . . .

"R-D. Q. 82. You say that on one or two occasions you might have heard people ask you, 'Were the cigarettes made by the gum people or Beech-Nut Packing Company?' What did you tell them?

"A. Why, they would say to me, 'Well, we sell your Beech-Nut gum,' and I would emphatically deny it and say, 'Beech-Nut gum was not made by P. Lorillard Tobacco Company; it was made by the Beech-Nut Packing Company.'

"R-D. Q. 83. How often would that happen?

"A. Very few times."

Defendant's witness, ALBERT MARKS, of Green Bay, Wis., salesman for the Lorillard Company (R., Vol. II, pp. 1496-1497):

"X-Q. 187. During your experience in selling or conducting the sales of Beech-Nut scrap tobacco did you hear any questions at all or any comments about whether this Beech-Nut scrap tobacco is made by the same people that put out the Beech-Nut gum and Beech-Nut peanut butter and those other Beech-Nut products?

"A. Well, I will tell you, I don't just recall of any special place or anything of that kind, but I will be safe in saying I have had perhaps a mighty few ask me that question, but I cannot recall of having very many ask me that.

"X-Q. 188. You didn't try to remember such incidents, I suppose at the time?

"A. No, because we really were not interested in anything about anybody else. The only thing, if I was asked that question, as near as I can remember, that I would immediately deny it, of course, and say that this was the P. Lorillard Company, that has always been our by line, understand, you know."

Defendant's witness, FRANK HOPEWELL, of Milwaukee, Wis., salesman for the Lorillard Company (R., Vol. II, pp. 1516-1517):

"X-Q. 125. Have you heard any questions asked or any comments at all about whether anyone was questioning who the maker of the Beech-Nut cigarettes was?

"A. No, I never saw at any time where there was any confusion about who made Beech-Nut cigarettes.

"X-Q. 126. But have you had any questions asked you by dealers or consumers as to whether the Beech-Nut cigarettes were made by the same people made the Beech-Nut gum and peanut butter?

"A. I never had a question of that kind put to me by a consumer in my life.

"X-Q. 127. Or a dealer?

"A. Or a dealer.

"X-Q. 128. Did you make any attempt to remember such a thing?

"A. I believe I would have remembered it if it had really happened.

"X-Q. 129. You never heard one single question?

"A. I never heard a dealer that ever asked me——

"X-Q. 130. Or a consumer?

"A. Or a consumer ever asked me if the Beech-Nut Packing Company made Beech-Nut cigarettes or Beech-Nut tobacco.

"X-Q. 131. Did you hear any discussion on that point?

"A. Well, whether I have heard Beech-Nut gum discussed along with possibly my being interested in the sale of Beech-Nut chewing tobacco and cigarettes, —yes, possibly. In fact, yes.

"X-Q. 132. Can you remember any of those instances?

"A. Why, yes, I can remember where dealers—not only dealers, but where I am well acquainted with the dealer, in his conversation he would say, 'If this Beech-Nut cigarettee of yours will sell as well as your Beech-Nut tobacco it will be a good seller,' and he would go on and say, 'Beech-Nut gum sells well too.' There was no confusion with that dealer though, that they were made by the same company whatsoever.

"X-Q. 133. Did the dealer in such a case tell you there was no confusion in his mind?

"A. Why no, I don't expect him to take particular time and attention to tell me. If there wasn't any confusion naturally, he wouldn't tell me.

"X-Q. 134. How do you know what was in his mind?

"A. I wouldn't know what was in his mind."

Defendant's witness, WADE H. BROWN, of Chicago, district manager of the Lorillard Company (R., Vol. II, p. 1592):

(Page 1598):

"Q. 41. Have you heard any comments, inquiries or remarks from customers or consumers to the effect or which would lead you to believe that they were under the impression that the Beech-Nut cigarettes or the Beech-Nut scrap tobacco were made by the same people that make the Beech-Nut chewing gum, Beech-Nut peanut butter, and other food products?

"A. Well, when I first began introducing the Beech-Nut cigarettes. I had possibly half a dozen dealers that asked me if we made the Beech-Nut gum and I told them no, we did not; that the Lorillard Tobacco Company made the Beech-Nut cigarettes, Beech-Nut chewing tobacco, Climax, Murad, Helmar and brands of that kind, and that we were in the tobacco business and not the gum or food business."

(Pages 1613-1614):

"X-Q. 164. And how many inquiries, comments or remarks did you hear in regard to who made the Beech-Nut cigarettes and as to whether they were made by the same people that make the Beech-Nut gum?

"A. Well, not over half a dozen retailers asked me that question, but here is what they asked: 'Do you people make the gum?' I would say approximately six, half a dozen dealers.

"X-Q. 165. Can you describe some of those instances where they occurred?

"A. No, I cannot, Mr. Johnson, I could not.

"X-Q. 166. Did you make any attempt to remember such inquiries, comments or remarks?

"A. No; I just enlightened the man and told him we had nothing to do with the Beech-Nut gum; that it was the Lorillard Tobacco Company that made tobacco.

"Mr. Johnson: Read the question, please.

"(The question was read.)

"X-Q. 167. Did you make any attempt to remember such instances?

"A. No, I did not.

"X-Q. 168. Did anyone ask you to make a note or remember any such instances that might occur?

"A. No, sir. In every instance where those approximately half a dozen occurred, I explained to them very thoroughly that Lorillard made Beech-Nut chewing tobacco, Murad, Helmar and those brands of tobacco; that we had nothing to do with the gum business; we were in the tobacco business, cigarette business, and not the gum business or food commodities or anything of that sort.

"X-Q. 169. You were pretty busy during that time, were you not?

"A. Well, I was, naturally, as I am busy now. I was busy; yes, sir, I was. I manage to keep busy all the time, Mr. Johnson.

"X-Q. 170. When you say that you have heard a half a dozen of such inquiries or remarks, you mean you do not remember any more than that?

"A. No, I cannot. I never heard any more than that, I say approximately six; in all, half a dozen.

"X-Q. 171. Can you give the names of any of those six parties who have asked?

"A. Oh, no. As I have just told you, I did not pay much attention to it, and explained to the dealer we were in the tobacco business and did not make gum and explained to him thoroughly what we made. I didn't pay much attention to it."

Defendant's witness FRANK C. DEGAN, of Chicago, salesman for the Lorillard Company (R., Vol. II, pages 1642-1643):

"X-Q. 61. Have you ever heard any discussion at all, or any questions asked as to who made the Beech-Nut cigarette?

"A. You mean the dealer?

"X-Q. 62. Anybody.

"A. That question is rather broad, Mr. Johnson. I wouldn't know just how to answer that. I would have to answer it in blanket no.

"X-Q. 63. Anybody on your rounds as you have gone about the City of Chicago or your Indiana district?

"A. Oh, I heard once or twice, not over that, I don't think, they would ask or make the comment: 'This is not made by the people that make the gum, is it?' I have had that occur to me once or twice. They seemed to take it for granted that it was not.

"X-Q. 64. Can you describe where or when such incidents as that occurred?

"A. No, I cannot. I attached no importance to them at the time at all; none whatever. I had made a practice of giving the dealer to understand that I was from the Lorillard, the Climax and the Beech-Nut Scrap house. That was as much as anything, because I wanted him to remember me. I wanted him to remember me.

"X-Q. 65. You have heard a few instances of that kind of questions and discussions, have you?

"A. No discussion. It was just a casual remark: 'This is not made by the gum house.' I have heard that once or twice; I do not know where or when."

Defendant's witness, PHILIP L. BURGESON, of Chicago, salesman for the Lorillard Company (R., Vol. II, pages 1649-1650):

"Q. 23. Now, have you ever heard of any questions or comments or remarks from customers or any other person or persons to the effect or which would lead you to believe that they thought the Beech-Nut cigarettes or the Beech-Nut Scrap tobacco were made by the same people that make the Beech-Nut gum or Beech-Nut peanut butter or food products?

"A. Well, I have perhaps as high as two or three times. A dealer would say 'Do you also make the Beech-Nut gum?' Of course, it would not be our big dealer that would say that; it would be some of the peanut stands, as we would say, that would say that. Two or three times at the highest.

"Q. 24. What was your answer on those occasions?

"A. 'We only make smoking articles.' Always say Beech-Nut gum is a food product and we do not make food products. We make eighty-five of the Turkish brands that are on the market. We do not manufacture any food products whatsoever.

Cross-Examination by Mr. Johnson.

"X-Q. 25. You did, then, Mr. Burgeson, hear some questions and discussion as to whether the Beech-Nut cigarettes were made by the gum people?

"A. Yes, naturally I would, on account of being the same name, but not as much as we did expect."

Defendant's witness, JOHN A. WEBER, manager and part owner of seven cigar stores in Chicago (R., Vol. III, page 1712):

. . . . . .

(Pages 1714-1715):

"Q. 25. Mr. Weber, have you ever heard any remarks, inquiries or comments among your customers or others to the effect or which would lead you to believe they thought Beech-Nut Scrap tobacco or Beech-Nut cigarettes to be the product of the same company that manufactures Beech-Nut chewing gum?

"A. There was one, about once or twice that question was asked, wanted to know whether it was made all by one company or not.

"Q. 26. About how many times do you think that was?

"A. Once or twice, and I happened to be on watch at that time."

. . . . . .

(Page 1715):

"Q. 28. What did you tell those people who asked you whether it was made by the same company?

"A. Well, being acquainted with both companies, I just told them one was made by the packing company that makes bacons and hams, and the other was made by P. Lorillard Company, the tobacco com-

pany; there was no confliction between the two at all."

(Pages 1718-1719):

"X-Q. 65. And have you heard some discussion as to whether the Beech-Nut cigarettes are made by the same people that make the Beech-Nut chewing gum?

"A. Never. No, I can't say that I ever heard that.

"X-Q. 66. Did you ever hear any questions asked as to who makes the Beech-Nut cigarettes?

"A. Only once or twice, as I stated before.

"X-Q. 67. Can you describe those incidents that you have just mentioned? Remember what the people said at the time?

"A. All I can say is, one party says, 'Are they all made by the same people?' I says, 'No.'

"X-Q. 68. What did they mean, were they all made by the same people, what were they referring to?

"A. Well, Beech-Nut gum and Beech-Nut cigarettes.

"X-Q. 69. And how many times have you been asked questions like that?

"A. Twice to my knowledge that is all.

. . . . . .

(Page 1719):

"X-Q. 75. You might have heard some more then that you do not remember, might you not?

"A. The reason of me remembering those two is because the names were all so much alike. That is the reason I remember that, you see, and made by different corporations. Otherwise, I am positive I never heard anything said about it."

Defendant's witness, J. W. COREY, of Chicago, owner of a tobacco, candy and variety store (R., Vol. III, pages 1778-1779):

"When the cigarettes first appeared I remember hearing four or five persons inquire whether the

Beech-Nut Cigarette and Beech-Nut Chewing Gum were made by the same company. I told these persons that this was not the case and that the Lorillard Co. made the cigarettes and the Beech-Nut Packing Company made the chewing gum. Although I cannot say definitely that four or five was the number of these remarks which I heard, I can state positively that it was not many more than that."

Defendant's witness, W. E. DOUGLAS, manager of a tobacco store in Knoxville, Tennessee (R., Vol. III, page 1869):

"When the cigarette first appeared I remember that two or three people asked me whether the Beech-Nut Cigarettes and the Beech-Nut Chewing Gum were manufactured by the same company."

Defendant's witness, E. R. TURNER, manager of a drug store in Louisville, Kentucky, and in charge of the candy and tobacco department of the store (R., Vol. III, page 1900):

"When the cigarette first appeared I heard perhaps four customers ask whether the Beech-Nut cigarettes and Beech-Nut Gum were made by the same company."

Defendant's witness W. B. ZULWOOD, manager of a drug store in Louisville, Kentucky, in which tobacco is sold (R., Vol. III, page 1918):

"I remember that in all my experience I have heard about six people ask whether either the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes were made by the same company that manufactures the Beech-Nut Gum and Beech-Nut Mints."

Defendant's witness JOSEPH H. ROSSWOG, a retail tobacco dealer at Pittsburgh, Pennsylvania (R., Vol. III, page 1949):

> "I have never heard more than four or five remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco or the Beech-Nut Cigarettes to be the products of the Beech-Nut Packing Company."

Defendant's witness J. F. REINACKER, a retail tobacco merchant at Wheeling, West Virginia (R., Vol. III, pages 1970-1971):

> "I have never heard more than three or four remarks, inquiries or comments among my customers or others to the effect, or which led me to believe that they thought the Beech-Nut Scrap Tobacco and the Beech-Nut Cigarettes to be products of the Beech-Nut Packing Company."

Defendant's witness I. KAUFMAN, a druggist dealing in tobacco in his drug store at Hartford, Connecticut (R., Vol. III, page 2055):

> "When the Beech-Nut Cigarette first appeared on this market I remember that two or three persons asked me whether the Beech-Nut Cigarette was manufactured by the same company that manufactured the Beech-Nut Chewing Gum."

Defendant's witness SAM SUKLOFF, JR., a retail tobacconist at New Haven, Connecticut (R., Vol. III, page 2103):

> ". . . I do remember that when the cigarette was first put on the market a few of my customers did ask me whether there was any connection between the makers of the gum and the makers of the cigarettes."

Defendant's witness A. H. GOTCH, a retail tobacconist at Bridgeport, Connecticut (R., Vol. III, page 2135):

> ". . . I heard possibly as many as three or four customers inquire whether the Beech-Nut cigarette was made by the same company that manufactured the Beech-Nut Gum."

APPENDIX D, QUOTATIONS FROM TESTIMONY OF DEFENDANT'S WITNESSES SHOWING THAT THE NAME "LORILLARD" IS PRACTICALLY UNKNOWN AS AN IDENTIFICATION OF TOBACCO PRODUCTS.

[Page numbers of the brief where Appendix D is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

JOHN A. WEBER, manager and part owner of seven cigar stores in Chicago, a witness for defendant, testified as follows (R., Vol. III, pages 1719-1720):

"X-Q. 76. When people have come into your stores, within your long experience in the tobacco business, do they usually ask for cigarettes or tobacco by the name of the brand?

"A. Oh, yes; yes.

"X-Q. 77. Would you say that cigarettes and tobacco sell by the brand?

"A. By the brand; yes.

"X-Q. 78. Did you ever have a purchaser come in and ask for Reynold's Camels?

"A. No.

"X-Q. 79. Or American Tobacco Company's Lucky Strikes?

"A. No. Never.

"X-Q. 80. Or Lorillard's Beech-Nut cigarettes?

"A. No.

"X-Q. 81. Do they always ask for the cigarettes or tobacco by the name of the brand?

"A. They do."

The following is from the testimony of WILLIAM H. GETZELMAN, general manager of the eleven Breitung cigar stores in the business center of Chicago. He was a witness for defendant (R., Vol. III, page 1688):

(Pages 1700-1701):

"X-Q. 101. In your experience in the tobacco business, Mr. Getzelman, have you found that customers ask for cigarettes and tobaccos by the name of the brand? Do they ask for Camels and Lucky Strikes and Union Leader, Climax, the names of the brands, such as that?

"A. Yes. Yes they come in and say, Camel, Lucky Strike. That is generally the way they ask for them.

"X-Q. 102. Would you say they sell by brands?

"A. Well, I guess that is what you would say, they sell by brands. If a man wants a package of Camels, he won't say Reynolds' Camels; he would say Camels.

"X-Q. 103. That is what I mean. Did you ever, in your experience, extending through sixteen years, hear a man, a customer, ask for Reynolds' Camels?

"A. No.

"X-Q. 104. Or American Tobacco Company's Lucky Strikes?

"A. No.

. . . . . .

"X-Q. 107. Did you ever in your experience hear a customer ask for Lorillard's Moguls?

"A. No.

"X-Q. 108. Or Lorillard's Murads?

"A. No."

NATHAN ADELMAN, of Chicago, retail tobacco dealer, one of defendant's witnesses, testified as follows (R., Vol. III, page 1731):

"X-Q. 95. In your experience in the tobacco business, Mr. Adelman, do customers usually ask for a cigar, cigarette or tobacco by the name of the brand?

"A. Absolutely; absolutely.

"X-Q. 96. Do many customers ask you for the name of the brand, together with the name of the maker, like Reynolds' Camel cigarettes?

"A. No.

"X-Q. 97. Did anybody ever ask you for cigarettes that way?

"A. No, no, they come in and ask for Beech-Nut Scrap tobacco, Beech-Nut cigarettes, and if they want Beech-Nut Cigarettes they say Beech-Nut cigarettes.

"X-Q. 98. They do not say Lorillard cigarettes?

"A. No, they say Beech-Nut cigarettes."

WILLIAM GOLDSTEIN, head salesman for P. Lorillard Co., at Chicago, was a witness for defendant. The following is an extract from his testimony (R., Vol. II, pages 1365-1366):

"X-Q. 127. As a matter of fact, Mr. Goldstein, isn't it the brand of the cigarette, Murad or Moguls or London Lifes, the people ask for?

"A. As a rule the ordinary consumer does, yes.

"X-Q. 128. Isn't it the brand that sells the particular cigarette?

"A. Sure, it is the trade-name that sells it, but the average consumer that calls for that trade-name knows it is a product of the Lorillard Tobacco Company."

BENJAMIN A. MOSHER, proprietor of a drug store in Milwaukee, Wisconsin, testified for defendant concerning the tobacco business conducted in connection with his drug store. The following is quoted from his testimony (R., Vol. II, pages 1532-1533):

"X-Q. 101. In selling cigarettes, Mr. Mosher, did you find or have you found that people ask for them using the name of the maker?

"A. Never.

"X-Q. 102. Have you had people ask you when

they were buying, for Lorillard's Beech-Nut cigarettes?

"A. No, sir.

"X-Q. 103. Or Lorillard's Murad cigarettes?

"A. No, sir.

"X-Q. 104. Or Lorillard's Mogul cigarettes?

"A. No, sir.

"X-Q. 105. Or the American Tobacco Company's Lucky Strikes?

"A. No, sir.

"X-Q. 106. Have you found that it is the brand of the cigarette that sells the cigarette?

"A. Yes.

"X-Q. 107. You have found that right through, haven't you, it is the brand the people know and not the maker?

"A. Yes.

"X-Q. 108. It is the brand the people ask for?

"A. Yes, sir.

"X-Q. 109. Do people ask just for Beech-Nuts or the Beech-Nut?

"A. Yes, a package of Beech-Nuts.

"X-Q. 110. And in a case like that, what do you do?

"A. Ask them whether they want gum or cigarettes."

Defendant's witness, JOHN GLASSPIEGEL, Milwaukee, Wisconsin (R., Vol. II, page 1560):

"X-Q. 98. How many years have you been handling tobacco and cigarettes?

"A. About eight.

"X-Q. 99. Do your customers ask for them by the brand? That is, do they ask for Camels or Beech-Nuts?

"A. They ask for the brand, for the name, whether it is Camels, Lucky Strike, Chesterfields, or Beech-Nuts, it doesn't make any difference what cigarette it is. A cigarette smoker as a rule asks for the name of the brand.

"X-Q. 100. And does the same thing apply to chewing tobaccos?

"A. Yes, sir.

"X-Q. 101. Did you ever have any customer ask you for Lorillard's Union Leader?

"A. No, sir.

"X-Q. 102. Or Lorillard's Moguls?

"A. No, sir.

"X-Q. 103. Or Lorillard's Murads?

"A. No, sir.

"X-Q. 104. Or American Tobacco Company's Lucky Strikes?

"A. No, sir.

"X-Q. 105. You never heard any customer ask for cigarettes or tobaccos by the name of the maker?

"A. No, sir.

"X-Q. 106. Have you found then that tobacco and cigarettes sell by the brands?

"A. I have found that tobaccos and cigarettes sold by the title."

Defendant's witness, J. S. WEINER, manager of the cigarettes department in the department store of Rothschild & Co., in Chicago (R., Vol. III, page 1674):

"X-Q. 31. Have you found in your experience in the tobacco trade that customers ask you for a brand of cigarettes or tobacco, or do they ask you for the cigarettes by the name of the maker?

"A. They ask for the cigarettes by the name of the brand of the cigarettes.

"X-Q. 32. Cigarettes sell by the brand?

"A. By the brand; by the name."

Defendant's witness, DAVID KOSSACK, tobacco and cigar dealer, in Chicago (R., Vol. III, page 1685):

"X-Q. 47. Have you found in all these years' experience in the tobacco trade that people ask for cigarettes or tobacco by the name of the brand?

"A. Only.

"X-Q. 48. That is, they ask for Camel cigarettes?

"A. Camels or Beech-Nut, or whatever cigarette brand, they ask for it by name.

"X-Q. 49. Did you ever hear a customer ask for Lorillard's Beech-Nut cigarettes?

"A. No, sir.

"X-Q. 50. Or for Reynolds' Camels?

"A. No, sir, they never asked me that.

"X-Q. 51. Or for the American Tobacco Company's Lucky Strikes?

"A. No, siree.

"X-Q. 52. You never heard anyone buying cigarettes or tobacco ask for it by the name of the maker, have you?

"A. No, sir."

Defendant's witness, JACOB SHANFIELD, retail dealer in tobacco, candies and novelties, Chicago. (R., Vol. III, p. 1739):

"X-Q. 61. Do you find through your experience of thirteen years that your customers ask for a cigarette or tobacco by the name of the brand?

"A. By the name of the brand; yes, sir.

"X-Q. 62. Do they ask for a brand made by the American Tobacco Company or—

"A. No, sir.

"X-Q. 63. Or naming the maker?

"A. No, sir. Sometimes they come and ask me and give me the P. A., or there was a tobacco by the name J. R. There was one tobacco, J. R. Reynolds, and that was on the package, big J. and big R. J. R.

"X-Q. 64. Was that generally asked for in any way except by the name of the brand?

"A. Brand.

"X-Q. 65. Would you say cigarettes and tobacco sell by the brand?

"A. By the brand.

"X-Q. 66. Have you a front display window facing the side walk on the front side of your store?

"A. Yes, sir.

"X-Q. 67 Whose brands are you displaying in one half of your front window at the present time?

"A. Mostly P. Lorillard Company.

"X-Q. 68. What name is on that painted sign hanging out over your door with the street number '742 West 43rd Street' on it?

"A. One side is Helmar and one side is London Life, I believe. Don't say what company."

The testimony shows that even among the retail dealers in tobacco called as witnesses by DEFENDANT, many did not know the names of the manufacturers of the leading tobacco brands which they sold over the counter and could not name the brands made by the Lorillard Company.

SAMUEL S. BROADBENT, of Worcester, Mass., sells tobacco products in his drug store. He was one of defendant's witnesses. The following is quoted from his testimony (R., Vol.II, pp. 1157-1159):

"X-Q. 20. Have you sold other Lorillard brands besides Beech-Nut?

"A. Of what? Cigarettes, cigars?

"X-Q. 21. Cigarettes?

"A. I don't remember. I don't know what other brands they make, really.

"X-Q. 22. The only brand you can identify positively as a Lorillard brand is the Beech-Nut.

"A. Yes.

"X-Q. 23. Do you know who makes the Camel cigarettes?

"A. No, I don't know as I do.

. . . . . .

"X-Q. 27. Do you sell 'Murad' cigarettes?

"A. Yes, I think we have them.

"X-Q. 28. Do you sell 'Mogul' cigarettes?

"A. Yes.

"X-Q. 29. Do you sell 'Helmar' cigarettes?

"A. Yes.

"X-Q. 30. Do you know who makes those cigarettes?

"A. I do not.

"X-Q. 31. And you cannot name any Lorillard brands at all of cigarettes?

"A. No. As I told you, that was the only thing

that fixed that in my mind, was reading the ad. through to see . . .''

The following is from the deposition of PETER PETERS, of Lawrence, Mass., a retailer of tobacco and groceries, one of defendant's witnesses (R., Vol. II, p. 1138):

"Q. 7. Do you know who makes the Beech-Nut cigarettes?

"A. Yes.

"Q. 8. Who makes it?

"A. Leroyd or Alroyd, or Ralroid—I don't know how to spell the name.

"Q. 9. You don't know how to spell the name?

"A. I don't know how to spell the name, but it is right on the package, anyway.

"Q. 10. Do you know who makes the Beech-Nut gum?

"A. Sure.

"Q. 11. Who?

"A. Beech-Nut Packing Company; their name is all marked on the package.

. . . . . .

(Pages 1140-1141):

"X-Q. 16. Who makes the Fatima cigarettes, do you know?

"A. I didn't look to see.

"X-Q. 17. Can you tell me out of your head who makes the Fatima cigarettes?

"A. Of course, I don't handle much of them.

"X-Q. 18. How about the Camels, do you know who makes them?

"A. The Camels?

"X-Q. 19. Yes.

"A. No,—the American Tobacco Company, I think.

"X-Q. 20. Who makes the Lucky Strike, do you know?

"A. Meyers, or Miles,—I don't know.

"X-Q. 21. And who makes the Moguls?

"A. I don't handle them.

"X-Q. 22. Did you ever handle the Murads?

"A. Yes, sir.
"X-Q. 23. Who makes those?
"A. I don't know; I didn't look on the packages.
"X-Q. 24. Who makes the Helmars?
"A. I couldn't remember who makes them, but of course when I look at the package I can tell.
"X-Q. 25. But in the ordinary course you would not look on the package unless somebody asked you?
"A. No."

Another of defendant's witnesses, ANDREW J. WRIGHT, of Worcester, Mass., who had for eleven years kept a grocery, tobacco and confectionery store, testified as follows (R., Vol. II, pp. 1167-1168):

"X-Q. 36. What are the leading Lorillard brands of cigarettes you sell?
"A. I would have to look at the packages to tell you who makes them.
"X-Q. 37. Can you name any other Lorillard brand of cigarettes except the Beech-Nut without looking at the packages?
"A. Very doubtful.
"X-Q. 38. Do you know the name of the makers of the Camel cigarettes?
"A. I couldn't say, without looking.
"X-Q. 39. Do you know who makes the Fatima cigarettes?
"A. Again, I wouldn't say without looking.
"X-Q. 40. Or Chesterfields?
"A. No.
"X-Q. 41. Or Deities?
"A. No, I don't handle them.
"X-Q. 42. Murads?
"A. The Greek,—I don't know what his name is; I don't know how you pronounce it.
"X-Q. 43. Or Moguls?
"A. Why—
"X-Q. 44. Some Greek makes the Moguls?
"Mr. Cavanagh: Anargyros.
"A. Yes, I guess that would be it. I was trying to make it begin with an S.
"Mr. Cavanagh: S. Anargyros.

"X-Q. 45. You have been selling Deities and Moguls?

"A. Deities I haven't handled for a long time.

"X-Q. 46. You still sell Moguls?

"A. Yes.

"X-Q. 47. You sell Helmars?

"A. Yes.

"X-Q. 48. Do you know who makes Helmars?

"A. Well, let's see. Isn't that by the same people that makes Moguls?

"X-Q. 49. Do you know? Whether you know or not?

"A. If I was going to say, I should say it was the same people that makes the Moguls. I wouldn't swear to it.

"X-Q. 50. So the only cigarettes of which you can name the manufacturer definitely is Beech-Nut?

"A. Why, let's see. No, I guess 'Sweet Caps' (Caporals) isn't that the American? Well, I wouldn't undertake to name them accurately.

"X-Q. 51. Can you name any other except Beech-Nut?

"A. Because I never pay any attention to these things. Most of these cigarettes have been manufactured by somebody and have been consolidated with other concerns; without paying any particular attention I know they have been, but who the originators are and who owns them, I wouldn't be sure."

CARL W. JACOBSON, one of defendant's witnesses, a retailer in Baltimore, Maryland, did not know that the Beech-Nut cigarette was made by the Lorillard Company until told so by defendant's counsel as shown by the following question and answer. (R., Vol. II, p. 1215):

"Q. 12. Do you know what company makes the Beech-Nut cigarettes?

"A. After I had a conversation with you I do, but I didn't know it before."

WILLIAM STEIDINGER, another of defendant's own witnesses, retailer of tobaccos, candies, groceries and notions, near an entrance to the Union Stock Yards in Chicago, did not know who made either Beech-Nut Scrap Tobacco or Beech-Nut cigarettes until shown packages of each by defendant's counsel, although he handled both in his business. The following is from his testimony (R., Vol. III, pp. 1745-1746):

"Q. 17. Do you handle Beech-Nut Scrap tobacco?

"A. Yes, sir.

"Q. 18. Do you know what company makes Beech-Nut Scrap tobacco?

"A. The Beech-Nut is—I don't even know; I can't even tell you right now.

"Q. 19. Mr. Steidinger, do you know of the Lorillard Tobacco Company?

"A. Sure, I know of the Lorillard.

"Q. 20. Do you handle any of the Lorillard Tobacco Company's products?

"A. Sure, I got Lorillard.

"Q. 21. Could you name a few Lorillard products that you handle?

"A. Well, sir, that is, the Climax is Lorillard's, isn't it? Yes.

"Q. 22. Do you handle Beech-Nut cigarettes?

"A. Beech-Nut cigarettes? Yes, sir.

"Q. 23. Do you know what company makes Beech-Nut cigarettes?

"A. I do not know; no. I never paid any attention to that. You see, I buy from the jobbers; I don't even know half of the companies, who makes them.

"Q. 24. I show you a package of Beech-Nut cigarettes, which is in this case as Plaintiff's Exhibit No. 1. Will you tell me whose name appears on the front of that package beneath the oval?

"A. The P. Lorillard—The manufacturer?

"Q. 25. Yes.

"A. Yes, P. Lorillard Company."

. . . . . .

(Page 1747):

"Q. 36. Did I understand you to say, when I asked you a moment ago whether you knew what company made Beech-Nut Scrap tobacco, that you did not know what company made it?

"A. I didn't know it unless I took time. I didn't pay any attention to the manufacturers at that time. I know it was not a gum manufacturer; it was a tobacco."

(Page 1753):

"R-X Q. 93. You keep the Lorillard products, do you not?

"A. Yes, sir.

"R-X Q. 94. Any others besides Beech-Nut cigarettes and Beech-Nut Scrap tobacco?

"A. Well, let's see. That is one thing I have never paid much attention to, as I buy through jobbers. Climax tobacco and Havana Blossom. I don't know. I might have one or two more that I can't think of just now."

The following is from the testimony of another of defendant's witnesses, ELEAZER LEBEWOHL, who keeps a tobacco store in Boston (R., Vol. II, p. 963):

"X-Q. 34. When you speak about the reputation of the Lorillard Company, you mean its reputation in the tobacco trade?

"A. As being an old, reliable concern, and handling their merchandise for so many years, it impresses it on your mind.

"X-Q. 35. You naturally would deal with them on that account?

"A. Yes; and the merchandise being so extentively advertised, too, you know.

"X-Q. 36. What are the leading Lorillard brands of cigarettes which you have found to be the best sellers?

"A. You mean any cigarettes?

"X-Q. 37. Yes.

"A. Well, I will tell you; in buying tobacco, I

have in mind buying the tobacco, see, and my attention is so much occupied with all the other little details that I cannot tell you right off what they are,—you know, to be truthful to you."

PHILIP H. MORAN, proprietor of a tobacco store at West Lynn, Mass., a witness for defendant, thought every one knew that Lorillard made the Beech-Nut cigarettes, but he himself could not state accurately the names of the makers of other more prominent and widely sold cigarettes. The following is from his testimony (R., Vol. II, pp. 1109-1110):

"X-Q. 11. When you put in the Beech-Nut cigarettes, did the jobber, or the Lorillard agent come in and get you to put them in?

"A. I believe the agent came in first.

"X-12. He came in first and told you they were coming out with a new kind of cigarettes and that you better put them in?

"A. Yes, he asked me if I would put in some at the time.

"X-Q. 13. And, of course, you know who made them?

"A. Yes; I presume that everybody knew who made them.

"X-Q. 14. That is not based on anything anybody told you?

"A. No, that is just my supposition.

"X-Q. 15. You knew yourself?

"A. Yes, sir.

"X-Q. 16. When a man comes in to buy Camel cigarettes, or other brands of cigarettes, he comes in and puts his money down and takes the goods and walks out?

"A. Yes.

"X-Q. 17. And you don't have any discussion with him as to who makes Camel cigarettes?

"A. I don't know who makes them. I give him the brand he calls for. I am interested in making the sale, that is all I am interested in, the sale of them.

"X-Q. 18. Do you know who makes the Camel cigarettes?

"A. Yes.

"X-Q. 19. Who makes the Camels?

"A. The American Tobacco Company.

"X-Q. 20. Who makes the Fatimas?

"A. Why, I don't know; I think they are made by the same house, I wouldn't say; I don't know exactly.

"X-Q. 21. Do you know who makes the Lucky Strike?

"A. No, I was under the impression that the American Tobacco Company did.

"X-Q. 22. You are not sure who makes some of these most popular brands?

"A. Yes, I know some of them, but there are some I don't know.

APPENDIX E, PLAINTIFF'S WITNESSES SHOWING LORILLARD NAME UNKNOWN TO MANY CLASSES OF PEOPLE.

[Page numbers of the brief where Appendix E is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

ALFRED W. GODFREY, trader in feeds and flour, on Chamber of Commerce, Boston—R., Vol. I, p. 53, X-Q. 24.

THOMAS F. MALONEY, trader on Chamber of Commerce, Boston—R., Vol. I, p. 69, X-Q. 13.

DORACE L. BOTTOMLY, grocer's clerk, Worcester, Mass.—R., Vol. I, p. 169, X-Q. 36.

JOHN H. LANG, wholesale grocer, Worcester, Mass.—R., Vol. I, p. 173, X-Qs. 17-19, p. 175, X-Q. 26.

CHAS. O. LARSON, grocer, Chicago, Ill.—R., Vol. I, p. 443, X-Q. 16.

EUGENE C. SULLIVAN, advertising salesman, Chicago—R., Vol. I, p. 459, X-Qs. 7, 10, 17.

DANIEL HUTTNER, butcher, Chicago—R., Vol. I, p. 487, X-Q. 19.

F. J. LATZEL, delicatessen proprietor, Oak Park, Ill.—R., Vol. I, p. 493, X-Qs. 17-19.

FRED KNOOP, grocer, Oak Park, Ill.—R., Vol. I, p. 497, X-Q. 9.

H. N. PETERSEN, grocer, Manitowoc, Wis.—R., Vol. I, p. 515, X-Q. 38.

MISS C. HELLER, bookkeeper and grocery clerk, Milwaukee, Wis.—R., Vol. I, p. 542, X-Q. 64.

CARL W. NEMETZ, grocer, Milwaukee, Wis.—R., Vol. I, p. 552, X-Qs. 22-24.

GEO. B. ROACH, grocer, Pembroke, Ky.—R., Vol. I, p. 669, X-Qs. 13-14.

BRYAN O. FOSTER, grocer's clerk, Pembroke, Ky.—R., Vol. I, p. 689, X-Qs. 39-40.

CHAS. P. COOK, grocer, Paris, Ky.—R., Vol. I, p. 698, X-Qs. 30-32.

WM. T. HILL, grocery and meat market, West Greenville, S. C.—R., Vol. I, p. 726, X-Qs. 11-13.

JEFFERSON D. HAYDEN, grocer, Columbia, S. C.—R., Vol. I, p. 763, X-Qs. 88-92.

WALTER PEABODY, grocer's clerk, Chicago, Ill.—R., Vol. IV, p. 2232, X-Q. 10.

LUDWIG NURNBERG, grocer, Chicago, Ill.—R., Vol. IV, p. 2236, X-Q. 3.

APPENDIX F, A FEW VETERAN TOBACCO DEALERS ARE THE ONLY WITNESSES WHO EVEN REMEMBER THAT THE WEISSINGER BEECHNUT TOBACCO BRAND EVER EXISTED—NOT ONE ULTIMATE CONSUMER REMEMBERS.

The only witnesses who testified to any knowledge or remembrance of the old Weissinger Beechnut brand of tobacco, outside of Lorillard Company officials and a few men connected with its manufacture, are the following:

W. H. NICHOL, buyer for twenty-five years for a Pittsburgh wholesale and jobbing grocery house, Allen, Kirkpatrick & Co., stated that he had, at the request of a representative of the Lorillard Company, examined the records of the company for which he worked and that he found records of purchases of Weissinger Beechnut tobacco in 1901, 1902 and 1903, but no record of any purchases of that tobacco after 1903 (R., Vol. IV, pp. 2275-2276). Mr. Nichol had no personal recollection of the Weissinger Beechnut brand and said that "my knowledge of it would be simply the record as it is recorded in the books." This witness was not an ultimate consumer and had no recollection of the Weissinger Beechnut brand. He merely produced the old records of his employer, and these records show no purchase later than 1903.

CHARLES C. ST. CLAIR (R., Vol. IV, p. 2280), also a buyer for twenty-five years for the same concern that the above-mentioned witness, Nichol, works for, remembered buying Weissinger Beechnut tobacco for his employer, and when asked why his company ceased buying that brand he replied, "Well, my only opinion would be that they were unable to get it; it was not manufactured; no other reason that I know of." The company for which

Mr. St. Clair worked made its last purchase of Weissinger Beechnut tobacco in 1903 and Mr. St. Clair thought the reason no more was bought was that it could not be obtained because it was not manufactured.

WILLIAM M. GORMLY, a buyer employed for thirty years by S. Ewart & Co. of Pittsburgh, a company engaged in the wholesale grocery and tobacco business, produced a record showing purchases of Weissinger Beechnut tobacco in 1901 and 1902 (R., Vol. IV, pp. 2283-2284). He also produced two packages of the Weissinger Beechnut tobacco put out by Luhrman & Wilbern and bearing revenue stamps canceled in 1905 (R., Vol. IV, p. 2285). Mr. Gormly obtained these old packages from an "old drawer of samples" which "as a sample drawer has been out of use for ten years" (R., Vol. IV, p. 2287, X-Q. 51). Mr. Gormly referred to the samples in the drawer as "pretty well dried out now" (R., Vol. IV, p. 2287, X-Q. 54). When asked if he intended to destroy the drawer he said that "it should have been done long ago" (R., Vol. IV, p. 2288, X-Q. 59), but that it would be kept "until housecleaning" (X-Q. 60). In answer to cross-question 74 he said they had offered several times to give away the contents of the drawer but "no person would take it on account of its age" (p. 2290). The latest packages produced by Mr. Gormly were those taken from this drawer and bearing revenue stamps canceled in 1905. He stated as his idea of the reason his company ceased buying Weissinger Beechnut tobacco that possibly there was a lack of demand for it (p. 2288, X-Q. 64).

H. H. ARNOLD, for thirty years connected with S. Ewart & Company, the firm for which Mr. Gormly also worked, identified the book entries referred to by the latter as being in his, Arnold's, handwriting. Despite

this long period of employment by S. Ewart & Company he imparted no information regarding the Weissinger Beechnut tobacco and did not state that he even remembered that such a brand had ever existed (R., Vol. IV, p. 2291).

T. F. Coyle, a buyer connected with Arbuckles & Company, wholesale grocers, of Pittsburgh for "at least twenty-five years," says that he bought the Weissinger Beechnut tobacco for his employer during the years 1901 to 1908 as shown by the Arbuckles & Company weekly and fortnightly printed price lists which are bound in yearly volumes and preserved by the company. There was no record showing that Arbuckles & Company dealt in Weissinger Beechnut tobacco after the year 1908 (R., Vol. IV, pp. 2292-2293).

H. O. Evans was employed for twenty-four years by Thomas C. Jenkins Company, wholesale grocers and jobbers, of Pittsburgh. Mr. Evans was at first a bookkeeper and later a buyer for his employer. He produced records of the Jenkins Company showing purchases of Weissinger Beechnut tobacco in the years 1901 to 1907, but no record showing any dealings in that tobacco later than 1907 (R., Vol. IV, pp. 2294-2297). He said that the business in this tobacco "was a very small factor in our business" and that "we bought it in 100 pound lots" which "is a very small item for tobacco," "accustomed as we are to buy in carload lots" (R., Vol. IV, p. 2298, X-Q. 89).

J. Lewis Orrick, secretary and treasurer of J. C. Orrick & Sons Co., of Cumberland, Maryland, wholesale grocers and jobbers, stated on June 1, 1920 (R., Vol. IV, pp. 2270-2273), that he had been connected with this company "in one capacity or another" for nearly twenty

years and that during the first years of his connection therewith this concern was selling "Beechnut" tobacco "purchased from Harry Weissinger Tobacco Co., Continental Tobacco Co. and Luhrman & Wilbern Tobacco Co." He produced from the records of his company nine paid invoices showing purchases by his company of "Beechnut" tobacco from those firms in 1902, 1903, and 1906-1908, respectively. He stated that a few months before (in 1920), at the instance of a P. Lorillard Co. investigator, he found a carton of the old Harry Weissinger Tobacco Co. "Beechnut" tobacco which he sold to the Lorillard investigator, it having been in the Orrick store "for many years."

Albert P. Gans, of Louisville, Kentucky, stated that he had been employed for thirty-three years by the C. C. Bickel Company, manufacturers of cigars and jobbers of tobacco (R., Vol. IV, p. 2339). He said that the Bickel Company had bought and sold one "little lot" consisting of one gross of Weissinger Beechnut tobacco in the year 1897 (p. 2340, Q. 9, and p. 2342, Q. 19). He did not know what happened to this brand of tobacco or whether it remained in the market or not (p. 2343, X-Qs. 25-26).

P. J. Rosswog, retail tobacco merchant of forty-five years' experience in Pittsburgh, Pa., stated (R., Vol. III, p. 1927) that for several years following 1900, but not after 1910, he sold a scrap tobacco put out by Harry Weissinger Tobacco Co. or its successor, which bore the name "Beechnut" and the picture of a squirrel. He could not remember exactly when he first began to handle it or when he made his last sale (R., Vol. III, p. 1928).

M. Borenstein, in the retail tobacco business for fifteen years in Pittsburgh, Pa., testified (R., Vol. III, p. 1930) to the same effect as P. J. Rosswog, above.

APPENDIX G, UNITED STATES TRADE-MARK STATUTES—EXCERPTS.

Act of Feb. 20, 1905, ch. 592; 33 Stat. L. 724 (as amended).

"SEC. 5. That no mark by which the goods of the owner of the mark may be distinguished from other goods of the same class shall be refused registration as a trade-mark on account of the nature of such mark unless such mark—

"(*a*) Consists of or comprises immoral scandalous matter.

"(*b*) Consists of or comprises the flag or coat of arms or other insignia of the United States or any simulation thereof, or of any State or municipality or of any foreign nation, or of any design or picture that has been or may hereafter be adopted by any fraternal society as its emblem, or of any name, distinguishing mark, character, emblem, colors, flag, or banner adopted by any institution, organization, club, or society which was incorporated in any State in the United States prior to the date of the adoption and use by the applicant: Provided, That said name, distinguishing mark, character, emblem, colors, flag or banner was adopted and publicly used by said institution, organization, club, or society prior to the date of adoption and use by the applicant: Provided, That trade-marks which are identical with a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties, or which so nearly resemble a registered or known trade-mark owned and in use by another and appropriated to merchandise of the same descriptive properties as to be likely to cause confusion or mistake in the mind of the public or to deceive purchasers shall not be registered: Provided, That no mark which consists merely in the name of an individual, firm, corporation, or association not written, printed, impressed, or woven in some particular or distinctive manner, or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which

they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this Act: Provided further, That no portrait of a living individual may be registered as a trade-mark except by the consent of such individual, evidenced by an instrument in writing: And provided further, That nothing herein shall prevent the registration of any mark used by the applicant or his predecessors, or by those from whom title to the mark is derived, in commerce with foreign nations or among the several States or with Indian tribes which was in actual and exclusive use as a trade-mark of the applicant, or his predecessors from whom he derived title, for ten years next preceding February twentieth, nineteen hundred and five: Provided further, That nothing herein shall prevent the registration of a trade-mark otherwise registrable because of its being the name of the applicant or a portion thereof." [33 Stat. L. 725, as amended by 34 Stat. L. 1251, 36 Stat. L. 918, 37 Stat. L. 649.]

"And if any person or corporation shall have so registered a mark upon the ground of said use for ten years preceding February 20, 1905, as to certain articles or classes of articles to which said mark shall have been applied for said period, and shall have thereafter and subsequently extended his business so as to include other articles not manufactured by said applicant for ten years next preceding February 20, 1905, nothing herein shall prevent the registration of said trade-mark in the additional classes to which said new additional articles manufactured by said person or corporation shall apply, after said trade-mark has been used on said article in interstate or foreign commerce or with the Indian tribes for at least one year provided another person or corporation has not adopted and used previously to its adoption and use by the proposed registrant, and for more than one year such trade-mark or one so similar as to be likely to deceive in such additional class or classes." [41 Stat. L. 535.]

"SEC. 6. That on the filing of an application for registration of a trade-mark which complies with the requirements of this act, and the payment of the

fees herein provided for, the Commissioner of Patents shall cause an examination thereof to be made; and if on such examination it shall appear that the applicant is entitled to have his trade-mark registered under the provisions of this act, the Commissioner shall cause the mark to be published at least once in the Official Gazette of the Patent Office. Any person who believes he would be damaged by the registration of a mark may oppose the same by filing notice of opposition, stating the grounds therefor, in the Patent Office within thirty days after the publication of the mark sought to be registered, which said notice of opposition shall be verified by the person filing the same before one of the officers mentioned in section two of this act. An opposition may be filed by a duly authorized attorney, but such opposition shall be null and void unless verified by the opposer within a reasonable time after such filing. If no notice of opposition is filed within said time, the Commissioner shall issue a certificate of registration therefor, as hereinafter provided for. If on examination an application is refused, the Commissioner shall notify the applicant, giving him his reasons therefor." [33 Stat. L. 726, as amended by 34 Stat. L. 1252.]

"SEC. 9. That if an applicant for registration of a trade-mark, or a party to an interference as to a trade-mark, or a party who has filed opposition to the registration of a trade-mark, or party to an application for the cancellation of the registration of a trade-mark, is dissatisfied with the decision of the Commissioner of Patents, he may appeal to the Court of Appeals of the District of Columbia, on complying with the conditions required in case of an appeal from the decision of the Commissioner by an applicant for patent, or a party to an interference as to an invention, and the same rules of practice and procedure shall govern in every stage of such proceedings, as far as the same may be applicable." [33 Stat. L. 727.]

"SEC. 13. That whenever any person shall deem himself injured by the registration of a trade-mark in the Patent Office he may at any time apply to the

Commissioner of Patents to cancel the registration thereof. The Commissioner shall refer such application to the examiner in charge of interferences, who is empowered to hear and determine this question and who shall give notice thereof to the registrant. If it appear after a hearing before the examiner that the registrant was not entitled to the use of the mark at the date of his application for registration thereof, or that the mark is not used by the registrant, or has been abandoned, and the examiner shall so decide, the Commissioner shall cancel the registration. Appeal may be taken to the Commissioner in person from the decision of examiner of interferences." [33 Stat. L. 728.]

"SEC. 16. That the registration of a trade-mark under the provisions of this Act shall be *prima facie* evidence of ownership. Any person who shall, without the consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade-mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use, or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs." [33 Stat. L. 728.]

"SEC. 17. That the circuit and territorial courts of the United States and the supreme court of the District of Columbia shall have original jurisdiction, and the circuit courts of appeal of the United States and the court of appeals of the District of

Columbia shall have appellate jurisdiction of all suits at law or in equity respecting trade-marks registered in accordance with the provisions of this Act, arising under the present Act, without regard to the amount in controversy." [33 Stat. L. 728.]

"SEC. 18. That writs of certiorari may be granted by the Supreme Court of the United States for the review of cases arising under this Act in the same manner as provided for patent cases by the act creating the circuit court of appeals." [33 Stat. L. 729.]

"SEC. 19. That the several courts vested with jurisdiction of cases arising under the present Act shall have power to grant injunctions, according to the course and principles of equity, to prevent the violation of any right of the owner of a trade-mark registered under this Act, on such terms as the court may deem reasonable; and upon a decree being rendered in any such case for wrongful use of a trade-mark the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages the complainant has sustained thereby, and the court shall assess the same or cause the same to be assessed under its direction. The court shall have the same power to increase such damages, in its discretion, as is given by section sixteen of this Act for increasing damages found by verdict in actions of law; and in assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost which are claimed." [33 Stat. L. 729.]

"SEC. 23. That nothing in this Act shall prevent, lessen, impeach, or avoid any remedy at law or in equity which any party aggrieved by any wrongful use of any trade-mark might have had if the provisions of this Act had not been passed." [33 Stat. L. 730.]

Act of May 4, 1906, ch. 2081; 34 Stat. L. 168.

"SEC. 2. That the Commissioner of Patents shall establish classes of merchandise for the purpose of trade-mark registration, and shall determine the particular descriptions of goods comprised in each class. On a single application for registration of a trade-mark the trade-mark may be registered at the option of the applicant for any or all goods upon which the mark has actually been used comprised in a single class of merchandise, provided the particular descriptions of goods be stated." [34 Stat. L. 169.]

APPENDIX H, DECEPTIVE PRACTICES OF SALESMEN SELLING BEECH-NUT TOBACCO AND CIGARETTES.

[Page numbers of the brief where Appendix H is referred to are shown in the list of Appendices appearing on the blue page immediately preceding the Appendices section.]

That the inherent deceptive effect of the Lorillard Beech-Nut labels was frequently aggravated by the deceptive representations or conduct of many of the Lorillard or other tobacco salesmen cannot be doubted in view of the testimony of some of the plaintiff's witnesses.

CHARLES P. COOK, of Paris, Kentucky, is proprietor of a grocery store. His deposition appears at page 695 of Vol. I of the Record. He testified (Q. 17 *et seq.*) that four or five years previously a salesman had come into his store, stating that he was selling Beech-Nut tobacco; that he told the salesman that he did not know that the Beech-Nut Packing Company put up tobacco and that the salesman replied "that this was a new product, or one of their new products" (Q. 20). Mr. Cook stated that he was not certain that he bought Beech-Nut tobacco at that time, but that he would have been willing to handle it because he "had been handling other Beech-Nut stuff and thought the quality would be like all other Beech-Nut stuff." He added that he remembered this occurrence because Mr. Mattox, who sells the Beech-Nut products, was in the store at the time and he told Mr. Mattox that he did not know that the Beech-Nut Packing Company put out tobacco, and that Mr. Mattox replied that he did not know it either, that it was not on his list, but that he would find out about it. (Q. 22.)

GEORGE B. ROACH, a grocer of Pembroke, Ky., whose deposition appears at page 663 of Vol. I of the Record, testified that he dealt in the products of the Beech-Nut Packing Company; that he first learned of the Beech-Nut tobacco by seeing posters in the show windows, and that he then thought the tobacco was being put out by the Beech-Nut Packing Company; that he first saw a package of the Beech-Nut tobacco when shown it by a traveling salesman who came into his store saying that he represented Beech-Nut tobacco (Q. 19). This occurred about the first of August, 1921. In reply to questions 24 to 33, Mr. Roach stated that he did not remember that the salesman stated whom he represented, but said he was selling Beech-Nut tobacco and that he gained the impression that he represented the Beech-Nut Packing Company. He stated his reason for this impression as follows (Q. 26):

> "Well, because he said in the conversation that I knew the Beech-Nut trade-mark and knew what it stood for—anything put out under the Beech-Nut trade-mark had to be the highest quality."

Mr. Roach stated that these remarks convinced him that the tobacco was put out by the Beech-Nut Packing Company, but he learned differently later from Mr. Hamilton, a salesman for the Beech-Nut Packing Company, and that at a still later date the Beech-Nut tobacco salesman came in again, and Mr. Roach gives the following account of his interview with him upon that occasion (Q. 32):

> "Well, I told him that I understood that the Beech-Nut Packing Company was raising 'Cain' about them using their trade-mark, and he said that they had sold the trade-mark to the Beech-Nut Packing Company, and had reserved the right to use the trade-mark on tobacco—he said that they had sued them once on the trade-mark and lost it, and he didn't think that they could gain it this time."

Mr. Roach said that the Beech-Nut tobacco salesman said his name was Bacon (Q. 37).

WILLIAM T. HILL, proprietor of a grocery store in West Greenville, S. C., stated that a salesman came to his store, offering Beech-Nut tobacco for sale, about the first of November, 1921. He described the occurrence as follows (R., Vol. I, p. 724):

> "Q. 18. What did you say to him?
> "A. Well, I just have to commence sort of in my own way. You know we have men to come in here every day to sell something. As nigh as I recollect, I was by myself when he came in here. He asked me about the tobacco, and I had never heard tell of it. I told him I would not buy none now, but probably later on. I talked on and explained to him I didn't like buying new things. He went on then to ask me about how the Beech-Nut stuff sold, such as peanut butter and gum, and so on, and I told him it was a fine seller. 'Well,' he said, 'this tobacco will make you just such a seller as Beech-Nut.' I turned around to him and said, 'The Beech-Nut Company putting out tobacco?' He talked on and I don't know I got any direct answer. Don't think I did.
> "Q. 19. What was the effect on you of what he did and said at that time?
> "A. Well, I just put it up that they had put out tobacco.
> "Q. 20. Who did you think put it out?
> "A. The Beech-Nut Company, that's who I thought."

ROBERT L. BOWEN, a grocer of Spartanburg, S. C., whose deposition appears at page 742 of the Record, Vol. I, testified that he dealt in Beech-Nut products; said that when he first saw a package of Beech-Nut cigarettes (Q. 15 *et seq.*) he thought that they were the product of the Beech-Nut Packing Company. He describes the

occasion when he first learned of the Beech-Nut cigarettes as follows (R., Vol. I, p. 744, Qs. 17-22):

"Q. 17. When you first saw them, who did you think put them out?

"A. Beech-Nut Packing Company.

"Q. 18. What made you think so?

"A. Well, a man came in and held it up just like you, only not so far, not that far away, and I saw Beech-Nut on it, and the style of their label.

"Q. 19. What was the occasion when you first saw the Beech-Nut cigarettes?

"A. I was in the store and a gentleman came in —I was busy at the time, and he walked around. He kept waiting and finally I got a chance to speak to him. He said, 'I see you handle Beech-Nut peanut butter, and I want to sell you some Beech-Nut cigarettes.'

"Q. 20. Then, what occurred between you and him?

"A. He tried to sell me some, and I told him that I did not want to put in a new line, I was handling Chesterfields. He could not sell me, and he started to pack up and go away, and I said, 'It's funny that the Beech-Nut Packing Company is putting up cigarettes.' He said, 'Yes,' and went on out the door.

"Q. 21. Did he have any Beech-Nut cigarettes with him?

"A. Yes, sir.

"Q. 22. What effect did he have on you? What impression did he leave?

"A. He left the impression that the cigarettes were put up by the Beech-Nut Packing Company."

(Pages 748-749):

"X-Q. 26. You always bought your Beech-Nut goods from Mr. Jennings?

"A. Yes, sir.

"X-Q. 27. You would naturally think it strange that another party should come in to sell you Beech-Nut goods?

"A. Not necessarily.

"X-Q. 28. The party who came in to sell you the cigarettes did not say he was the Beech-Nut Packing Company's representative?

"A. He offered me Beech-Nut cigarettes.

"X-Q. 29. He did not say he was from the Beech-Nut Packing Company?

"A. I don't think he said he was from the Beech-Nut Packing Company. He said he saw I was handling Beech-Nut peanut butter, and he wanted to sell me some Beech-Nut cigarettes. He did not say he was from the Beech-Nut Packing Company—he made me think, though, that he was selling me cigarettes put up by them.

"X-Q. 30. You did not buy any, did you?

"A. I did not buy any from him, but he went off leaving me under that impression.

"X-Q. 31. What else did this man have with him besides the cigarettes?

"A. He did not show me anything else—when he went out of the store, I just made the remark that it was funny the Beech-Nut people were making cigarettes. He just said 'Yes.' He did not explain to me they were made by a different concern. He left the impression on my mind that the Beech-Nut Packing Company were making the cigarettes. He wanted to sell me Beech-Nut cigarettes and speaking about the Beech-Nut butter made me think they were made by them.

"X-Q. 32. He did not say the Beech-Nut Packing Company were making them?

"A. I don't remember what he said about it, but he left the impression on me that the Beech-Nut Packing Company were making the cigarettes."

JEFFERSON D. HAYDEN, proprietor of a grocery store in Columbia, S. C., stated (R., Vol. I, p. 756, Q. 23 *et seq.*) that he first saw a package of Beech-Nut scrap tobacco on Oct. 18, 1921, when a salesman came into his store and sold him some. He said that when he first saw this tobacco he thought it was made by the Beech-Nut people who put out the other Beech-Nut products, and that he was led to think so from the appearance of the package, adding "all looked the same, the label and the name Beech-Nut."

Mr. Hayden describes his experience with the Beech-Nut tobacco salesman as follows (*Ibid,* p. 757):

"Q. 27. Who was the man who came into your store, the salesman, that day, October 18, 1921?

"A. E. L. Larson.

"Q. 28. What took place between you and Mr. Larson when he came into your store, October 18, 1921?

"A. He came in and introduced himself as Mr. Larson, selling Beech-Nut tobacco and from the appearance of the package it looked the same as the other Beech-Nut products, and he told me the Beech-Nut was a good seller, and I told him I had been selling the other products all along, and I thought it would be a good seller, and I would try a small quantity of it, and he said, 'Well, who would you like for it to come through,' and I told him it did not make any difference to me—Byrd Johnson would do. They were jobbers. I told him he could send me a small quantity. He said he would put in a dozen, and I told him all right. He had a little case with him full of tobacco, full of these packages, and he says, I can leave these packages with you. I told him all right. So I took an order for a dozen packages, and in the meantime I asked him how much it would amount to. He said, less than a dollar, so I took an order for a dozen and paid him. He said it would amount to 96 cents, with 2 per cent. discount. I said, 'Well, you can just mark the bill paid.' In the meantime he gave me this receipt here, marked 1 doz. packages, 10-cent size, which amount to 96 cents, 2 per cent. discount comes to 94 cents, paid to E. L. Larson. I gave him the cash over the counter for it.

"Q. 29. What was the effect on you of what Mr. Larson did and said at that time?

"A. He left me under the impression that it was the same house that sold the other Beech-Nut products, and that it was a good seller, that it would sell as the other products had been selling, and I understood the tobacco would be good, too.

"Q. 30. Who did you think was putting it out as a result of what he said?

"A. The same people who were putting out the other Beech-Nut products.

"Q. 31. How long did the conversation with Mr. Larson last?

"A. Very short. I suppose fifteen or twenty minutes. He was not in there very long, a very short time.

"Q. 32. You say he gave you this receipt for your order and your money?

"A. He did.

"Receipt signed E. L. Larson, identified by this witness, offered in evidence and marked Plaintiff's Exhibit No. 14. [Reproduced in Record Vol. VI, page 57.]

"Q. 33. Please look at this receipt and read the printed name at the top.

"A. 'P. Lorillard.' A part of it is scratched out.

"Q. 34. Torn out?

"A. Yes, sir. 'P. Lorillard' is all I see, looks like 'Incorporated' on the end.

"Q. 35. Torn out?

"A. Torn out (resuming the reading), '119 West 40th Street, New York.'

"Q. 36. What is the date on it?

"A. 'October 18, 1921.'

"Q. 37. Is there any jobber named?

"A. 'Byrd-Johnson.'

"Q. 38. What address?

"A. 'Columbia, S. C.'

"Q. 39. Any shipping instructions?

"A. Under name, 'Cash and Carry Groceries, shipping point 827 Main. quantity 1 doz., brand Beech-Nut, size, ten cents, price '96' cents, discount 2 cents, net, '94' cents. Marked 'Paid' by 'E. L. Larson.'

"Q. 40. Is that his signature?

"A. Yes, sir.

"Q. 41. Is there any other indication of the salesman on that order blank?

"A. 'Order taken by Salesman E. L. Larson,' stamped with rubber stamp, I suppose it is.

"Q. 42. Did you know what P. Lorillard Company was, whose name was at the top?

"A. I did not.

"Q. 43. Did that mean anything to you?

"A. No, sir.

"Q. 44. You did not notice it at the time?

"A. I did not.

"Q. 45. Was shipment made through the jobbers?

"A. No, sir.

"Q. 46. How was it delivered to you?

"A. Over the counter.

"Q. 47. Did you buy that loose packages of tobacco—of Beech-Nut scrap, believing that you were dealing with the same people that were putting out Beech-Nut butter?

"A. I did.

"Q. 48. Did you sell any of it to your customers thinking it was put up by the same company that put up Beech-Nut butter?

"A. I did.

"Q. 49. Can you tell us what you said to some of them?

"A. I says, I have a new Beech-Nut product on the market, and it should be a good seller, that it was Beech-Nut and it ought to be all right. Beech-Nut products were good sellers and it should be a good product if it were as good as the others were."

(Page 762):

"X-Q. 85. When he came in here Larson did not tell you that the tobacco was made by the Beech-Nut Packing Company, did he?

"A. He did not tell me who made it.

"X-Q. 86. But he gave you a receipt of P. Lorillard Company?

"A. That is the receipt he gave me.

"X-Q. 87. That receipt has no connection whatever with the Beech-Nut Packing Company?

"A. It has not, so far as the name on it.

"X-Q. 88. As an ordinary careful man, familiar with business, as you are, when that receipt was given to you, if you looked at it you would have seen P. Lorillard, and know it was a P. Lorillard receipt, would you not?

"A. If I had observed it carefully.

"X-Q. 89. If you had looked at it?

"A. I did not look at it. If I had I would not have known whether it was the manufacturer or the jobber.

"X-Q. 90. But you would have known that it was a receipt of P. Lorillard Company?

"A. I would have known that it was headed P. Lorillard Company, but I would not know him from anybody else. He did not explain whether he was the manufacturer or jobber when I bought this."

(Page 766):

"R-D. Q. 119. To go back to your conversation at the time Mr. Larson went into your store—what was the impression made on you as a result of his conversation and his conduct at the time he was in your store?

"A. He left me under the impression that he was putting out a Beech-Nut product made by the Beech-Nut people, and, as I say, these Beech-Nut products were selling fine, and I was under the impression the tobacco would go the same way, and I told him I would try a small quantity of it. I would not keep much on hand, therefore, I took a dozen packages. I was not able to carry any larger stock as you notice. I carry a very small stock of any kind of goods.

"R-D. Q. 120. And whose product did you think this tobacco was at the time that you made that first purchase from Mr. Larson.

"A. I thought it was the Beech-Nut Packing Company's product. I thought it was put out by the Beech-Nut people."

Mrs. Amelia Petersen, of Manitowoc, Wis., wife of E. F. Petersen, one of two brothers who keep a grocery store at Manitowoc, testified (R., Vol. I, p. 502) that she first heard of Beech-Nut cigarettes (Q. 14) when a man came into the store trying to sell them. She was asked what this man said, and replied:

"Well, he said they were branching, that the Beech-Nut Packing Company were branching off into tobacco and cigarettes, that is what he told us." (Q. 16.)

She stated that the salesman made this statement to her brother in her presence and that they talked with

the salesman about peanut butter and he said they were branching off into tobacco and cigarettes (Qs. 17 to 20).

H. N. PETERSEN testified (R., Vol. I, p. 510) that he is one of the Petersen brothers who own the grocery store at Manitowoc, Wisconsin; that he first heard of Beech-Nut cigarettes when a salesman came into the store trying to sell them (Qs. 5 and 6); that his brother's wife was present upon this occasion (Q. 13). He was asked to state the conversation that took place when the salesman came in trying to sell the cigarettes, and testified as follows (p. 511, Q. 9):

> "A. Well, then I says to him when he showed them cigarettes, I says, 'Well, if those cigarettes are as good as the Beech-Nut peanut butter, it is a good line, but,' I said, 'we have never had them before.' And I said to him, then: 'Well, that is a kind of peculiar line to go into, from the peanut butter into cigarettes,' and he said then, 'Well,' he says, 'they are branching out,' so I never paid no attention to the tobacco, really, whose that was, and never thought any more of it at the time."

Upon cross-examination, Mr. Petersen testified as follows (p. 514):

> "X-Q. 35. Now, I want you to think this over very carefully. Did this man, when he came in, say that he represented the Beech-Nut Packing Company?
>
> "A. He meant it this way, that I said to him, 'Well, if it is the same people—'
>
> "Mr. Cavanagh: Would you just answer the question?
>
> "Mr. Hinton: Let him answer. He is entitled to finish his answer.
>
> "A. (Continuing) I asked him, 'If it is the same people that turn out the cigarettes as the peanut butter, it is a good article, no question about it,' and he said: 'Yes.' I said: 'But that is a funny thing to branch out in that line from peanut butter,' and he said: 'Well, they are branching out.' That is all he said.

"Mr. Cavanagh: X-Q. 36. Then he didn't say these cigarettes were made by the Beech-Nut Packing Company, did he?

"A. No, he didn't say that that I understood, but I thought when I mentioned the peanut butter that would be sufficient.

"X-Q. 37. As a matter of fact, he didn't say those cigarettes were made by the Beech-Nut Packing Company?

"A. No, he didn't say that, that I heard.

"X-Q. 38. Do you know of the P. Lorillard Company?

"A. No, sir."

Defendant introduced the testimony of E. F. PETERSEN, brother of H. N. Petersen (R., Vol. II, p. 1580). E. F. Petersen testified that some months before the Beech-Nut cigarette was introduced into the city of Manitowoc he had purchased an order of Beech-Nut scrap tobacco from a salesman who stated he was from P. Lorillard Company, tobacco manufacturers, and that this salesman made no misrepresentations as to who was the manufacturer of that tobacco. Upon cross-examination Mr. E. F. Petersen stated that he did not recall ever having mentioned to his wife, Mrs. Amelia Petersen, or to his brother, H. N. Petersen, the first visit of this Beech-Nut scrap tobacco salesman or what he had said or done at that time.

WM. C. WEIGEL, retail grocer of Milwaukee, Wisconsin, testified as follows regarding what occurred when the Beech-Nut scrap tobacco was first sold him (R., Vol. I, page 561):

"I don't know whether I asked him directly, or whether he told me, but I was given to understand that this was a label that was only permitted on the very best products and was leased by the different companies that put out this product." (Q. 8.)

"I naturally supposed that the Beech-Nut label

was owned by some man or some company and then leased out to the people that put it out in a very high class product." (Q. 13.)

Mr. Weigel testified that he had dealt in scrap tobacco about two years (Q. 6) and that he had not learned the true facts regarding the trade-mark until about two or three weeks before testifying (Q. 14).

Office Supreme Court, U.
FILED
DEC 19 192
WM R. STANSBU
CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1925.

No. [redacted]249

BEECH-NUT PACKING COMPANY,

Petitioner.

vs.

P. LORILLARD COMPANY,

Respondent.

OPPOSING BRIEF FOR RESPONDENT ON PETITION FOR CERTIORARI.

JOHN W. DAVIS,
WILLIAM R. PERKINS,
JOHN MILTON,
Counsel for Respondent.

INDEX.

	PAGE
Four tribunals deny petitioner's contentions.....	1
Like petitions in similar cases uniformly denied..	2
I. Facts in case present no new question calling for decision by this court.....	3–9
Use of "Beech-Nut" for tobacco dates from 1897	3
Petitioner's business always wholly food products	4
No concern has ever combined food and tobacco products	5
Respondent's business always wholly tobacco products	5
Petitioner is estopped by laches and acquiescence	6
No deception of public or confusion in trade	7
No injury to petitioner's business.....	8
II. No conflict of decisions—they differ in result solely by reason of different facts.....	9–12
The Vogue Case.....	10
The Peninsular Case.....	10
The Aunt Jemima Case.....	11
III. Lower Court correctly applied well settled principles to the particular facts of this case	12–17
Hanover Case followed and applied.....	12–13
Goods and businesses totally unrelated....	13–16
Courts have always so classified them.....	14
Such the uniform custom of trade.....	15
Respective packages utterly unlike.....	16
Respondent's conduct fair and honest.....	16–17
Conclusion	17

CITATIONS.

Beech-Nut v. Lorillard Decisions.

	PAGE
Circuit Court of Appeals (3d Cir.) 7 F (2d) 967	1, 5, 7, 9, 12, 13, 16, 17
District Court of New Jersey, 299 Fed. 834	1, 4, 6, 16
Acting Commissioner of Patents, Rec. Vol. VI, p. 123	1
Examiner in Patent Office, Rec. Vol. VI, p. 114	1

Other Cases.

American Tobacco Co. v. *Polacsek*, 170 Fed. 117	15
Anheuser-Busch v. *Budweiser Malt Corp.*, 295 Fed. 306	11
Armour & Co. v. *Louisville Provision Co.*, 283 Fed 42	2
Atlas Mfg. Co. v. *Street*, 204 Fed. 398	2
Aunt Jemima Co. v. *Rigney & Co.*, 247 Fed. 407	2, 11
Baglin v. *Cusenier Co.*, 221 U. S. 580	4
California Packing Corp. v. *Price-Booker Co.*, 285 Fed. 993	14
Carroll v. *McIlvaine*, 183 Fed. 22	7
Charles Broadway Rouss v. *Winchester Co.*, 300 Fed. 706	2, 11
Columbia Mill Co. v. *Alcorn*, 150 U. S. 460	13
D. & H. Canal Co. v. *Clark*, 13 Wall. 311	13
Hanover Star Milling Co. v. *Metcalf*, 240 U. S. 403	13
McLean v. *Fleming*, 96 U. S. 245	13

PAGE

Mouson & Co. v. *Boehm*, L. R. 26 Ch. D. 398 4

National Picture Theatres Inc. v. *Foundation Film Corp.*, 266 Fed. 208 11

Old Lexington Club Co. v. *Kentucky Co.*, 234 Fed. 464 7

Peninsular Chemical Co. v. *Levinson*, 247 Fed. 658 10

Pflugh v. *Eagle White Lead Co.*, 185 Fed. 769 7

Pittsburgh Brewing Co. v. *Ruben*, 3 F. (2d) 342 ... 14

P. Lorillard Co. v. *Peper*, 86 Fed. 956 8

Rosenberg Bros. & Co. v. *Elliott*, 7 F. (2d) 962 12

Saxlehner v. *Eisner*, 179 U. S. 19 4

Southern Power Co. v. *N. C. P. S. Co.*, 263 U. S. 508 3

Valvoline Co. v. *Havoline Co.*, 211 Fed. 189 7

Vogue Co. v. *Thompson-Hudson Co.*, 300 Fed. 509 10

Washburn-Crosby Co. v. *France Milling Co.*, 7 F. (2d) 304 .....2, 7, 11, 12

Window Glass Co. v. *Pittsburgh Co.*, 284 Fed. 645 7

STATUTES.

Trade Mark Act (1905) 13

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

No. 834.

BEECH-NUT PACKING COMPANY,
Petitioner,

vs.

P. LORILLARD COMPANY,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI.

OPPOSING BRIEF ON BEHALF OF RESPONDENT.

Four different times have the petitioner's contentions in this matter been adjudicated: First by the Examiner in the Patent Office (Rec. Vol. VI. p. 114); next by the Acting Commissioner of Patents (Rec. Vol. VI. p. 123); then by the District Court (299 Fed. 834); and lastly by the Circuit Court of Appeals (7 F (2d) 967). *And each time they have been overruled and the rights and position of respondent upheld.* It would seem that such a complete unanimity of opinion on the particular facts of this case by so many tribunals would indicate that a correct decision both in law and fact had been reached and entirely prevent this case from affording those "special and important reasons" which are necessary for the granting of a writ of certiorari.

Note: Italics ours, unless otherwise stated.

Furthermore, the petition for certiorari and supporting brief but seek a consideration and application by this Court to the particular facts of this case of the very same legal principles, and for the very same reasons, which were presented and urged for a like purpose in the entirely similar cases of

Washburn-Crosby Co. v. *France Milling Co.* (C. C. A. 2d) 7 F. (2d) 304, where the court had allowed the mark "Gold Medal" to be used by one party for "straight" flour and by the other for "prepared" flour and certiorari was denied (45 Sup. Ct. 640);

Charles Broadway Rouss v. *Winchester Co.* (C. C. A. 2d) 300 Fed. 706, where the court had allowed the mark "Winchester" to be used by both parties for shirts and certiorari was denied (266 U. S. 607);

Armour Co. v. *Louisville Provision Co.* (C. C. A. 6th) 283 Fed. 42, where the court had allowed one party to use "Star" as a mark for hams and bacon and the other to use "Southern Star" as a mark for like products and certiorari was denied (260 U. S. 744);

Aunt Jemima v. *Rigney & Co.* (C. C. A. 2d), 247 Fed. 407, where the court had restrained a party from using "Aunt Jemima" as a mark for pancake syrup at the instance of one using it for pancake flour and certiorari was denied (245 U. S. 672);

Atlas Manufacturing Co. v. *Street* (C. C. A. 8th), 204 Fed. 398, where the court had allowed the mark "Nick Carter" to be used by one party for a periodical and by the other for motion pictures and certiorari was denied (231 U. S. 755).

This uniformity of denial of such petitions in this class of cases would seem conclusive here, where like questions, all primarily ones of fact, constitute the whole

issue (*Southern Power Co.* v. *N. C. P. S. Co.*, 263 U. S. 508).

I.

The facts in this case present no new question calling for decision by this Court.

USE OF "BEECH-NUT" FOR TOBACCO DATES FROM 1897.

The mark "Beech-Nut" had its inception as a tobacco brand not in 1915, as the petition and supporting brief might lead this Court to believe, but in the Spring of 1897 when the Harry Weissinger Tobacco Company put out a "Beech-Nut Chewing and Smoking Tobacco" (see facsimile of label at end of brief). It also registered "Beech-Nut" as a trade mark for tobacco products in the tobacco brand directory for 1898, 1899 and 1903 (Rec. Vol. IV. pp. 104-5). This brand by successive assignments duly came to belong to respondent. And it has been used as a brand for tobacco products during each of the years since 1897 to the present time though, due wholly to lack of orders, no sales of it were made in the four years 1911-1914. Early in 1915, however, the brand was again brought prominently before the public in the "Sunburst" package (see facsimile at end of brief) with the result that since 1916 respondent's sales of this one product, though but a 10¢ package, have greatly exceeded in money value the combined sales of all petitioner's products, such sales for 1919 being $8,979,586.35 by petitioner and $14,650,865.63 by respondent (Rec. Vol. I. pp. 867-70, Vol. VI. pp. 260-2).

It was admitted for petitioner at the trial that if no abandonment had occurred, petitioner had no standing for the purposes of this litigation (Rec. Vol. V. pp. 28-9). And the District Court on the authority of *Baglin* v. *Cusenier Co.*, 221 U. S. 580, 597-598, *Saxlehner* v. *Eisner*, 179 U. S. 19, 31, and *Mouson & Co.* v. *Boehm*, L. R. 26 Ch. D. 398, held that no abandonment had occurred because respondent had clearly manifested its intention to retain ownership and made no sales in 1911-1914 solely for lack of orders (299 Fed. pp. 847-9). The Circuit Court of Appeals did not find it necessary to pass on this point; but, being purely a question of fact as to the intention of respondent as shown by the evidence, the decision against petitioner by the District Court, in view of petitioner's admission, would seem conclusive here.

PETITIONER'S BUSINESS ALWAYS WHOLLY FOOD PRODUCTS.

Petitioner has never made or sold a tobacco product, much less used "Beech-Nut" for that purpose. It has always and only made and sold food products. The business was started about 1891 by Imperial Packing Company and for many years consisted almost wholly of packing and selling hams and bacon. In 1899 it was taken over by petitioner who thereafter continued and expanded it, adding in later years peanut butter, preserves, jam, jellies, baked beans, chewing gum, soft drinks and candies (Rec. Vol. VI. p. 77). All these are food products for which it obtained registration of "Beech-Nut" under Patent Office Classification No. 46 "Foods and Ingredients of Foods" (See Reg. No. 89613, Rec. Vol. I, p. 21).

Accordingly, the assertion of petitioner that it has seriously considered dealing in tobacco must be regarded as made only for the purposes of this litigation in view of the many years which passed without any such addition and its very inconsistent contention that the use of "Beech-Nut" for tobacco is injuring its food business because of the anti-tobacco sentiment in this country. *The fact is, as admitted by petitioner's officers (Rec. Vol. I, p. 791) and found by the Circuit Court of Appeals (7 F. (2d) 967, 970) no concern has ever combined the manufacture and sale of food and tobacco products, so distinct and incompatible are the two businesses.*

RESPONDENT'S BUSINESS ALWAYS WHOLLY TOBACCO PRODUCTS.

Respondent's business dates from 1760 when Pierre Lorillard opened his tobacco factory in what is now Bronx Park, N. Y. During all the intervening years respondent and its predecessors have made and sold tobacco products only. Under the name "Lorillard" tobacco products of every kind have been sold in every part of this country, until it has become a household word. The name "Lorillard" appears on all its "Beech-Nut" packages, as it does on the great majority of its packages, and also the words "Established 1760" because respondent is featuring these facts (Rec. Vol. V. pp. 197-8).

Since its reorganization in 1911 respondent has been one of the largest tobacco concerns in this country. In 1919 its output was over $80,000,000. in money value, its capital over $60,000,000. exclusive of surplus, it had some 20 plants located in various states and over 10,000 employees. In the years 1911-1919 it spent in advertis-

ing the stupendous sum of $49,058,936.51 (Rec. Vol. IV. p. 113; Vol. V. pp. 186, 245-6).

PETITIONER IS ESTOPPED BY LACHES AND ACQUIESCENCE.

Petitioner did not complain of the use of "Beech-Nut" for tobacco until June 1915 when it wrote saying it had adopted the "mark or name for our manufacturing output of *food material*" and "while we have never yet manufactured tobacco, the taking on of such manufacture" was not impossible (Rec. Vol. VI. p. 181). So it claimed ownership of the mark for tobacco. A correspondence ensued which is fully set forth in the opinion of the District Court (299 Fed. pp. 840-5). Its result was that respondent asserted ownership by reason of such long use without question and the distinct nature of the products and businesses, while petitioner said the questions were interesting and it would write again after further examination.

However, four years passed in silence during which respondent actively pushed this brand with the results already noted and petitioner acquiesced in and encouraged this use by forwarding to respondent any missent orders and informing the trade that Lorillard made and sold the tobacco (Rec. Vol. I. pp. 794-5). It was not until the summer of 1919 that petitioner made any further objection and then it was not to the use of "Beech-Nut" or the tobacco package, but simply to the dress and design of the cigarette package which respondent was about to put on the market. For the executive committee of petitioner suggested by letter:

> "In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while

> to simulate your Beech-Nut Scrap tobacco package in a wrapping for your cigarettes; in other words, use for your cigarettes a form of label *which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product''* (Rec. Vol. VI. p. 205).

On these facts respondent contended that petitioner was estopped. Neither of the lower courts found it necessary to pass on the question; but it seems clearly sustained by *Pflugh* v. *Eagle Co.* (C. C. A. 3d) 185 Fed. 769; *Washburn-Crosby Co.* v. *France Milling Co.* (C. C. A. 2d) 7 F. (2d) 304, 306; *Window Glass Co.* v. *Pittsburgh Co.* (C. C. A. 3d) 284 Fed. 645; *Carroll* v. *McIlvaine* (C. C. A. 2d), 183 Fed. 22; *Old Lexington Co.* v. *Kentucky Co.,* 234 Fed. 464 and *Valvoline Co.* v. *Havoline Co.,* 211 Fed. 189, 195.

NO DECEPTION, CONFUSION OR INJURY.

The charges of deception, confusion and injury contained in the petition and supporting brief are entirely erroneous and contrary to the record.

The Lower Court found that

> ''The evidence shows that its goods have in no way been confused with those of the plaintiff so that when a purchaser desired a certain brand of plaintiff's goods, he in fact secured those of defendant. Defendant carefully made prominent in its label the Lorillard origin of its products. The difference between their labels is so great and distinct that any purchaser paying ordinary attention

need not and should not be mistaken and certainly not deceived." (7 F (2d) p. 971).

This was clearly admitted by petitioner's executive committee in the letter suggestion already quoted.

And it is also overwhelmingly proven by the numerous depositions respondent took throughout New England, west into Wisconsin and south into the Carolinas, constituting a great mass of testimony filling two volumes (II and III) of the record. The witnesses were largely retail dealers, because it was felt that any such wholesale deception and confusion as petitioner claimed would certainly be known to them and that examining consumers over such a territory would magnify the record out of all proportion. But the witnesses were truly representative, coming from stores of all kinds, sizes and locations and where (with few exceptions) both products were handled. They gave a faithful portrayal of existing conditions and it showed that out of at least 110,500 customers who *daily* patronized these stores less than 100 instances of confusion had arisen—thus perfectly illustrating and confirming Mr. Justice Brewer's oft quoted observation that such mistakes will happen "no matter how great the differences" (*P. Lorillard Co.* v. *Peper*, 86 Fed. 956, 960). Their typical answers were "I have never heard that discussed", " I have never had it come up", "Their question was answered in the window on the posters", "It is on the front of the package" and "See the package, that is all".

Nor was petitioner's business injured. During the alleged period of injury, the years 1915-19, its total sales grew from $4,966,377.76 to $12,109,573.68 and its sales of chewing gum from $2,480,023.48 to $6,281,945.41 (Vol. I, pp. 867-70), an increase of some 300% more than its

total growth during the preceding quarter of a century. That respondent's products are not cheap or inferior, as is now charged in the supporting brief, is demonstrated by the duration and magnitude of its business which forced petitioner to admit in writing that "the name 'Lorillard' carries with it a vast amount of good will and unquestionably a guarantee of excellence" (Vol. VI, p. 194).

II.

No conflict in legal principle exists between this decision and the Vogue and Peninsular Cases in the Sixth Circuit or the Aunt Jemima Case in the Second Circuit. They differed in result simply because of their different facts.

In the first place, the lower court expressly recognized the authority and applied the principles of these cases in reaching its conclusion, for the opinion says:

> "We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word 'unfair' rather than 'competition'. If by unfair and fraudulent means, the plaintiff is injured and the public deceived, equity will enjoin whether the injury comes through competition or in some other way. Aunt Jemima Mills Co. *v.* Rigney & Co., 247 Fed. 407; Vogue Co. *v.* Thompson-Hudson Co., 300 Fed. 509, 512. Within the principles announced in these cases, or in any other way, has the defendant injured the plaintiff in its property or reputation? We are satisfied that it has not. It has not tried to palm off its products as those of the plaintiff" (7 F (2d), p. 970).

And in the second place, on the facts of this case these three decisions clearly sustain and would allow the use respondent is making of "Beech-Nut" for tobaccos.

The *Vogue Case* (C. C. A. 6th), 300 Fed. 509 was not simply that of a mark being used by one party for a magazine and by another for ladies hats. The pivotal fact was that "prior to 1912 (when the mark was first used for the hats) the magazine had become the country over one of the dominating factors in the creation and promotion of styles, including those in millinery, and its approval or promotion of any pattern or style in its pages carried great influence" (pp. 510-1). This close relation of the articles, a question of fact only, not any new principle of law, clearly prompted the decision (p. 512). Had the magazine been a tobacco journal the suit would have been summarily dismissed. For the court on rehearing (6 F (2d) 875) allowed the defendant to "use the name and label 'Vogue Hats' in connection with or without 'New York' or 'Fifth Avenue', if accompanied by any prominently displayed manufacturing name it may select (not including the word Vogue)". *Consequently, as respondent's name does not include the word "Beech-Nut" and is prominently displayed on its "Beech-Nut" packages, the Vogue Case becomes an express authority in its favor.*

The *Peninsular Case* (C. C. A. 6th), 247 Fed. 658 proceeded upon similar principles to a like conclusion as in the *Vogue Case*. There the plaintiff, who had registered and used "Penslar" for drugs and pharmaceutical preparations, sought to restrain the defendants from using it for cigars. The court held the difference in the articles prevented infringement or unfair competition (pp. 660-1). But having found as a further fact that "defendants untruthfully represented that the article they were selling was, in effect, the plaintiff's article and that they were

selling for and in the interest of plaintiff'' the court felt that the plaintiff was entitled to relief from these fraudulent practices because ''we know of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger''. Accordingly, the injunction did not restrain the use of ''Penslar'' for cigars but only such untruthful representations in that connection (p. 663). It will be seen, therefore, that the case likewise turned wholly on a question of fact and is an authority for respondent to continue its use of ''Beech-Nut'' since, as the Lower Court specifically found, no such practices obtained in the instant case; and even had such practices obtained it would be authority only for stopping such practices, not respondent's use of the mark ''Beech-Nut''.

The *Aunt Jemima Case* (C. C. A. 2d), 247 Fed. 407 restrained the defendants from using for pancake syrup a mark plaintiff for years had been using for a pancake flour because, as the court said, ''syrup and flour are both food products and food products commonly used together'' (p. 410). That this close relation between the two products, a question of fact only, was the determining factor clearly appears from the subsequent decisions of that court in the *National Picture Theatres Case,* (266 Fed. p. 211), the *Anheuser-Busch Case* (295 Fed. p. 310), the *Winchester Case* (300 Fed. p. 723) and the *Washburn-Crosby Case* (7 F (2d) 304), each of which turned on this question of fact, namely, the relation of the products and laid down the test to be that ''there must be a real present or prospective competition, that is, an endeavor to get the same trade from the same people at the same time.'' (266 Fed. 211), stating in a note that pens and hair brushes were not while tooth and toilet brushes were so related.

Thus in the *Washburn-Crosby Case* that court said, just as might be truly said in this case:

> "*If then so many years of building up trade in 'straight' wheat Gold Medal flour had produced no business in 'prepared' flours, how can it be said that the two articles belong to the same class of commodities? Classification of any commercial article depends far more on commercial custom than upon the inherent nature of the product. Dog-biscuit and pilot-bread are closely allied in physical origin, and so are gun-cotton and calico, but in commercial classification they are poles apart.* The difference between 'straight' and 'prepared' flours is not so great as in the illustration given, but that as commercial commodities they are different is in our opinion plainly shown by the exhibition of business methods given by the affidavits; and that such was Washburn's own opinion in 1923 we have pointed out above." (7 F (2d) at p. 305).

III.

The Lower Court only applied well settled rules of trade mark law to the facts as it found them from the evidence before it.

No one can read the opinions of the Lower Court in *Rosenberg Bros. & Co.* v. *Elliott*, 7 F (2d) 962, and in the instant case, 7 F (2d) 967, considered and decided at the same time, and decided differently solely because of their different facts, without being convinced that that court is keenly alive to and in thorough sympathy with the trend of trade mark decisions on both infringement and unfair competition; and is correctly interpreting and applying the principles established by this Court in the

Hanover Star Milling Case, 240 U. S. 403, 413, 414, which it cites in these opinions.

When analyzed, the opinion of the Lower Court in the instant case will be seen to have considered and decided three propositions, all questions of fact, which, being resolved in respondent's favor, made it prevail.

The first proposition was whether or not the products were such different classes of commodities as that both parties could use the mark.

As a matter of legal principle, indisputably the use of a mark on one class of merchandise will not prevent another from using it on a different class. This is the basis of our Trade Mark Act (33 Stat. L. 728, Sec. 16) and is the rule definitely announced by this Court in the *D. & H. Canal Case* (13 Wall. 311, 322-3), *McLean* v. *Fleming,* 96 U. S. 245, *Columbia Co.* v. *Alcorn,* 150 U. S. 460, 463 and the *Hanover Star Milling Case* (240 U. S. 403, 412-4) where the Court also showed it was the rule in England and in the States and quoted the typical English illustration that

> "If he does not carry on a trade in iron, but carries on a trade in linen and stamps a lion on his linen, another person may stamp a lion on iron."

Accordingly, the first proposition became wholly a question of fact as to the relation of the foods and tobaccos under this legal principle. And the Court found the fact to be:

> "It is undisputed that the plaintiff and its predecessor in business have always dealt in food products only and that the defendant and its predecessors have always manufactured and sold tobacco, and have never dealt in food products. All the witnesses at the trial in the District Court testified in the most positive terms that food and

tobacco products belong to different classes. Foods and tobacco are classified as distinct and unrelated products under the Trade-Mark Act. Tobacco Products are in Class No. 17; while 'foods and ingredients of foods' belong to Class No. 46. The Treasury Department treats them as of different classes. It has always taxed tobacco products just as it did liquor products, but it has never taxed food products.

"The Examiner of Interferences in the Patent Office found that tobacco and food do not possess the 'same descriptive properties' and so belong to different classes. This view was also held by the Acting Commissioner of Patents and the District Judge. Food promotes the growth of animal or vegetable life. There is no nutrition in tobacco. It is merely a narcotic. Foods are used by all mankind as a matter of necessity, but this is not true of tobacco. State *v.* Ohmer, 34 Mo. App. 115; Liggett & Myers Tobacco Co. *v.* Cannon, 132 Tenn. 419; 178 S. W. 1009, L. R. A. 1916 A 940, Ann. Cas. 1917 A 179. The merchandise of the plaintiff and defendant belonged, therefore, to different classes" (7 F (2d) at p. 970).

Such has been the holding of the Court of Appeals of the District of Columbia. Thus in *California Packing Corp.* v. *Price-Booker Co.*, 285 Fed. 993, 995, that Court illustrated its idea of distinct classes of products by saying "no one would be deceived into believing that a can of tobacco and a can of peas were put out by the same concern simply because they bore similar trade marks"; and in *Pittsburgh Brewing Co.* v. *Ruben*, 3 F. (2d) 342, that Court held the same mark could be registered for soft drinks and stogies by different concerns, saying:

"It is true that soft drinks and stogies are frequently kept on sale at the same stands, but this fact does not go far towards determining the

> 'descriptive properties' of the goods, for it is well known that most retail stores deal in a variety of articles of diverse character. And when soft drinks and stogies are considered with reference to their component materials, processes of manufacture, and manner of consumption, it becomes evident that they are not goods of the same descriptive properties, and they are not so regarded in common understanding. Moreover, it is safe to assume that soft drinks and tobacco products are not often, if ever, made or marketed by the same manufacturer." (p. 343).

It is also the universal custom of the trade for the same mark to be used by a food and tobacco concern. Such is the case with such well known marks as "Veribest", "Ideal", "O. K.", "Climax", "Eureka", "Red Cross" and many others set forth in the opinion of the District Court (299 Fed. p. 847). As illustrating this custom there were introduced at the trial three exhibits, photographs of which are inserted at the end of this brief, showing three important cigarette brands, namely, "Camel" (the largest in this country), "Omar" and "Mogul", each being used for a line of food products similar to petitioner's.

And of course this Court knows of its own knowledge, as the testimony abundantly shows, that the tobacco business is one of the great generic industries of this country, ranking in this respect with steel, automobiles, textiles, coal and oil, so that if the position of the petitioner should obtain under the circumstances of this case it would work a complete revolution of the trade mark law of this country. As said by Judge Coxe in *The American Tobacco Company* v. *Polacsek* (1909) 170 Fed. 117, 120:

> "Whether a manufacturer confines himself to smoking tobacco, chewing tobacco, or cigarettes, he is still in the tobacco business, just as one is in the

> clothing business whether he makes coats, waistcoats or trousers, just as one is in the whiskey business whether he makes rye or bourbon''—

and he might have added, just as one is in the food business, whether he makes bacon, jelly, candies, chewing gum or soft drinks.

The second proposition was whether or not the dress or design of respondent's packages was in unfair competition with that of petitioner's.

This, again, was entirely a question of fact. And so different are the packages that the District Court said ''nothing like this sunburst or radiating effect appears on the labels of the plaintiff and the fact that the defendant adopted it demonstrates conclusively, it seems, that there was no attempt on the part of defendant to copy or imitate the standard mark of the plaintiff'' (299 Fed. p. 851). While both Courts united in declaring:

> ''If one should eliminate the word 'Beech-Nut' from both labels, it would be extremely difficult to locate any similarity at all between them'' (7 F. (2d) at p. 971).

The third proposition was whether or not the public was being deceived or the goods confused to the injury of petitioner.

This, also, was entirely a question of fact, as the Court said, of fraud or dishonesty in the use (7 F (2d) 971, citing Howe Scale Co. case). And here the Court subjected respondent's conduct to a most searching examination. Placing the emphasis on ''unfair'' rather than on ''competition'' it inquired whether by market competition, *or ''in any other way''*, ''by unfair and fraudulent means'' of respondent ''the plaintiff is injured and the public deceived''; and gave as its answer ''we are satisfied that it (respondent) has not'' (7 F (2d) at p. 970).

These three fundamental questions, all primarily of fact, being thus decided, inevitably led the court to its general conclusion that:

> "These principles, founded alike on reason and authority, when applied to the facts of this case, are decisive of the issues involved. The evidence, in our opinion, conclusively shows that both parties have acted in perfect good faith. Both have used the word 'Beech-Nut' on their respective, but very different, labels because they thought that they had the legal right to do so. The plaintiff adopted its trade mark without knowledge of the 'Beech-Nut' trade mark of the Harry Weissinger Tobacco Co. The defendant naturally adopted the 'Beech-Nut' trade mark for its products, because it owned the old Harry Weissinger trade mark and thought it was acting within its legal rights. The plaintiff is proud of its 'position substantially at the top of a highly competitive industry'. The defendant is one of the great tobacco companies of this country with a Lorillard reputation stretching back into three centuries. Neither needed nor desired the reputation of the incompatible business of the other. The evidence does not disclose anything on which infringement of the trade mark or unfair competition can be based." (7 F (2d) at p. 971).

Conclusion.

We submit, therefore, that the petition should be denied.

December, 1925.

Respectfully,

JOHN W. DAVIS,
WILLIAM R. PERKINS,
JOHN MILTON.

Counsel for Respondent

Factory No. 28, Fifth District of Kentucky.

NOTICE.—The manufacturers of this Tobacco have complied with all the requirements of law. Every person is cautioned, under the penalties of the law, not to use this package for Tobacco again.

"Weissinger" Label. First used in 1897.

"Sunburst" Label. First used in 1919.

CAMEL
Camel Brand
PORK AND BEANS
CAMPBELL HOLTON & CO.
BLOOMINGTON, ILL.

OMAR
STEELCUT
COFFEE
OMAR
GRAPES
OMAR
APRICOTS
OMAR
SLICED PINEAPPLE
OMAR
CUT WAX BEANS
OMAR
PEAS
OMAR

COMMERCIAL LIBRARY
THE
SLSO

MAR 11 1927
WM. R. STANSBU
CL

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1926.

No. 249.

BEECH-NUT PACKING COMPANY,
Petitioner,

vs.

P. LORILLARD COMPANY,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT.

JOHN W. DAVIS,
WILLIAM R. PERKINS,
JOHN MILTON,
Attorneys for the Respondent.

BEECHNUT
CHEWING AND SMOKING
TOBACCO
SUPERIOR QUALITY HAVANA CUTTINGS AND
HIGH GRADE SEED LEAF
HARRY WEISSINGER TOBACCO CO.
INCORPORATED
LOUISVILLE, KY.
NOT MADE BY A TRUST
BAGLEY'S
HAZEL NUT
HAZEL NUT
FOR PIPE OR
CIGARETTE
HAZEL NUT
LONG CUT
SMOKING OR CHEWING
HAZEL NUT
HAZEL NUT

HAZEL NUT
LORILLARD'S
10¢
BEECH-NUT
ESTABLISHED 1760
CHEWING
TOBACCO
EXTRA PICKED
BEECH
Beech-Nut
CLOVE
DROPS
ADDED COLOR
BEECH-NUT PACKING CO. CANAJOHARIE, N.Y. U.S.A.
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
CLOVE DROPS
Beech Nut
CLOVE
DROPS
BEECH NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
CLOVE DROPS
NET WEIGHT 1⅛ OZS or 31.8 GRAMS
REG. U.S. PAT. OFF.
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
MACARONI
Beech-Nut
ORANGE
DROPS
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
ORANGE DROPS
BEECH-NUT PACKING CO. CANAJOHARIE, N.Y. U.S.A.
Beech-Nut
CINNAMON
DROPS
ADDED COLOR
BEECH-NUT PACKING CO. CANAJOHARIE, N.Y. U.S.A.
BEECH-NUT BRAND
BEECH-NUT
TRADE MARK
REG. U.S. PAT. OFF.
CINNAMON DROPS

LORILLARD'S
10¢
BEECH-NUT
ESTABLISHED 1760
CHEWING
TOBACCO
EXTRA PICKED
BEECH
Beech-Nut
CLOVE
DROPS
Beech-Nut
CLOVE
DROPS
BEECH-NUT BRAND
BEECH-NUT
MACARONI
Beech-Nut
LEMON
DROPS
Beech-Nut
ORANGE
DROPS
Beech-Nut
CINNAMON
DROPS

TABLE OF CONTENTS.

	PAGE
Opinions Below	1
Statement of the Case	1
Use of Beech-Nut by Petitioner	1
The Use of Beech-Nut for Tobacco Products	3
Petitioner's First Protest in Regard to the Beech-Nut Mark	8
Introduction of Beech-Nut Cigarettes	9
Petitioner's Cigarette Experiment	11
The Patent Office Proceeding	13
The Evidence in the Record	14
Four Window Displays	14
The Seven Alleged Cases of Misrepresentation by Respondent's Salesmen	15
Case of William T. Hill	16
Case of Robert L. Bowen	17
The Case of William C. Weigel	18
The Case of George B. Roach	18
Other Cases	20
Testimony of Petitioner's Salesmen	20
Other Witnesses Examined by Petitioner	22
Misaddressed Letters	23
Witnesses for the Respondent	24
Introduction and Summary of Argument	26
What the Lower Courts Decided	27
The Writ of Certiorari was Improvidently Granted.	30
Summary of Respondent's Argument	31
POINT I. The petitioner properly was denied relief on its claim of trade-mark infringement because the goods of the petitioner and respondent were not of the same descriptive properties	32

PAGE

Petitioner's Use and Registration of "Beech-Nut".. 32

The Trade Mark Act and Decisions of this Court Recognize that the Same Mark may be used on Goods which do not possess the "Same Descriptive Properties" 33

Tobacco Products and Food Products Do Not Have the "Same Descriptive Properties"..... 37

Court Decisions Deny "Same Descriptive Properties" to Food Products and Tobaccos..... 40

Use of the Same Mark by One Concern for Foods and by Another for Tobacco Has for Years Been a Universal Trade Custom 42

The Classification Rule in Trade Mark Law is Sound in Principle 44

POINT II. The petitioner properly was denied relief on the claim of unfair competition 46

The Courts below did not stop at inquiring as to unfair competition. They went further and inquired if by any "unfair and fraudulent means the plaintiff is injured and the public deceived" 53

POINT III. The use of the word "Beech-Nut" by Petitioner in its corporate name gives it no right to complain of the use of that word in the tobacco trade 55

POINT IV. There is no conflict of opinion between the Circuit Courts of Appeal: Alleged conflicting decisions of the Second, Third and Sixth Circuits and in England distinguished 57

Aunt Jemima Case 58

Peninsular Case 59

Vogue Case 60

Overland Case 61

Rolls Royce Case 62

PAGE

Walter W. Ashton 62
Kodak Case 64
The writ of certiorari was improvidently granted insofar as based upon an alleged conflict with these decisions of the Circuit Courts of Appeal... 64

POINT V. Petitioner is barred by laches, acquiescence and estoppel from obtaining any relief herein 66

POINT VI. Petitioner has failed to establish any damage and is entitled neither to an injunction nor to an accounting 72

POINT VII. There was no abandonment by the respondent of the Beech-Nut Mark 78

CONCLUSION 84

Appendix "A" consists of quotations from the witnesses of Petitioner cited in its Appendices "A" and "B" which show the utter carelessness and indifference of these witnesses, precluding any deception of them by Respondent 85

Appendix "B" consists of the correspondence passing between the Petitioner and Respondent prior to the bringing of this suit showing the acquiescence of Petitioner in the use of "Beech-Nut" for tobaccos, as well as the intent of Lorillard to sell its products on its own reputation 104

The photographs, in the order of their insertion, are the following exhibits offered at the trial: 140

(1) Lorillard Products.
(2) Showing use of "CAMEL" for cigarettes and for a diversified line of food products.

PAGE

(3) Showing use of "OMAR" for cigarettes and for a diversified line of food products.
(4) Showing use of "MOGUL" for cigarettes and for a diversified line of food products.
(5) Showing use of "O. K." for tobaccos and foods.
(6) Showing use of Ovals for various packages.
(7) Contrasting Scrap packages with packages of Petitioner.
(8) Contrasting Cigarette packages with packages of Petitioner.
(9) The "HAZEL-NUT" package showing the squirrel thereon.

Citations.

PAGE

Abestone Co. v. The Philip Carey Mfg. Co., 41 App. Div. D. C. 507 55
Ainsworth v. Walmsley, L. R. 1 Eq. 518 .....35, 47
Akron-Overland Tire Co. v. Willys-Overland Co., 273 Fed. 674 .....36, 61
Allen B. Wrisley Co. v. Iowa Soap Co., 122 Fed. 796.... 51
American Steel Foundries v. Robertson, 269 U. S. 372 .....46, 55, 56
American Tobacco Co. v. Globe Tobacco Co., 193 Fed. 1015 52
American Tobacco Co. v. Gordon, 10 F. (2d) 646 36
American Tobacco Co. v. Polacsek, 170 Fed. 117..... 67
Amoskeag Mfg. Co. v. Trainer, 101 U. S. 51 34
Anglo-American Co. v. General Electric Co., 43 App. Div. D. C. 385 36
Atlas Mfg. Co. v. Street, 204 Fed. 398 36
Aunt Jemima Mills Co. v. Rigney, 247 Fed. 407.....36, 55, 58
Baglin v. Cusenier Co., 221 U. S. 580 .....79, 82
Ball &c. Co. v. Mammoth Co., 48 App. D. C. 243 82
Basket Stores Co. v. Allen, 99 Neb. 217, 155 N. W. 893.. 47
Beech Nut Packing Co. v. P. Lorillard Co., 7 Fed. (2d) 967 .....30, 36
Borden's Ice Cream Co. v. Borden's Condensed Milk Co., 201 Fed. 510 .....36, 47, 57
Borthwick v. The Evening Post, L. R. 37 Ch. D. 449 .....36, 47, 57
British-American Tob. Co. v. British-American Cigar Co., 211 Fed. 933 57
Burt v. Tucker, 178 Mass. 493 79
California Packing Corp. v. Price-Booker Co., (App. D. C. 1922) 285 Fed. 993 41
Carroll v. Duluth Superior Milling Co., 232 Fed. 675.... 47
Carroll v. McIlvaine, 183 Fed. 22..... 72
Charles Broadway Rouss v. Winchester Co., 300 Fed. 706 .....36, 47, 58

PAGE

Coats v. Merrick Thread Co., 149 U. S. 562 .....49, 60
Col. W. F. Cody v. Colonial Co., 284 Fed. 873 72
Columbia Mill Co. v. Alcorn, 150 U. S. 460 34
Corning Glass Works v. Corning Cut Glass Co., 197 N. Y. 173 .....36, 47, 56
Delaware & Hudson Canal Co. v. Clark, 13 Wall. 311 .....34, 44, 48
Dubuque German C. Seminary v. St. Joseph's College, 169 N. W. (Ia.) 405, 8 T. M. Rep. 425 47
Dunlop Pneumatic Tire Co. v. Dunlop Motor Co., (H. L. 1907) 24 R. P. C. 572, L. R. App. Cas. 430 (1907) 36, 47, 56
Eastman Co. v. Kodak Cycle Corp., 15 Rep. Pat. Cas. 105 64
Elgin National Watch Co. v. Illinois Watch Co., 179 U. S. 665 49
Elgin National Watch Co. v. Loveland, 132 Fed. 41..... 57
Enoch Morgan Sons Co. v. Ward, 152 Fed. 690..... 36
Ex Parte Penn Tobacco Co., 144 O. G. 275..... 67
Farmers' L. & T. Co. v. Farmers' L. & T. Co. of Kan., 1 N. Y. Supp. 44 57
France Milling Co. v. Washburn-Crosby Co., 7 F. (2d) 304 .....36, 58
Gaines & Co., W. A. v. Rock Spring Co., 246 U. S. 312.. 81
Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598 48
Hall v. Barrows, 4 DeG. J. & S. 150 .....36, 47
Haller Baking Co. v. Ward Baking Co., 295 Fed. 681.... 47
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403 .....34, 45, 46, 47
Hier v. Abrahams, 82 N. Y. 519 82
Houston Oil Co. v. Goodrich, 245 U. S. 440 .....31, 65
Howard Co. v. Baldwin Co., 48 App. D. C. 437..... 55
Howe Scale Co. v. Wyckoff, 198 U. S. 118 49
Hub Dress Mfg. Co. v. Rottenberg, 237 Mass. 281, 129 N. E. 442 .....36, 47, 56
International Trust Co. v. International L. & T. Co., 153 Mass. 271 56

PAGE

Investor Pub. Co. v. Dobinson, 82 Fed. 56 57
Johnson Educator Food Co. v. Sylvanus, Smith & Co., 37 App. D. C. 107 36
Keystone Oil & Mfg. Co. v. Buzby, 219 Fed. 473..... 57
Lawrence v. Sharpless, 203 Fed. 762, aff'd 208 Fed. 886.. 36
Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537.. 34
Layne and Bowler Corporation v. Western Well Works, 261 U. S. 387 .....31, 65
Layton Pure Food Co. v. Church & Dwight Co., 182 Fed. 35 36
Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523 .....47, 56
Liggett & Meyers Tobacco Co. v. Cannon, 132 Tenn. 419.. 42
Lord & Taylor v. Wolf & Sons, 41 App. D. C. 514..... 36
Lorillard Co., P. v. Peper, 86 Fed. 956 52
Ludington v. Leonard, 127 Fed. 155 76
McLean v. Fleming, 96 U. S. 245.....34, 75
Mouson & Co. v. Boehm, L. R. 26 Ch. D. 398..... 78
National Pictures Theatres Inc. v. Foundation Film Corp., 266 Fed. 208.....36, 47, 58
Nolan Bros. Co. v. Nolan, 131 Cal. 271..... 47
Old Lexington Club Co. v. Kentucky Co., 234 Fed. 464.. 72
Oppenheim, etc. v. President Suspender Co., 3 F. (2d) 88 36
Paul F. Beich Co. v. Kellogg Co., 262 Fed. 640..... 36
Peninsular Chemical Co. v. Levinson, 247 Fed. 658...36, 48, 58
Pflugh v. Eagle White Lead Co., 185 Fed. 769..... 71
Pittsburg Brewing Co. v. Ruben (App. D. C. 1925) 3 F. (2d) 342 .....36, 41
Quaker Oats Co. v. Mother's Macaroni Co., 41 App. D. C. 254..... 36
Rosenberg Bros. Co. v. Elliott, 7 F. (2d) 962....36, 56, 61, 77
Royal Milling Co. v. J. F. Imbs Milling Co., 44 App. D. C. 207 81
Rushmore v. Badger Bros. Mfg. Co., 198 Fed. 379..... 76
Saxlehner v. Eisner, 179 U. S. 19 79

PAGE

Schlitz, Joseph Brewing Co. v. Houston Ice & Brewing Co., 250 U. S. 28 30
Scottish U. & N. Ins. Co. v. Scottish N. Ins. Co., 26 R. P. C. 105 ..... 36, 47, 57
Singer Mfg. Co. v. Loog, 8 App. Cas. 15 56
Southern Power Co. v. North Carolina Public Service Co., 263 U. S. 509 ..... 31, 65
Standard Paint Co. v. Trinidad Asphalt Co., 220 U. S. 446 ..... 45, 50
State v. Ohmer, 34 Mo. App. 115 41
United Drug Co. v. Rectanus, 248 U. S. 90...35, 45, 46, 47, 70
Vacuum Oil Co. v. Gargoyle Textile Corp., 285 Fed. 1002 36
Valvoline Oil Co. v. Havoline Co., 211 Fed. 189..... 71
Vassar College v. Loose-Wiles Co., 197 Fed. 982..... 57
Virginia Baking Co. v. Southern Biscuit Works, 111 Va. 227 ..... 36, 47
Vogue Company v. Thompson-Hudson Co., 300 Fed. 509, 6 F. (2d) 873 ..... 36, 59, 76
Wall v. Rolls-Royce of America, 4 F. (2d) 333..... 61, 62
Walter v. Ashton, L. R. (1902) 2 Ch. D. 282..... 48, 62
Walter Baker & Co. v. Harrison, 32 App. D. C. 272.... 58
White v. Miller, 50 Fed. 277 82
Window Glass Co. v. Pittsburg Co., 284 Fed. 685..... 72

Table of Statutes Cited.

Trade Mark Act (Act of February 20, 1905), 33 Stat. 724 33
Trade Mark Act, Sections 1 and 5, 35 Stat. 628, 37 Stat. 649 ..... 34, 36, 37
Trade Mark Act, Section 16, 33 Stat. 728 34

Text Books Cited.

Brown on Trademarks, Section 681 79
Hopkins on Trademarks (Third Edition), p. 213.....79, 82
Nims on Unfair Competition and Trade-marks, 2 Ed. Sec. 221 35

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

BEECH-NUT PACKING COMPANY, Petitioner, vs. P. LORILLARD COMPANY, Respondent.	No. 249.

BRIEF FOR RESPONDENT.

Opinions Below.

This case is here on Certiorari directed to the Circuit Court of Appeals for the Third Circuit, whose opinion rendered September 11, 1925, (V, p. 2694) is reported in 7 Fed. (2nd) 967.

The case came to the Circuit Court of Appeals on appeal from the Decree of Judge Lynch of the District Court of the United States, District of New Jersey, entered June 17, 1924, (V, p. 2676), pursuant to an opinion rendered May 7, 1924, (V, p. 2645) reported in 299 Fed. 834.

Both the Circuit Court of Appeals and the District Court decided in favor of respondent, dismissing Petitioner's bill on the merits.

Statement of the Case.

The Use of Beech-Nut by Petitioner.

In 1891 Imperial Packing Company, a New York Corporation, commenced in a small way packing and selling hams and

bacons. After using the name "Imperial" as a mark for a short time, it commenced using the name "Beech-Nut". In 1899 the petitioner was organized under the laws of New York and succeeded to all the assets, trade-marks, business and goodwill of Imperial Packing Company. Records prior to 1903 were destroyed by fire but since that time records of the petitioner show a gradual expansion in its line of food products from year to year. A summary of its products showing the yearly additions to the line appears at Vol. VI, page 2784 of the record.

From time to time it registered the name Beech-Nut as a trade-mark for food products. The most comprehensive registration is the one asserted in this suit and was made December 31, 1912. It lists all the products put out by the petitioner at that time including chewing gum and after enumerating them closes by saying "all in Class 46, foods and ingredients of foods" (I, p. 21). An illustrative trade-mark typical of the petitioner's device is its bacon trade-mark appearing at page 2878 of Vol. VI of the record. A photograph of all of its labels appears at page 2777 of Vol VI.

It is to be noted that the mark is in the form of an oval with a border or annular band in red (it is so described in the registration, I. p. 21, and by petitioner's witness Barbour, I, p. 790, and in its letter, VI, p. 2888, making no mention of a blue mark or outline) across the upper section of which are printed the words "Beech-Nut Brand" in white letters. In the center is a single Beech-Nut embedded in three leaves pointing upwards and on each side in the border there is likewise a single Beech-Nut pointing upward embedded in the three leaves. The colored border frequently is outlined in gold. Other familiar Beech-Nut labels are reproduced at pages 2872 and 2876 of Vol. VI.

The business of the petitioner grew fairly steadily from a volume of sales in 1903 amounting to $563,764.37 to $12,109,573.68 in 1921. Chewing gum, which in 1921 contributed about half the total money value of petitioner's

output, was introduced in 1911. It grew steadily in value, reaching the point of $3,594,864.53 in 1917, falling off during the war years on account of the difficulty in obtaining chicle (I, p. 869), and after regaining the lost ground reached $3,955,902.00 in 1920, and rose in 1921 to $6,281,945.41 (I, p. 868). The progressive growth in petitioner's business is summarized in a table of sales statistics appearing on page 868 of Vol. I. Between 1915, when respondent introduced its Beechnut scrap tobacco, and 1921, when this suit was brought, petitioner's business doubled.

The Use of Beech-Nut For Tobacco Products.

The tobacco business is one of the largest and most distinctive American industries, comparable in these respects to the textile, packing, oil, coal and steel industries. For 1922 the crop of leaf tobacco in the United States alone was sold by the farmers for over $300,000,000 (V, p. 2632). The success of a tobacco product depends upon blending leaf tobacco to meet the taste of the consumer, an intricate and delicate operation, requiring years of experience and the utmost care in preparation. The result has been to develop a great variety of types and blends of cigars, cigarettes, chewing and smoking tobacco and snuff, making this a highly specialized industry.

In 1922, there were in the United States 10,291 concerns engaged in manufacturing tobacco having an output of the value of more than $1,000,000,000 (V, p. 2632). The larger concerns are officered by men who have devoted their lives to the tobacco business and who are experts in all its delicate operations.

Scrap tobacco started as a distinct tobacco product in the nineties, and had its origin in finding a way to dispose of "cigar clippings" or "scrap". Today the scrap business is so important that cigar clippings are entirely inadequate and large quantities of leaf are bought and used for this type of tobacco alone (V, pp. 2567-70, 2583). The use of the word

scrap consequently is not to be taken as a designation of an inferior tobacco product, for the finest kind of leaf is used in making it, and cigar clippings from expensive varieties of cigars are used in it (V, p. 2574).

Scrap tobacco was first sold in Ohio, in the early nineties, and gradually spread through the Middle Western States to West Virginia, Pennsylvania and New York. While these States remain the big scrap territory, it is sold extensively in all sections of the United States. From the beginning it has been put up almost universally in a package like the respondent's Beech-Nut package, which will be shown the Court upon the argument. Its individuality of shape and appearance have created a standard which makes the scrap tobacco package recognizable wherever it is seen. Among the earlier brands still selling today are the familiar Polar Bear and Mail Pouch.

In 1897 the Harry Weissinger Tobacco Company, a concern then carrying on a considerable business in Louisville, brought out a scrap tobacco which it called "Beechnut Chewing and Smoking Tobacco". The mark was registered in 1898 with Connerton's Bureau of Registration for Tobacco Brands as follows: "Beech Nut granulated, Harry Weissinger Tob. Co., Louisville, Ky." (IV, p. 2252). A reproduction of its package appears at page 2981 of Vol. VI. Figures prior to 1904 are not available as to the extent of the sales of this Beech Nut tobacco but the brand had an extensive sale (IV, pp. 2270-2301). On October 29, 1903, by an assignment, the Weissinger Tobacco Company sold and transferred its entire assets including the brand "Beech Nut" to Continental Tobacco Company, a New Jersey Corporation. This Company in turn by an assignment dated December 17, 1903, sold and transferred certain assets including the Beech Nut mark to Luhrman & Wilbern Tobacco Company, another New Jersey Corporation. In October, 1904, Continental Tobacco Company was merged under the laws of New Jersey in the American Tobacco Company. An illustration of the

"Beechnut" label as used by Luhrman & Wilbern appears at page 2971 of Vol. VI.

When the decree was entered in November, 1911, dissolving the American Tobacco Company pursuant to the decision of this Court, 221 U. S. 106, the respondent corporation was formed and there was transferred to it under the terms of the decree all the shares capital of the then existing P. Lorillard Company and of Luhrman & Wilbern Tobacco Company, together with the trade-marks set out in a list of brands delivered at the time of the transfer. Among such brands was the trade-mark "Beech Nut" (VI, pp. 2942, 2945, 2956).

The name Lorillard had been connected prominently with the tobacco industry from 1760 when Pierre Lorillard opened his tobacco factory in what is now Bronx Park, New York. Since that time tobacco products of all kinds have been sold under this name throughout the country and during this period neither the respondent nor any of its predecessors has ever made or sold anything but tobacco products (V, p. 2624). Respondent has uniformly featured the name Lorillard in its advertising and on its package, the only exceptions being in the case of active brands obtained by transfer under the 1911 decree, such as "Honest Scrap", "Polar Bear", "Union Leader", "Murad", "Helmar" and "Deities". On these brands no change was made in the label because of the risk involved in leading the customer to believe that the blend has been changed whenever the package has been altered (V, p. 2578). Respondent now is, and since its organization in 1911 has been, one of the largest tobacco manufacturers in the United States, having in 1919 an aggregate retail money value for its output of over $80.000,000 (IV, p. 2261). It has over twenty plants and employs about 10,000 people. It has spent in advertising its name and business from 1911 through 1922, the enormous sum of $49,058,936.51 (V, p. 2573).

Undoubtedly the foregoing shows, as the testimony of nearly every witness confirms, that the name "Lorillard"

possessed a wide and splendid reputation in the tobacco business of the United States and therefore it is not surprising that Petitioner in a letter to Respondent dated September 30, 1915, acknowledged "that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence." (See Appendix B, p. 117.)

Due to the change in tastes of consumers, which vary from time to time for reasons which the ablest men in the industry are unable to explain, tobacco brands rise and fall just as styles come and go in other articles. For example, the scrap tobacco Polar Bear, rose from 4,260,000 pounds in 1902 to 6,819,000 pounds in 1906, and declined to 2,813,000 pounds in 1910. Honest Scrap rose from 1,316,242 pounds in 1906 to 18,527,034 pounds in 1910, and declined to 13,512,000 in 1914 (V, p. 2567). The old Beechnut had sold at 10,775 pounds in 1904, declined to 3,600 pounds in 1906, and to 25 pounds in 1910.

The decline in Honest Scrap prompted the officers of the respondent to develop a new blend and after investigation, Mr. Ball, Vice-President, reported in 1914 that the sweeter blends were growing in favor. Upon his recommendation a new formula was worked out which produced a sweeter blend (V, p. 2557). In selecting a name for the new formula, Mr. Ball referred to the list of brands which had come to the respondent under the dissolution decree. He had been accustomed from time to time to refer to that list and to draw from it brands for use on the respondent's tobacco products. In this way he had selected Comet, Pioneer, and Yacht Club. On this list under the heading Luhrman & Wilbern, there were seven tobacco brands, six of which were actively selling in 1914, the seventh, Beechnut, having been dormant since the decline in popularity heretofore mentioned (VI, p. 2945; V, pp. 2558-9, 2575).

While this brand was then dormant in the sense that no sales actually had been made since 1910, labels and other necessary material were on hand and respondent had been at all times ready and willing to fill any orders received for

it. Mr. Ball accordingly sent for one of the Beech-Nut packages and upon examination decided that the dress of the package was out of date; that it had too much reading matter on it and that it was objectionable in its use of the picture of the squirrel because there was at the time a well-known brand of tobacco known as "Hazel Nut" actively selling on the market, which prominently displayed the picture of a squirrel (V, p. 2560; VI, p. 2960). It was decided, however, to use the Beech-Nut name and a lithographer was directed to revamp the package. The result was the adoption of the sunburst package, a sample of which appears in the front of this brief, and photographs of which appear at page 2870 of Vol. VI.

It is to be noted that the most prominent feature of the package consists of the radiating red lines emanating from the center, a most distinctive device admittedly never used by petitioner and which has given the package its name "Sun-Burst". Prominently displayed at the top of the package is the name "Lorillard's". No solid color border such as appears in all the petitioner's labels occurs on the respondent's package. The Beech-Nut letters are printed in blue on a natural paper background, whereas the petitioner's name always appears across the top of the oval as "Beech-Nut Brand" in white letters against a red or colored background. On one side of the package in the oval the words "Established 1760" appear and on the other side "Middletown. Ohio", the respondent's chief factory is printed in prominent lettering. On each side appears in bold type the words "Chewing Tobacco". The beech-nuts appearing in the center of the mark are in the form of a pair of beech-nuts pointing downwards and are not surrounded by any leaves. It was explained that these twin beech-nuts were drawn from some picked up by the respondent's President, Mr. Maloney, on his New Jersey farm (V, pp. 2560, 2636).

Ovals, like stars and other devices, have for years been used upon packages of all kinds, including tobaccos, such a use having been made by Respondent and its predecessors on

"Bagpipe", another scrap brand. It is also a custom of long standing to use conjointly with a mark the object of which it is the name; such a use having been made by Respondent in the case of "Comet", "Open Book", "Red Cross", "Stag". And the use of the hyphen in the "Beech-Nut" was too insignificant a detail to mislead anybody. See the very pertinent case of *Postum Cereal Co.* v. *American Co.* (C. C. A. 7th), 119 Fed. 848, 852-3.

The tobacco under this brand was offered to the market early in 1915 and met with great success, its sales being 7,364,214 pounds in 1915, 16,284,786 in 1916 and so on steadily to 27,602,606 in 1919 (VI, pp. 2968, 2970).

The total annual scrap business of the country is in the vicinity of 60,000,000 pounds, and in 1921, when this suit was brought, the respondent's Beech-Nut covered about fifty-per cent. of the business (V, p. 2635). The respondent's sales in 1919 of this brand alone had a retail value of $14,650,865.23 as compared with the petitioner's total sales for that year of all its products of $8,979,586.35. This is striking in view of the fact that the respondent's package has always been sold for 10¢. This success is directly attributable to the intelligent way in which the consumers' taste had been ascertained and met and to the very hard, systematic and expensive work by way of advertising and sampling which was done to introduce and push the brand. By the end of 1921, the respondent had expended in manufacturing and selling Beech-Nut scrap a total of $64,691,954.61 (V, pp. 2570-2572).

Petitioner's First Protest in Regard to the Beech-Nut Mark.

On June 11, 1915, the petitioner, by letter addressed to the respondent, first asserted an objection to the form of package under which the scrap tobacco was being introduced. This letter appears at page 2888 of Vol. VI, and the ensuing correspondence is set forth in the pages immediately following. For the Court's convenience all of this correspondence, arranged in chronological order, is printed as Appendix

B, p. 104 of this brief. The correspondence continued through the summer of 1915 and terminated substantially in a very full letter from the respondent to the petitioner dated September 15, 1915 (VI, p. 2897). In this letter the respondent set forth the early use of the Beech-Nut name by its predecessors commencing with the Weissinger Tobacco Company at Louisville in 1897. It explained in detail how the brands had come to it under the dissolution decree and it enclosed price lists and samples relating to the early use of the name. It then stated the legal doctrine on which it relied to support its right to use the name Beech-Nut on tobacco without violating petitioner's right to use the name on foods, referring to decided cases, and to *Nims on Unfair Competition*. It disclaimed any intention to make use of the Beech-Nut Packing Company's reputation to further the sale of its tobacco and pointed to the care it had exercised in selecting a label which would not be imitative of the petitioner's mark. It expressly invited the petitioner to inform it of any cases of representations made by its salesmen to the effect that Beech-Nut scrap was a product of the Packing Company and volunteered promptly to discharge any salesmen making such representation.

To this very full letter the petitioner sent an acknowledgment dated September 20, 1915, in which it said that it desired to review the matter before giving a definite reply. No further action of any sort followed *for a period of four years*, although during that time the respondent's business on this brand grew to the point where it commanded almost 50% of the scrap tobacco business of the country, and had a retail sales value almost twice that of all the petitioner's products combined, and during the same time the petitioner's business itself had doubled.

Introduction of Beech-Nut Cigarettes.

Prior to 1919, the respondent's cigarette business had consisted almost entirely of pure Turkish cigarettes in box packages selling at 10 for 25¢ or more. The great volume of

cigarettes generally in use were blended mixtures of Turkish, bright domestic and Burley tobaccos, such as Camels, Lucky Strikes and Chesterfields, and were selling in "cup" packages as a rule at 20 for 20¢. As the end of the war promised to bring a lessened cost of materials respondent conceived the idea of offering a blended cigarette in a "cup" package to sell at 20 cigarettes for 15¢, and because of its success with the scrap tobacco it decided to offer its cigarettes under the Beech-Nut name. In this particular it was following the successful experience of the American Tobacco Company in promoting Lucky Strike cigarettes after Lucky Strike smoking tobacco (V., pp. 2592-94).

This came to the notice of the Petitioner and it volunteered the suggestion that the "sun-burst" design of the scrap package be adopted for the cigarette package, but examination showed that there was danger of a conflict with the sun-ray design of Sweet Caporal cigarettes then being sold by the American Tobacco Company, and there was some danger that the design may have been anticipated by "Zubelda". Accordingly, the twin Beech-Nuts and the oval were taken from the scrap package and a wrapper prepared and used on the cigarettes which is illustrated at page 2708 of Vol. VI. The prominent position of the name "P. Lorillard Co." is noteworthy. The use of the oval was, of course, a familiar design on cigarette packages, for instance on "Twelfth Nights". The solid red background was adopted because of the success of other cigarettes employing solid backgrounds such as the buff of Camels and Fatimas, the blue of Omars, the green of Lucky Strikes and Lord Salisbury and the white of Piedmonts and Chesterfields. Furthermore, red was the predominant color on the scrap tobacco and had already been used by the respondent on its "London Life" and "Windsor Castle" cigarettes (V, pp. 2594, 2604).

An early sample wrapper first submitted for the cigarette package carried the catch-phrase "Cigarettes of Beech-Nut quality have never before been offered to the public" (VI, p.

2973). Upon the petitioner's objection, this catch-phrase was changed to read "Beech-Nut cigarettes 'mildest of all' perfect quality, delicious taste, P. Lorillard, Established 1760", and only cigarettes bearing the later catch-phrase were marketed (V, p. 2620). The petitioner's objection had been to the close proximity of the words "quality" and "Beech-Nut" in the first suggested catch-phrase. The package was wrapped in glassine paper as was true of many other cigarettes in the competing brands.

On both the front and back of the distinctive cigarette package appears the name "P. Lorillard Co." These packages are sold ten in a carton, on each of which cartons is printed the name "Lorillard". Each carton contained a yellow and a white card for display on the counter in advertising these cigarettes which stated the cigarettes were "Lorillard's". And all other advertisements, whether in windows, billboards, newspapers or periodicals, plainly carried the name "P. Lorillard Co."

While preparations were commenced in 1919 for the introduction of Beech-Nut cigarettes, it was not until 1921 that the respondent was in a position to introduce them to the market. They were actively pushed, at first well received, and sold very satisfactorily. But the older and better-known brands, in part due to the deflation in 1921, soon engaged in a price war which resulted in the reduction by them to 15¢ for 20, and frequently two packages for a quarter. Beech-Nut was no match for these brands in a competitive situation of this bitterness, the old brands were able to command the situation, and by lack of volume it was unable to force its price below 15¢. The result was, in the language of the respondent's Vice-President in charge of cigarettes, "It just took the living life out of Beech-Nut" (V, p. 2602).

Petitioner's Cigarette Experiment.

In the spring of 1919, when the respondent was commencing its preparations for marketing a Beech-Nut cigarette, one of its sample labels came to the attention of the petitioner.

Thereupon the petitioner ordered from the American Tobacco Company 2,060 cigarettes and shipped some of them to one of its Vice-Presidents, some to its counsel and some to the New Jersey Tobacco Company, a jobber, all at a cost of $11.85 (I, p. 791). These cigarettes were packed in plain white boxes with black printing thereon. The label which appears in Vol. VI. at page 2999, and which conforms to the usual Beech-Nut food product label was never used on these cigarettes (IV, p. 2169).

Hearing of these shipments, the respondent wrote the petitioner on June 28, 1919 (VI, p. 2902) asserting its ownership of Beech-Nut for tobacco products and demanding that the petitioner cease using it on cigarettes. An interview followed and correspondence ensued running into October, which is set out on pages 2904 and following, of Vol. VI and Appendix B herein. The correspondence related to proposed changes in the wrapper for the Beech-Nut cigarette package put out by the respondent, and terminated in a letter from the respondent to the petitioner dated October 15, 1919, in which the respondent stood firmly on its position that it was entitled to use the name Beech-Nut for all tobacco products (VI, p. 2922).

It is important to note, however, that the petitioner made no objection whatever to the use of Beech-Nut on the scrap tobacco, confining its objections to the color and lettering of the proposed cigarette package (IV, p. 2173 and VI, p. 2922). In a letter dated August 7, 1919, the petitioner wrote the respondent stating that its Executive Committee had made the suggestion that "In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut Scrap Tobacco in a wrapping for your cigarettes; in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained from the merchandising of that prod-

uct" (VI, p. 2912). Again in a letter dated October 8, 1919, the petitioner wrote: "Briefly stated our position is this—that regardless of the trade-name or mark Beech-Nut, your Company adopted our oval trade-mark and our general color scheme and other embellishments for your cigarette package and this your Company had no right to do regardless of any rights that you may have had in so far as the name Beech-Nut is concerned" (VI, p. 2920). It thus appears from this correspondence that petitioner definitely acquiesced in the respondent's use of Beech-Nut for scrap tobacco and in fact encouraged the respondent to adopt the scrap tobacco marking for its cigarettes.

The Patent Office Proceeding.

During the progress of the 1919 correspondence, the petitioner applied for the registration of Beech-Nut for cigarettes under the Trade-mark Act in the Patent Office. The respondent opposed the application, and the entire record of the proceeding, together with the decisions has been made a part of the record here, and is printed in Vol. IV (the opinions are in Vol. VI, pp. 2821, 2830). The issues presented were in a large measure the same as those here involved. The first hearing was before the Examiner of Interferences who held that respondent had a right to adopt and use the mark even as late as 1915 for tobacco products, notwithstanding the petitioner's use of the mark for food products, because the products were not of the same descriptive properties. He therefore held that the petitioner's application for registration should be denied (VI, p. 2821). The petitioner appealed to the Commissioner of Patents who affirmed the ruling of the Examiner and refused registration. From this decision no further appeal was taken (VI, p. 2830).

Thereupon, the present suit was instituted in May, 1921 charging trade-mark infringement and unfair competition. Voluminous testimony was taken in all parts of the country, very full argument was had before the District Court, elaborate briefs submitted, and after careful consideration, the

District Judge held that the respondent was entitled to the use of the mark, that no unfair competition had been practised and that the respondent owned and could continue to use Beech-Nut for its tobacco products. Accordingly, the bill of complaint was dismissed. 299 Fed. 834. (V, p. 2645.)

On appeal to the Third Circuit Court of Appeals, that Court affirmed the decree below, Judge Davis rendering a comprehensive opinion (*V*, p. 2694), 7 Fed. (2nd) 967.

The Evidence in the Record.

The evidence introduced to establish the petitioner's case will be reviewed under the various subdivisions under which it naturally falls. The major portion of it was devoted to an attempt to establish that there had been wide-spread confusion in the public mind as a result of which many consumers thought that the respondent's tobacco was made by the petitioner. To this end there were introduced four window displays in which advertising matter of both petitioner and respondent was alleged to have been set up in a confusing manner; seven cases of alleged misrepresentation by salesmen of the respondent; the testimony of sixteen of petitioner's salesmen, of a considerable number of dealers, and witnesses drawn from the general public. There were also introduced certain missent letters, which had come to the petitioner and which were inquiries relating to tobacco products. These different types of evidence will be considered in order.

Four Window Displays.

Four retail merchants in widely separated cities in dressing their respective store windows, included at the same time either packages or advertisements of both petitioner and respondent, along with other products. Three of them, Coughlin of West Haven, Conn. (III, p. 2090); Bieringer of Boston, Mass. (II, p. 911) and Pennell of Ashville, N. C.

(I, p. 712) were examined. The fourth, a grocer of Baltimore was not examined. In each instance the witness testified that the display was placed in his window without any suggestion, knowledge or participation by the respondent, and each retailer knew at the time of the difference of manufacture, and thought that the public likewise knew. The packages and advertisements of the respondent appearing in the windows plainly carried its corporate name.

Two photographs were put in evidence by the petitioner, one of the West Haven, Connecticut window (VI, p. 2710) and the other the Ashville, N. C. window (VI, p. 2762). When examined, these photographic exhibits do not show clearly the name P. Lorillard Co. as it appeared in black letters on the red background, but the name did appear on the placard reproductions of the packages with lettering in the same proportions as occurred on the package itself, and the name appears so plainly that both Pennell and Coughlin testified that it could be read from the street. Counsel for the petitioner explained the deceptive character of the photographs by saying that an improper camera had been used which would not show black lettering on red backgrounds. These photographs therefore must be considered with this defect in mind.

The Seven Alleged Cases of Misrepresentation by Respondent's Salesmen.

In considering the seven alleged cases of misrepresentation by salesmen of respondent it will be recalled that in one of petitioner's letters in the 1915 correspondence, the petitioner said that it knew that salesmen and agents of respondents deliberately pushed respondent's goods under petitioner's mark and name. To this the respondent replied that it would promptly discharge any salesman guilty of such representation. At the time of the correspondence not a single instance was cited of such misrepresentation, and in the elaborate preparation of testimony in this case only

seven such instances out of the tremendous volume of sales made by the respondent were introduced. Each of these seven instances was investigated to the bottom by the respondent and this investigation disclosed very clearly that not only was there no misrepresentation by any representative of the respondent but that on the contrary the facts strongly suggested that a representative of the petitioner practiced the alleged deceit in order to secure evidence in this case. The full import of this will be apparent upon an examination in detail of a few of the instances.

Case of William T. Hill.

Hill is a retail grocer handling tobacco products as well, in the small town of West Greenville, S. C. He testified on direct-examination by counsel for the petitioner that "a special man" called on him in November, 1921, offered to sell him Beech-Nut tobacco, which he did not buy, and that the man thereupon went on to ask him "how the Beech-Nut stuff sold, such as peanut butter, gum and so on." Hill thereupon asked the salesman if the Beech-Nut Company was putting out tobacco, and, "he talked on and I don't know I got any direct answer," but Hill was left under the impression that the petitioner was putting out tobacco (I, p. 724). Counsel for the petitioner did not inquire as to the name or description of this "special man" or identify him in any way. On cross-examination, the witness said that the man had not said he represented the Beech-Nut Packing Company, that the witness had bought no tobacco from him and that the witness had never had in stock either Beech-Nut cigarettes or Beech-Nut scrap tobacco. Hill further testified "later on someone came and asked me about the man coming here trying to sell Beech-Nut tobacco and that was the first I knew of it. I reckon it was around the latter part or the first of December they came in. That was the first I heard anything about it being wrong" (I, p. 725). The someone who came was the petitioner's repre-

sentative, and his visit resulted in the taking of Hill's testimony. Obviously, petitioner's representative would never have come to Hill unless the man who had tried to sell Beech-Nut tobacco likewise had come from the petitioner. The respondent went into West Greenville and took the testimony of other dealers in a further effort to get at the bottom of this incident. This investigation showed these dealers knew the tobaccos were Lorillard products and that Hills' case stood absolutely alone in that town (III, pp. 1863; 1865).

Case of Robert L. Bowen.

Bowen is a retail grocer also handling tobacco, in Spartanburg, S. C. On direct-examination by counsel for the petitioner he testified that in November, 1921 "a man came in and held it (a package of Beech-Nut cigarettes) up just like you (Counsel for petitioner), only not so far away" and the man said "I see you handle Beech-Nut peanut butter and I want to sell you some Beech-Nut cigarettes"; that witness refused to buy but said to the man, "It's funny that the Beech-Nut Packing Company is putting up cigarettes" to which the man said "yes" and went on out of the door (I, p. 744). Again, counsel for the petitioner did not endeavor to identify by name or description the man who interviewed the witness.

Counsel for the respondent on cross-examination brought out that the interviewer had not said that he was from the Beech-Nut Packing Company, although he made the witness think that he was selling cigarettes put up by them, and that when he went away the witness was under that impression. He left no credentials or card, and the witness had never seen him thereafter (I, pp. 748-9). Again representatives of the petitioner came along in about a month, made inquiries of Bowen, and later took his deposition (I, p. 745). Again in the process of investigation counsel for the respond-

ent examined every other dealer in Spartanburg with the result that Bowen's case likewise stood absolutely alone (III, pp. 1846, 1848).

The Case of William C. Weigel.

Weigel was a retail grocer handling tobacco in Milwaukee, Wisconsin. On direct examination by counsel for the petitioners he said that a man called upon him and sold him some Beech-Nut scrap tobacco, making delivery and taking payment in cash. The witness did not recall whether he asked the salesman directly or whether the salesman told him, but in any event he was given to understand "that this was a label that was only permitted on the very best products and was leased by the different companies that put out this product" (I, p. 561). As in the case of the other witnesses, counsel for the petitioner did not identify the salesman by name or description. Counsel for the respondent brought out that the salesman did not state what concern he represented, and that the jobbers from whom the witness normally bought Beech-Nut tobacco never told him that it was made by the Beech-Nut Packing Company.

Again counsel for the respondent took the testimony of dealers in the locality, all of whom testified that they had bought and sold the tobacco and cigarettes for varying lengths of time and always knew they were Lorillard's products from what the agents had said and from the packages and advertisements accompanying them (II, pp. 1430, 1459, 1524, 1538, 1551, 1566, 1568, 1569, 1571).

The Case of George B. Roach.

Roach was a grocer in the small town of Pembrooke, Kentucky. A travelling salesman made three visits to this store, the first of which was in August, 1921. According to the witness the salesman introduced himself as Mr. Bacon and

stated that he was representing Beech-Nut Tobacco. He gave Roach a package to try. The salesman reminded Roach that he knew the Beech-Nut trade-mark and what it stood for and that anything put out under it had to be of the highest quality and from this Roach testified he became "convinced that it was put out by" the petitioner (I, pp. 665-668). The witness did not buy any tobacco at that time nor did he examine the package. The second visit was about two months later. In the meantime Roach had seen an agent of the petitioner and accordingly he said to the salesman that he understood that the Packing Company "was raising Cain about them using their trade-mark" and the salesman replied that they had sold the trade-mark to the Beech-Nut Packing Company, reserving the right to this use on tobacco, and that one suit by the Packing Company had been lost and he didn't think that they could reverse it (I, p. 666). The third visit was around November 21, 1921. Roach was out and the salesman saw his clerk who testified that the salesman said he was Mr. Bacon of the Lorillard Tobacco Company and was handling Beech-Nut cigarettes and tobacco (I, pp. 684, 686). At page 677 it clearly appears that Roach did not buy any tobacco in the belief that it was a Beech-Nut Packing Company product.

It would unnecessarily extend this statement to detail the testimony of the other witnesses in this group. Like those which have been stated each of them was unique in the fact that the witness was the only dealer in his community who was approached by any one who endeavored to convey the impression that the cigarettes or tobacco were made by the petitioner, and in each case the salesman remained unidentified. The alleged visits were all made about October or November, 1921, long after scrap tobacco was an established product and shortly after the bill of complaint was filed and testimony was beginning to be taken in this suit. The other cases were those of Peterson Bros. (I, pp. 501 *et seq.*), Charles P. Cook (I, p. 695), Jefferson D. Hayden (I, p. 754).

Thus Mr. Hayden when buying the tobacco received a receipted bill therefor plainly displaying the name "P. Lorillard Company", and when testifying he not only had on his shelves other Lorillard brands of tobacco but in plain view a stack of Beech-Nut cartons eight feet high, on each of which appeared the name "Lorillard". And Petersen Bros. in fact were fully acquainted (II, pp. 1580-1).

Testimony of Petitioner's Salesmen.

Petitioner examined sixteen of its own salesmen, and it contends that their testimony proves not only wholesale deception of the trade but that three of these salesmen were themselves deceived. Every one of these salesmen on cross examination admitted that just as soon as he examined the package and saw the name P. Lorillard Company on it he was satisfied that it was not one of petitioner's products, and those who testified that they thought it was one of petitioner's products admitted that they had not examined or paid any attention to the package. Thus in the testimony of E. I. Ray appears the following: "X-Q.28. Do you know of the P. Lorillard Co., do you? A. Why, yes. X-Q.29. You know they are a large tobacco manufacturing concern and put out various brands of cigarettes? A. Yes. X-Q.30. This name, P. Lorillard Co., on this package of cigarettes would indicate to you that it was one of their brands? A. Yes." (I, p. 364.) Similarly O. A. HUBBARD testified:

> "X-Q.32. When you took this first package in your hand and examined it, you saw the name P. Lorillard Co. on it? A. I did. X-Q.33. That indicated to you that that was their product? A. It did; *just as soon as I got the package and examined it and saw the name 'P. Lorillard Co.' on it I was satisfied then.*" (I., pp. 101-2).

Their testimony as to the alleged deception of the trade took the indefinite form of stating that "hundreds" or "thou-

sands" or "innumerable" inquiries had been made of them as to the source of the tobacco products. The weight of this testimony may be appraised by the following illustrative question on cross examination. E. I. Ray was asked: "Do you know of your own knowledge if any of these people took the trouble to examine that package of cigarettes before they asked you that question? A. No. I don't" (I, p. 363).

It may also be appraised by a reading of the testimony given by some of these inquirers, which showed conclusively that such inquiries proceeded from careless inattention to the package and utter indifference to the manufacturer. Illustrative witnesses were Charles O. Larson (I, pp. 442-3); James J. Creevan (I, pp. 138-9, 141-2); Robert Greene (I, p. 275); James J. Marrinan (I, pp. 283-4); James J. Cashman (I, pp. 265-7); Clarence A. Wilkins (I, pp. 109, 111-2); Ida W. Wilkins (I, p. 121); Dorace L. Bottomly (I, pp. 168-9); T. J. Branigan (I, p. 287).

Thus CHARLES O. LARSON, named by Salesman Southern, said:

> "X-Q.6. Do you smoke cigarettes? A. No, sir. I wouldn't be caught with one in my mouth. X-Q.7. Do you chew tobacco? A. No, sir. * * * X-Q.11. Did you ever buy a package of those Beech-Nut cigarettes? A. No, sir. X-Q.12. Did you ever buy a package of that Beech-Nut scrap tobacco? A. No, sir. Have no use for it. X-Q.13. Did you ever take the trouble to look at a package? A. Have looked at it tonight. Never took trouble to closely examine it. X-Q.14. You never prior to tonight took trouble to read printing on the package? A. No, sir. I am not interested." (I, pp. 442-3).

And JAMES J. CREEVAN, named by Salesman Blanchard, testified:

> "X-Q.27. Did you ever buy a package of Beech-Nut cigarettes? A. No, sir; never smoked a cigarette in my life. X-Q.28. Did you ever go into a store and ask for a package of Beech-Nut cigarettes? A. No, sir. X-Q.29.

Did you ever carefully examine a package of Beech-Nut cigarettes? A. No, sir. * * * X-Q.33. Did you ever see Beech-Nut scrap tobacco? A. No, sir. X-Q.34. Like this package here that I show you? A. I never did see one before. * * * R-X.Q.58. Did you look at the cigarette package itself? A. I never saw the cigarette package until down here; you showed it to me. R-X.Q. 59. When was that? A. About ten minutes ago, just as I came up. R-X.Q.60. So the first time you saw a package of Beech-Nut cigarettes was today, August 19, 1921? A. Yes, sir." (I, pp. 138-9, 141-2.)

Other Witnesses Examined by Petitioner.

Counsel for the petitioner examined about thirty-five dealers, including those who testified to the seven cases of alleged misrepresentation, selected out of the thousands in the territory covered. The testimony of these dealers disclosed that none of them examined the package, that if the package had been so examined he would have seen Lorillard's name on it, and that that was the name of a tobacco company with which he was familiar. There was evidence also that these dealers were not representative of the trade but were hand-picked by counsel for the petitioner for the purpose of this suit. This was made evident by the testimony of witnesses offered by the respondent, who said that they had been interviewed by counsel for the petitioner and had been asked to testify to confusion in the minds of their customers, but when they explained that no such confusion existed, counsel for the petitioner did not take their testimony. Included in this group are L. G. Cauto (II, p. 971); Dennis T. O'Callahan (II, p. 1128); Ferdinand Bieringer (II, p. 919), Harry Klein (II, p. 990).

The petitioner also introduced certain other witnesses whose testimony on direct examination generally was to the effect that their first impression was that the tobacco products were made by the petitioner; but on cross examination they all admitted that they had never examined the package or the advertising, had never been interested

in who was the manufacturer, and in most cases had heard of the Lorillard Company and would have recognized its name if they had examined the package. Included in this group also were certain ardent anti-tobaccoists who testified that they experienced a feeling of disgust when they saw billboard advertising of the Beech-Nut scrap tobacco and gathered the impression, without reading the billboard, that the petitioner had gone into the tobacco business. Some of them testified that thereupon they resolved not to purchase any more of petitioner's products, although in each case the witness admitted that an examination of the package or the advertising would have set him right, and subsequently did.

A fair statement of the import of this testimony is that Petitioner has assembled some witnesses (a comparative few when the enormous extent of the two businesses are considered) who had, and on direct examination testified to, mistaken first impressions. But with great unanimity these witnesses frankly admitted on cross examination that their mistaken impressions were due to their own careless inattention to the packages, which in turn was due to their lack of interest in the source of manufacture. And they go further and say that had they taken the trouble to examine the packages they would have known they were the output of "Lorillard", the well-known tobacco manufacturer.

In Appendix A we have quoted from the testimony of each of the witnesses relied upon by Petitioner in its Appendices A and B and we refer the Court thereto for complete substantiation of our statements.

Misaddressed Letters.

Petitioner also introduced some seventy letters, most of which were orders (with a few requests for advertising) which had been received by it and which it is alleged indicated that the writer had been under the impression that petitioner was the manufacturer of the scrap and the cigarettes. These letters bear dates ranging from December 16,

1915 to October 18, 1923. During this period of nearly eight years thousands upon thousands of orders were sent in for these products and it is not astonishing that the petitioner received this relatively small number of missent communications.

One of these letter writers, William L. Miller, an advertising agent, was examined, and he confirmed what the misdirection of the letters would indicate—complete inattention and gross carelessness. He testified that having seen an advertisement in the New York Evening Sun of the Beech-Nut cigarette, he sent a letter to the petitioner in an effort to get some advertising for another magazine, because he thought the petitioner was putting out the cigarettes. On cross examination he admitted that he had known Lorillard for twenty years at least, was actually carrying advertisements for Lorillard when the incident occurred and in fact noticed the name P. Lorillard Company on the particular advertisement when he had cut it out and sent it to the petitioner (V, p. 2475).

Witnesses for the Respondent.

Respondent likewise introduced twelve of its salesmen located in various parts of the country, who testified that when the cigarettes were first introduced, one or two or perhaps half a dozen inquiries were made as to who was the manufacturer of the scrap or cigarettes. These witnesses testified that they regularly featured the name Lorillard in introducing themselves.

In addition to its own salesmen respondent took the testimony of a great many dealers in all parts of the country. Each of them with very few exceptions handled the products of both parties so that any confusion, if it existed, would be within their knowledge. They represented stores of all sizes and were drawn from different kinds of communities. Every effort was made to have this group of witnesses truly

representative of the chain stores, newspaper stands and restaurants, drug stores, grocery stores, general stores, etc., in which both products were likely to be sold. Exclusive of the many dealers who gave no figures, these witnesses disclosed that out of 110,500 customers who *daily* patronized their stores during all the years that respondent's Beech-Nut tobacco products had been on the market there were less than 100 comments or inquiries suggesting confusion or doubt in the mind of the public as to who was the maker of the tobacco product. It is perfectly obvious that no matter how great the difference between products may be, a minimum of confusion is likely to occur. Beyond all doubt this case presents the minimum.

Thus in Philadelphia respondent took the testimony of fifteen dealers whose combined customers averaged about 11,000 a day (II, pp. 1254-1335). Each of them who handled scrap or cigarettes or both knew them to be Lorillard products. Not one of them had ever heard any comment or inquiry indicating confusion in the trade. In Pittsburgh the respondent examined sixteen representative dealers whose combined customers averaging about 15,000 a day (not including seven who gave no figures) (III, pp. 1925-1962). Only one of them had ever heard any comment or inquiry indicating confusion and that was Joseph J. Rosswog with 500 customers a day, who had heard not more than four or five such inquiries (III, p. 1945). In other cities the experience was the same. Eleven dealers were examined from McKeesport, Pa. and vicinity, fifteen from Boston, eight from West Lynn and Salem, Mass., seven from Lawrence and Worcester, Mass., five from Springfield and Holyoke, Mass., nine from Wheeling, West Virginia, eleven from Baltimore, Md., four from Gary and Indiana Harbor, Ind., seven from Knoxville, Tenn., twenty-eight from four cities in Kentucky, twenty-one from three cities in North Carolina, fifteen from four cities in South Carolina, ten from

Milwaukee, nine from Manitowoc, Green Bay and Two Rivers, Wisconsin, eighteen from Hartford, Conn., ten from West Haven and New Milford, Conn., nine from Bridgeport, Conn., five from Norwalk and South Norwalk, Conn., and twenty-six from Chicago.

As illustrative of the testimony of these witnesses Peter Peters said: "If anybody asked me who makes it I would say, 'See the package,' that is all" (II, p. 1142). Samuel S. Broadbent said: "I saw the advertisements when they first came out in the paper saying they were made by Lorillard" (II, p. 1156); and Haskell Sharf said: "They know just as well as I did who was making it, because they always saw it advertised on the posters in the windows, see,—Beech-Nut cigarettes made by P. Lorillard, so you see they saw it before they came into the place. Their question was answered in the window on the posters" (II, p. 939).

It was upon the testimony of these witnesses, as well as upon the cross-examination of the petitioner's witnesses, that the District Court found and the Circuit Court of Appeals affirmed that there was no confusion and no effort on the part of the respondent to palm off its goods as those of the petitioner. It is apparent therefore that there was abundant support in the record for the finding of fact which was concurred in by the two courts below, and that this finding was based on a full survey of the country-wide situation in respect of both products.

Introduction and Summary of Argument.

The petitioner sought relief on two grounds: first, that there had been infringement of its trademark in the adoption by the respondent of the name "Beech-Nut"; second, that there had been unfair competition entitling petitioner to restrain the use of the "Beech-Nut" mark on tobacco because of alleged confusion in the public mind and injury to the petitioner.

The Respondent answered that there was no ground for relief on either of these contentions because of the utter dissimilarity of the names, packages, products and businesses of the respective parties and the long and wide use of "Beech-Nut" as a mark for tobaccos. Further, Respondent denied that it had palmed off its goods as those of Petitioner or had caused any confusion or injury as alleged, and contended that the long-continued acquiescence by the Petitioner in the sale of Scrap Tobacco between the years 1915 and 1919, during which time the business of Respondent on this brand had grown in the extraordinary amount and at the immense expenditure previously set forth in the statement of the case, made it inequitable for the Petitioner to have the drastic relief for which it prayed.

What the Lower Courts Decided.

In resolving the issues raised by these contentions, it is apparent that the decision was altogether a determination of fact. In making this determination both lower courts had before them a voluminous record containing the testimony, taken by deposition and in open court, of approximately 500 witnesses, and numerous extensive exhibits. Every effort was made to present the history and experience of both businesses in complete detail. With this record before them both courts below agreed upon three propositions, all of which were in the respondent's favor.

The *first* was that there was no trade mark infringement because foods and tobacco are not goods of the same descriptive properties.

The *second* was that the respondent's labels, products and business were too utterly unlike the petitioners to be the occasion of any unfair competition and that no "palming off" had occurred.

The *third* was that the public had not been misled or confused by the respondent's conduct, and that the petitioner had not been injured in any way.

In addition, the District Court considered the question of alleged abandonment of the Beech-Nut trade-mark by the respondent, and found that there had been no abandonment during the years 1911-1914, when no sales of Beech-Nut tobacco had been made.

In their opinions the Courts below considered the three decisions now alleged to be conflicting, in the second and sixth circuits, a conflict which was relied upon when the Writ of Certiorari was sought. These three cases are considered in detail subsequently in this brief. It is enough here to say that the Courts below did not criticise or depart from them in any way. To the extent that they differ in result, that difference was based on a difference in fact and not a difference in legal principle. Citing and following the very cases on which petitioner relies, the inquiry, in the language used below, was whether, as a matter of fact, "within the principles announced in those cases, or in any other way, has the defendant injured the plaintiff in its property or reputation." Indeed it was expressly stated, as the underlying principle, that "if by unfair and fraudulent means the plaintiff is injured and the public deceived, equity will enjoin whether the injury comes through competition or in some other way."

And thus it becomes plain that Petitioner's quarrel with the decisions of the Courts below is not any failure in them to recognize and apply the principles of these cases on which petitioner relies, but the finding that even "within the principles of those cases" respondent had not injured petitioner or deceived the public—a question of fact purely.

Petitioner would have this Court believe that every consumer was deceived. This astounding statement is repeated with varying emphasis in the Petitioner's brief no less than twenty-seven times by actual count. In the teeth of the express findings of the lower Courts, it is asserted and reasserted that "absolutely the entire purchasing public of the U. S. has been and is being deceived" (Brief, p. 75) by the

Lorillard use of the Beech-Nut Trade Mark. The claim rises to a climax of absurdity in the suggestion (Brief, p. 278) that "In effect the Court below rules that the universal deception of the public has resulted solely from the carelessness or stupidity of the hundred million inhabitants of the United States * * *".

We prefer to accept the statement of Petitioner's letter written to Respondent in 1919 after the "sunburst" scrap package had been on the market some four years and its sales had exceeded the total sales of Petitioner, saying that its Executive Committee suggested using the "sunburst" for the forthcoming cigarette package because this use

> "will immediately apprise the prospective purchaser that the cigarettes are made by the same company manufacturing the popular Beech-Nut tobacco" (VI, p. 2912).

And we refer the Court to the quotations in Appendix "A" from the testimony of a great number of these witnesses for Petitioner, from which the court will see that each of these witnesses frankly admitted that their mistaken first impressions came entirely from their own carelessness in failing to examine the package, that had they examined the package they would have known it was a tobacco product put out by Lorillard, the well known tobacco manufacturer.

Said the Circuit Court of Appeals:

> "The evidence shows that its goods have in no way been confused with those of the plaintiff, so that, when a purchaser desired a certain brand of plaintiff's goods, he in fact secured those of defendant. Defendant carefully made prominent in its label the Lorillard origin of its products. The difference between their labels is so great and distinctive that any purchaser, paying ordinary attention, need not and should not be mistaken, and certainly not deceived. * * *
>
> "The evidence, in our opinion, conclusively shows that both parties have acted in perfect good faith. Both have

used the word 'Beech-Nut' on their respective, but very different, labels because they thought that they had the legal right to do so. The plaintiff adopted its trade mark without knowledge of the 'Beech-Nut' trade mark of the Harry Weissinger Tobacco Co. The defendant naturally adopted the 'Beech-Nut' trade mark for its products, because it owned the old Harry Weissinger trade mark and thought it was acting within its legal rights. The plaintiff is proud of its 'position substantially at the top of a highly competitive industry.' The defendant is one of the great tobacco companies of this country with a Lorillard reputation stretching back into three centuries. Neither needed nor desired the reputation of the incompatible business of the other. The evidence does not disclose anything on which infringement of the trade mark or unfair competition can be based." (7 F. (2nd) at p. 971).

The Writ of Certiorari was Improvidently Granted.

Upon the foregoing facts this case, if it is to be reviewed at all by this court, falls clearly within and will be governed by the rule applied in *Joseph Schlitz Brewing Co.* v. *Houston Ice & Brewing Co.*, 250 U. S. 28, 29, a case likewise of alleged trade-mark infringement and unfair competition heard on certiorari where there was diversity of citizenship, also testimony to confusion by purchasers (241 Fed. p. 819), and this Court said:

> "This is a bill in equity, brought to restrain the use of a trade-mark alleged to infringe the plaintiff's, or at least to be used in a way that is calculated to deceive and unfairly to interfere with the plaintiff's good will. Both courts have found for the defendant (154 C. C. A. 519, 241 Fed. 817), so that the only question that we shall consider is whether, *upon inspection*, it can be said *as matter of law* that the *admitted* acts of the defendant are a wrong of which the plaintiff can complain."

It is apparent that the issues now before this Court are issues of fact upon which both Courts below have agreed. The petitioner sought the Writ of Certiorari on an alleged conflict of decision in point of law between this case and decisions in other Circuits. But in view of the complete agreement in legal principle between these Circuits, as will fully appear hereinafter, it is respectfully submitted that the Writ of Certiorari was improvidently granted. Since there remains nothing for this Court to consider except a review of issues of fact. the writ should be dismissed and the judgments below affirmed.

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 509;
Layne and Bowler Corporation v. *Western Well Works*, 261 U. S. 387, 393;
Houston Oil Company v. *Goodrich*, 245 U. S. 440.

Summary of Respondent's Argument.

The argument for the respondent in the brief following is divided into seven sections.

First, the petitioner properly was denied relief on its claim of trademark infringement because foods and tobacco are not goods of the same descriptive properties.

Second, the petitioner properly was denied relief on its claim of unfair competition because there had been no palming off of the respondent's goods as those of the petitioner. The parties are not trade rivals. Their names, packages and entire businesses are utterly dissimilar.

Third, the use of the word "Beech-Nut" by Petitioner in its corporate name gives it no right to complain of the use of that word in the tobacco trade.

Fourth, there is no conflict of opinion between the Circuit Courts of Appeal: Alleged conflicting decisions of the Second Third and Sixth Circuits and in England distinguished.

Fifth, the petitioner is barred by laches, acquiescence and estoppel from obtaining any relief because it has stood by for a period of years and without objection permitted the respondent to build up to a valuable business. It now seeks to destroy that business and to obtain the profits that have been made without protest by it.

Sixth, the petitioner has failed entirely to establish any damages to itself as result of the alleged unlawful conduct of the respondent.

Seventh, there was no abandonment by the respondent of its rights in the "Beech-Nut" name during the year 1911-1914 when no actual sales were made of "Beech-Nut" tobacco.

ARGUMENT.

POINT I.

The petitioner properly was denied relief on its claim of trade-mark infringement because the goods of the petitioner and respondent were not of the same descriptive properties.

Petitioner's Use and Registration of "Beech-Nut."

The petitioner was incorporated in 1899 under the Laws of New York and took over all the assets, trade-marks, etc., of Imperial Packing Company at that time. Imperial had been using the name "Beech-Nut" from 1891 on its products which had consisted chiefly of hams and bacon (IV, p.

2156). From year to year petitioner's products have increased in variety, but they have not only all been food products, but the particular class of food products which may be described as "delicatessen." In 1903 they included hams, bacon, chipped beef, grape jam, cramberry sauce, etc. During the next six years there were added marmalades, fruit jams, preserves, jellies, baked beans, sausage, candy in glass jars, catsup, sea foods, vegetables, etc. During 1911-1914, there were added olive oil, chewing gum, condiment sauce, sardines, etc., and during 1915-1920, there were added wintergreen, clove, and other compressed tablets, ginger ale, cough drops, peanut bars and caramels. A schedule of petitioner's products appears at page 2784 of Vol. VI.

From time to time petitioner and its predecessor registered "Beech-Nut" for its various products, the most comprehensive registration being the one asserted in this suit, No. 89613, made December 31, 1912 (I, p. 21). This was a registration made in the United States Patent Office in which the petitioner declared it had adopted for its use the trade-mark shown in the drawing attached to the declaration as its trade-mark for a large number of products ranging from hams and bacon to candies and chewing gum described in the statement as "all in class 46, foods and ingredients of foods."

Aside from the abortive attempt, hereafter discussed, to register the Beech-Nut mark for cigarettes, the petitioner has confined its use of the mark entirely to food products, so classified both under the Trade Mark and Pure Foods Acts.

The Trade Mark Act and Decisions of this Court Recognize that the Same Mark may be used on Goods which do not possess the "Same Descriptive Properties."

Both under the common law and the Trade-mark Act (Act of February 20, 1905, 33 Stat. 724), the principle long has been established that the same word or mark may be regis-

tered and used by one party for one product and by another party for another product if the respective products are not goods of "the same descriptive properties." See Section 1 and 5 of the Trade Mark Act, 35 Stat. 628; 37 Stat. 649.

The leading case in this Court on the subject is *Delaware & Hudson Canal Co.* v. *Clark,* 13 Wall. 311. There the Court said at page 323:

> "The first appropriator of a name or device pointing to his ownership, or which, by being associated with articles of trade, has acquired an understood reference to the originator, or manufacturer of the articles, is injured whenever another adopts the same name or device for similar articles, because such adoption is in effect representing falsely that the products of the latter are those of the former."

The doctrine of this case has been restated in *McLean* v. *Fleming,* 96 U. S. 245; *Amoskeag Mfg. Co.* v. *Trainer,* 101 U. S. 51; *Lawrence Mfg. Co.* v. *Tennessee Mfg. Co.,* 138 U. S. 537, 547, and *Columbia Mill Co.* v. *Alcorn,* 150 U. S. 460, 463. It is expressly carried into the Statute by Section 16 of the Trade Mark Act, 33 Stat. 728, fastening liability for infringement on one who uses another's mark on goods of "substantially the same descriptive properties."

More recently in two cases, the doctrine has been reexamined and restated. In *Hanover Star Milling Co.* v. *Metcalf,* 240 U. S. 403, 412, this Court said:

> "Where a party has been in the habit of labeling his goods with a distinctive mark, so that purchasers recognize goods thus marked as being of his production, *others are debarred from applying the same mark to goods of the same description,** because to do so would in effect represent their goods to be of his production and would tend to deprive him of the profit he might make through the sale of the goods which the purchaser intended to buy."

---

*Italics in this brief are ours unless otherwise indicated.

In *United Drug Company* v. *Rectanus,* 248 U. S. 90, the same doctrine was reaffirmed, and the Court took occasion to point out in language especially applicable to this case that the adoption of a trade-mark will not preempt the field to the owner of that trade-mark beyond the same kind of goods upon which it has been appearing. The Court said at page 98:

> "It results that the adoption of a trademark does not, at least in the absence of some valid legislation enacted for the purpose, project the right of protection in advance of the extension of the trade, or operate as a claim of territorial rights over areas into which it thereafter may be deemed desirable to extend the trade."

The leading English case on the subject states the same doctrine and may be quoted for its classic illustration of the linen and the iron.

In *Ainsworth* v. *Walmsley,* L. R. 1 Eq. 518, 524, Vice Chancellor Sir Wm. Page Wood said.

> "He has no property in that mark *per se,* any more than in any other fanciful denomination he may assume for his own private use, otherwise than with reference to his trade. If he does not carry on a trade in iron, but carries on a trade in linen, and stamps a lion on his linen, another person may stamp a lion on iron."

The doctrine is stated and discussed with numerous illustrations from decided cases in *Nims on Unfair Competition and Trade-Marks,* 2 ed., Sec. 221.

These decisions and the provisions of the Trade Mark Act have, of course, been accepted by the Federal Courts as expressing and establishing the law on this subject. With them the question has been not the authoritative existence of the principle but whether or not as a matter of fact the respective products in the particular case were goods of the

"same descriptive properties". And such is also the law of the States and in England.*

In accordance with the long established principle announced by these cases the Patent Office provides in its regulations than an applicant for the registration of a trade-mark must specify the class of goods in respect of which he desires registration. Indeed the statute so requires, the Act providing that the applicant must state in his application "the class of merchandise and the particular description of goods comprised in such class to which the trade-mark is appropriated." (35 Stat. 628).

The Patent Office has established some fifty classes of merchandise to guide applicants in making applications for registration of trade-marks. An extract from the Patent Office's pamphlet on this subject is printed at page 2941

---

*See in the Eighth Judicial Circuit: *Layton Pure Food Co.* v. *Church & D. Co.*, 182 Fed. 35, 37, and *Atlas Mfg. Co.* v. *Street*, 204 Fed. 398, 405-6; in the Seventh Judicial Circuit: *Borden's Ice Cream Co.* v. *Borden's Condensed Milk Co.*, 201 Fed. 510, 514, and *Enoch Morgan's Sons Co.* v. *Ward Co.*, 152 Fed. 690; in the Sixth Judicial Circuit: *Peninsular Chemical Co.* v. *Levinson*, 247 Fed. 658, and *Vogue Co.* v. *Thompson*, 300 Fed. 509; in the Third Judicial Circuit: *Rosenberg Bros. & Co.* v. *Elliott*, 7 F (2d) 962; *Beechnut P. Co.* v. *P. Lorillard Co.*, 7 F (2d) 967; *Akron-Overland Co.* v. *Willys-Overland Co.*, 273 Fed. 674, and *Lawrence* v. *Sharpless*, 203 Fed. 762; in the Second Judicial Court; *Aunt Jemima Mills Co.* v. *Rigney*, 247 Fed. 407; *National Picture Theatres* v. *Foundation Film Corp.*, 266 Fed. at p. 211; *Charles Broadway Rouss* v. *Winchester*, 300 Fed. 706, and *France Milling Co.* v. *Washburn Crosby Co.*, 7 F (2d) 304; in the D. C. Court of Appeals: *American Tobacco Co.* v. *Gordon*, 10 F (2d) 646; *Pittsburg Co.* v. *Ruben*, 3 F (2d) 342; *Oppenheim* v. *President Suspender Co.*, 3 F (2d) 88; *Vacuum Oil Co.* v. *Gargoyle Textile Corp.*, 285 Fed. 1002; *Paul F. Beich Co.* v. *Kellogg*, 262 Fed. 640; *Anglo-American Co.* v. *General Electric Co.*, 43 App. D. C. 385; *Lord & Taylor* v. *Wolf & Sons*, 41 App. D. C. 514; *Quaker Oats Co.* v. *Mothers Macaroni Co.*, 41 App. D. C. 254; *Johnson Educator Food Co.* v. *Sylvanus Smith Co.*, 37 App. D. C. 107; in the States *Corning Glass Works* v. *Corning Cut Glass Co.*, 197 N. Y. 173; *Hub Dress Mfg. Co.* v *Rothenberg*, 237 Mass. 281; *Va. Baking Co.* v. *So. Biscuit Works*, 111 Va. 227; and in England *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.* (H. of L. 1907), 24 R. P. C. 572, 580, (1907) L. R. App. Cas. 430; *Scottish U. & N. Ins. Co.* v. *Scottish N. Ins. Co.*, 26 R. P. C. 105; *Borthwick* v. *The Evening Post*, L. R. 37 Ch. D. 449; *Hall* v. *Barrows*, 4 DeG. J. & S. 150, 158-9.

of Vol. VI. Foods and ingredients of foods make up Class 46. Tobacco products are class 17.

Tobacco Products and Food Products Do Not Have the "Same Descriptive Properties."

On this aspect of the case the question becomes ultimately a question of fact as to whether the food products of the petitioner are goods of the same descriptive properties as the tobacco products of the respondent. In litigation between the parties in this suit this issue has been resolved against the petitioner no less than four times.

In 1919 after four years of silence on the part of the petitioner regarding the use of the Beech-Nut name, and during which period the respondent's scrap tobacco business had grown from 7,000,000 pounds in 1915 to 27,000,000 pounds in 1919 (VI, p. 2968), the respondent began preparation for marketing a Beech-Nut cigarette. A sample label prepared for this purpose reached the petitioner and in an endeavor to forestall the respondents' plans, the petitioner had The American Tobacco Company manufacture for it 2,060 cigarettes at a cost of $11.85 (I, p. 791; VI, p. 2831). These cigarettes were packed in plain white boxes with black printing. A label which appears as Exhibit 22 in Vol. VI, page 2999, similar to the petitioner's usual label was never used (IV, p. 2169).

The respondent, hearing of these activities, wrote the petitioner on June 28, 1919, asserting the ownership of the Beech-Nut name for tobacco products and demanding that the petitioner cease its use for cigarettes (VI, p. 2902). Correspondence ensued regarding the label proposed to be used by the respondent, and during the progress of this correspondence the petitioner applied for the registration of the Beech-Nut for cigarettes under the Trade-Mark Act.

The respondent opposed the application, filing its opposition under the provisions of Section 6 of the Trade-Mark Act. The basis of the opposition was that the respondent

was entitled to use the Beech-Nut name on tobacco products in view of its adoption and use of this name continuously since 1896, or at least since 1915 on scrap tobacco.

After an extended hearing, the Examiner of Interferences denied the application (VI, p. 2821). On appeal to the Assistant Commissioner of Patents, this decision was affirmed and registration was refused (VI, p. 2830). The basis of both decisions was that the goods were not of the same descriptive properties and that therefore the same name could be used by different parties on goods so differing. No further appeal was taken from the decision of the Assistant Commissioner.

Again, in the District Court in the present suit, the petitioner was defeated on its charge of trade-mark infringement upon the ground that the goods marketed by the two parties were not of the same descriptive properties (V, p. 2669). Again in the Circuit Court of Appeals in the decision now under review, the petitioner's contention met with defeat on the same ground (V, p. 2700).

There can be no question that these four adjudications arrived at the right result on the issue of fact before the respective tribunals. Before considering the authorities relied on in these decisions to support the results reached, a brief examination of the two products may be made.

In 1922, 10,291 concerns in the United States were engaged in manufacturing tobacco with an annual output of a value of $1,012,932,000., consisting of cigarettes, cigars, chewing and smoking tobacco and snuff (V, p. 2632). Not one of these manufacturers ever has made or marketed food products (I, 791; V, pp. 2555, 2614, 2634). Dating from 1760 when Pierre Lorillard opened his factory in what is now Bronx Park, New York, tobacco products of every kind and only tobacco products have been manufactured under the "Lorillard" name by respondent and its predecessors. The consumers of these products are mostly men. Tobacco is a narcotic. It is in no sense a food. Its active element is a

poison called "nicotine" which, when extracted, is used only as an insecticide for such purposes as spraying plants and dipping sheep.

On the other hand the petitioner has never made or marketed anything but food (I, p. 790) which it sells under its widely published slogan "Foods of finest flavor". Women and children are the chief buyers (I, pp. 385, 856). All of petitioner's products are embraced in the Pure Food Act (I, p. 790; V, p. 2510) and this statement, of course, includes chewing gum. No tobacco product is thus included. All tobacco products long have been the subject of heavy taxation under the Internal Revenue Laws. None of petitioner's products is thus taxed. Every witness in this case who testified on this subject, stated that tobacco and food products are distinct and unrelated products and are so recognized in the trade.*

No manufacturer of food products has ever made or sold tobacco products, and no manufacturer of tobacco products has ever made or sold food products. This is the testimony of witnesses whose recollection extends back 25 to 40 years, during all of which time they have been actively in the tobacco business (V, pp. 2555, 2614, 2634). This was admitted by Mr. Barbour, Petitioner's vice-president, when he said:

> "X-Q.48. Did you ever know a concern that was manufacturing package or food products that was engaged

---

*Examples from among Petitioner's witnesses are:

Bryon O. Foster (I, pp. 692-3); Albert Levy (I, p. 411); John E. Watson (I, p. 417); William H. Sage (I, p. 422); William C. Wiegel (I, p. 564); Henry Butcher (I, p. 246); Richardson S. Marks (I, p. 776); George B. Roach (I, p. 675); William T. Hill (I, p. 728).

Examples from among Petitioner's salesmen are:

Roy B. Southern (I, p. 398); Albert B. Lewis (I, p. 403); O. M. Wesling (I, p. 534); Wyatt P. Jennings (I, p. 736).

Respondent's witnesses likewise so testified:

Samuel Rackmales (II, p. 1203); Ferdinand Bieringer (II, p. 918); J. S. Weiner (III, p. 1673); David Kossack (III, p. 1682); Morris Gold (III, p. 1782); William Waschler (II, p. 1257); Harry Klein (II, pp. 992-3); David Ornstern (II, p. 1285).

in the manufacture of tobacco? A. I do not know of any—cannot think of any at this time" (I, p. 791).

There are a few dealers in, not manufacturers of, food products who have special brands made for them. The evidence makes this very plain (V, pp. 2465, 2614-5). But this practice is not nearly so common now as it was 25 years ago. Today there exist only the "Bon Voyage" cigarettes of Charles & Company, a retail grocery concern, the "Black & White" cigarettes of the Liggett Chain of drug stores, and the "Tilford" cigars of Park & Tilford, another retail grocery concern. These instances are dwelt upon in Petetioner's brief (p. 135), but Mr. Belt, a vice-president of Respondent, characterized these brands as "so infinitesimal" that no attention need be paid to them (V, p. 2616).

These practical differences are reflected in the attitude taken by the Patent Office toward trade-mark registrations involving these products.

Hon. James T. Newton, a former Commissioner of Patents, who had served twenty-eight years in the Patent Office and had there been in charge of the Trade-Mark Division, testified that it had been the office practice for years to register the same word for foods and for tobaccos on the application of different parties because they never were regarded as goods of the same descriptive properties (V, pp. 2518, 2520). By way of illustration, the witness produced three large volumes containing a great multitude of instances of the registration of the same word by one concern for foods and by another for tobaccos, which are not in the printed record but will be exhibited at the hearing. The registrations are summarized, however, in Vol. VI, p. 2924.

Court Decisions Deny "Same Descriptive Properties" to Food Products and Tobaccos.

The courts, whenever the question has arisen and in whatever form, have consistently held that tobacco products and

food products are not goods of the same descriptive properties.

In *Pittsburg Brewing Co.* v. *Ruben* (App. D. C. 1925) 3 F. (2d) 342, 343, the Court said:

> "It is true that soft drinks and stogies are frequently kept on sale at the same stands, but this fact does not go far towards determining the 'Descriptive properties' of the goods, for it is well known that most retail stores deal in a variety of articles of diverse character. And when soft drinks and stogies are considered with reference to their component materials, processes of manufacture, and manner of consumption, it becomes evident that they are not goods of the same descriptive properties, and they are not so regarded in common understanding. Moreover, it is safe to assume that soft drinks and tobacco products are not often, if ever, made or marketed by the same manufacturer".

In *California Packing Corp.* v. *Price-Booker Co.* (App. D. C. 1922) 285 Fed. 993, 995, the court illustrated its idea of distinct classes of products by saying:

> "For instance, no one would be deceived into believing that a can of tobacco and a can of peas were put out by the same concern, simply because they bore similar trade marks."

In *State* v. *Ohmer*, 34 Mo. App. 115 it was held that tobacco is not a food within the meaning of the laws forbidding sales on Sundays except of food and other necessities, the Court saying:

> "Food is a substance that promotes the growth of animal or vegetable life. There is no nutrition in tobacco. It is merely a narcotic. It is not generally regarded as an article of food. It could hardly be said that an indictment for selling unwholesome food could be sustained by proof the defendant sold a bad or unwholesome cigar."

And in *Liggett & Meyers Tobacco Co.* v. *Cannon,* 132 Tenn. 419, the court held chewing tobacco was not a food within the rule of law that in the sale of food products there is an implied warranty of fitness for consumption, saying:

> "We think it manifest that tobacco is not a foodstuff. It does not tend to build bodily tissue and as to the average adult its tendency is widely thought to retard the building up of fatty tissue. In respect to its use by the young, it cannot be doubted that it tends to stunt normal development and even growth in stature. The desire or appetite for food is natural and common to all of the human race, while the desire for tobacco must be created" (p. 423).
>
> "Foods are used as a matter of necessity in the support of life by all mankind from the infant to the aged. The legislatures have accordingly undertaken to give safeguards to the consuming public by way of pure food statutes. Tobacco has not been so treated. On the contrary it has been deemed a fit article on which to levy heavy internal revenue taxes, and as we have seen, the sale of tobacco in certain forms has been restricted, and undertaken to be prevented by statute. It is, we think, apparent that the same consideration of public welfare cannot support the enlargement of the class of foodstuffs so as to include tobacco even in the form of chewing tobacco, and that public policy as thus far declared is, as it should continue to be, not favorable to a classification that would protect its ultimate consumer under the rule above outlined" (pp. 424-5).

Use of the Same Mark by One Concern for Foods and by Another for Tobacco Has for Years Been a Universal Trade Custom.

For years it has been the universal custom in this country, sanctioned by the patent office through its classification and registrations as above stated, for the same mark to be used by one concern for its food products and by another concern for a tobacco product. This is thoroughly established by the record and is a fact of the utmost importance and has often been held determinative of the issue involved.

There are inserted at the end of this brief, by way of illustration, several pictures of physical exhibits presented to the courts below, to indicate the extent to which the same trade-mark has been used by one concern for tobaccos and by another concern for foods. In addition to the mute argument of these pictures, it may be recalled that the following duplications have existed in the market and that very frequently these products covered by the same name have been sold in the same stores and from the same counters.

"Apple" tobacco and "Apple" chewing gum.
"Star" tobacco and "Star" hams, milk, soap, washing fluids, etc.
"Sunshine" cigarettes and "Sunshine" Biscuits.
"Velvet" tobacco and "Velvet" Ice Cream.
"Eureka" tobacco and "Eureka" chocolates.
"Comet" tobacco and "Comet" rice.
"Polo" cigarettes and "Polo" canned goods.
"Tiptop" tobacco and "Tiptop" bread.
"Murad" cigarettes and "Murad" canned corn.
"Pall Mall" cigarettes and "Pall Mall" candy.

The illustrations in the picture are three very well known trade-marks now in general use, namely "Camel", "Mogul" and "Omar", each of which is being employed on an extensively sold line of cigarettes and at the same time on a broad list of food products similar to the petitioner's.

It appears therefore that the products of the petitioner and respondent differ widely in their ingredients, in the type of purchasers, and in the manner in which they have been treated under the pure food and revenue laws. These differences have been respected in a long administrative practice in the Patent Office which has registered the same name for food products and for tobaccos. This administrative practice has been approved by the courts wherever the issue has been raised. Furthermore, in the commercial world precisely the same situation exists in respect of numerous familiar trade-marks now in extensive use on both food prod-

ucts and tobaccos. In this state of the record the courts below were clearly right in concluding that food products and tobaccos are not goods of the same descriptive properties, and that consequently no suit would lie for an alleged infringement by the petitioner against the respondent on the ground of trade mark rights.

The Classification Rule in Trade Mark Law Is Sound in Principle.

The petitioner challenges this conclusion in this Court with the argument that the principle of classification, long embedded in the trade-mark law, is arbitrary and unsound and that where actual confusion of origin is shown to exist, trade-mark infringement must be recognized.

This argument may be met on several grounds. In the first place, as heretofore has been pointed out, courts of equity apart from statute had developed the doctrine of goods of the same descriptive properties long before Congress enacted any trade mark legislation. The statutory classification therefore merely followed familiar equitable doctrines and after the statute had re-enunciated these doctrines, this Court has had occasion again to consider the question and has adhered to the principle. A doctrine so thoroughly established ought not longer to be debatable.

But there are more serious objections to the petitioner's contention. If it prevails the barrier between goods of different classifications would be broken down and the registering of a trade-mark for any class of goods would give to that registrant a universal trade-mark for any article he might thereafter market. This Court has stated the objection to this doctrine in *D. & H. Canal Co.* v. *Clark,* 13 Wall. 311, 323:

> "No one can claim protection for the exclusive use of a trade-mark or trade-name which would practically give him a monopoly in the sale of any goods other than those produced or made by himself. If he could, the public would be injured rather than protected, for competition would be destroyed."

and this language was quoted with approval in *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 446, 454. This would lead to the very conflict which this Court had before it in *United Drug Co.* v. *Rectanus Company*, 248 U. S. 90, where the same mark had come into use in different parts of the country, each party being ignorant of the use by the other. The Court said at page 27:

> "The asserted doctrine is based upon the fundamental error of supposing that a trade-mark right is a right in gross or at large, like a statutory copyright or a patent for an invention, to either of which, in truth, it has little or no analogy."

This court plainly intimated in that case that it would require legislation especially directed to that end to make the trade-mark protection run beyond the scope of the owner's present activity either territorially or in respect of class of product. The petitioner's contention here would permit the trade-mark protection to run beyond the scope of the present activity not only territorially but also into totally unrelated products.

Such a principle is entirely at variance with the nature of the property in a trade-mark. For the petitioner's doctrine would give property rights upon the mere adoption of a mark. But as this Court said in *Hanover Milling Co.* v. *Metcalf*, 240 U. S. 403, 413:

> "As was said in the same case (*Trade Mark Cases*, 100 U. S. 82, 94) the right grows out of use, not mere adoption."

And it would give property rights separate and independent from an existing business, whereas this Court said in the *Hanover* case at page 414:

> "In short, the trade-mark is treated as merely a protection for the good-will, and not the subject of property except in connection with an existing business."

And in *United Drug Co.* v. *Rectanus Co.*, 248 U. S. 90, 97:

> "There is no such thing as property in a trade-mark except as a right appurtenant to an established business or trade in connection with which the mark is employed."

The rule of "same descriptive properties" preserves the essential character of the property in a trade mark and should not be set aside.

POINT II.

The petitioner properly was denied relief on the claim of unfair competition.

The argument heretofore has been confined to the question of technical trade-mark infringement and has been directed to establish that the petitioner was not entitled to relief on that ground because its goods and those of the respondents were not goods of the same descriptive properties. This Court has frequently observed, however, that trade-mark law is but a branch of the broader law of unfair competition. *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 413; *United Drug Company* v. *Rectanus*, 248 U. S. 90, 97; *American Steel Foundries* v. *Robertson*, 269 U. S. 372, 380.

The principles upon which equity will give relief on the ground of unfair competition, where technical trade-mark infringement is not established, have been settled by a long line of cases and may be illustrated by brief extracts from these decisions. Throughout them all it is to be noted that the fact essential to establish the right to relief is the palming off by the defendant of his goods in such a way as to deceive a purchaser into thinking that the goods in fact are the plaintiff's and that so long as the defendant acts honestly in the representation of his goods, the occasional confusion to customers resulting from casual or careless observation of

the package or the name will not make out a case for equitable relief.

As pointed out in the *Hanover* and *Rectanus Cases,* these principles, controlling both infringement and unfair competition, have as their basis the fundamental fact that, unlike a patent or copyright, which is a right in gross or at large, a trademark right arises from use, not mere adoption, and exists only as a right appurtenant to a business in which it is being employed, from which it necessarily follows as repects both territory and products (which the court treated as identical for this purpose) the adoption of a trade mark does not protect the right by its projection, as respects either infringement or unfair competition, in advance of the extension of the trade. In brief, there is no trade mark property where there is no business on the trade mark, whether looked at from the standpoint of territory or of commodity, or, as frequently otherwise expressed, where there is no competition there can be no unfair competition.

This view of the law has received the sanction of the leading cases in England and this country* as well as of this

---

* *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.,* App. Cas. 1907 L. R. 430, 437-8, House of Lords, 24 R. P. C. 572;
Scottish U. & N. Ins. Co. v. *Scottish N. Ins. Co.,* 26 R. P. C. 105;
Hall v. *Barrows* (1863) 4 De G. J. & S. 150, 158;
Leather Cloth Co. v. *American Leather Co.* (1865) 11 H. L. Cas. 523;
Ainsworth v. *Walmsley* (1866), L. R. I. Eq. 518, 524;
Borthwick v. *Evening Post* (1888) L. R. 37 Ch. Div. 499;
Corning Glass Works v. *Corning Cut Glass Co.,* 197 N. Y. 173;
Hub Dress Mfg. Co. v. *Rothenberg,* 237 Mass. 281;
National Picture Theatres v. *Foundation Film Corp.* (C. C. A. 2nd) 266 Fed. 208, 211;
Charles Broadway Rouss v. *Winchester Co.* (C. C. A. 2nd) 300 Fed. 706, 723;
Borden's Ice Cream Co. v. *Borden's Condensed Milk Co.* (C. C. A. 7th) 201 Fed. 510, 514;
Haller Baking Co. v. *Ward Baking Co.* (C. C. A. 3rd) 295 Fed. 683;
Basket Stores v. *Allen,* 99 Neb. 217, 155 N. W. Rep. 893;
Dubuque G. C. & S. v. *St. Joseph's College* (Iowa) 169 N. W. Rep. 405;
Nolan Bros. v. *Nolan,* 131 Cal. 271;
Va. Baking Co. v. *Sou. Biscuit Works,* 111 Va. 227;
Carroll v. *Duluth Co.* (C. C. A. 8th) 232 Fed 675, 681.

court in cases that we shall notice and is expressed in the phrase that there must be a palming off. Any injury done otherwise is not trade mark infringement or unfair competition but a common law tort to be established and dealt with under that category. (By way of illustration see *Peninsular Co.* v. *Levinson* and *Walter* v. *Ashton* hereinafter considered.)

In the early and leading case of *Delaware & Hudson Canal Company* v. *Clark,* 13 Wall. 311, the principle of unfair competition had been stated in the following language, at page 322:

> "This will be manifest when it is considered that in all cases where rights to the exclusive use of a trademark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities."

In *Goodyear's India Rubber Glove Manufacturing Co.* v. *Goodyear Rubber Co.,* 128 U. S. 598, 604, the principle is again stated in the following language:

> "The case at bar cannot be sustained as one to restrain unfair trade. Relief in such cases is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacture, to the injury of the plaintiff. *McLean* v. *Fleming,* 96 U. S. 245; *Sawyer* v. *Horn,* 4 Hughes, 239; *Perry* v. *Truefitt,* 6 Beavan, 66; *Croft* v. *Day,* 7 Beavan, 84. There is no proof of any attempt of the defendant to represent the goods manufactured and sold by him as those manufactured and sold by the plaintiff; but, on the contrary, the record shows a persistent effort on its part to call the attention of the

> public to its own manufactured goods, and the places where they are to be had, and that it had no connection with the plaintiff."

From the statement of facts already given and from further argument that will be made, it is evident that the present case comes squarely within the language of the last quoted sentence.

In *Coats* v. *Merrick Thread Co.*, 149 U. S. 562, 566, the same fundamental principle was stated by Mr. Justice Brown as follows:

> "There can be no question of the soundness of the plaintiffs' proposition that, irrespective of the technical question of trade-mark, the defendants have no right to dress their goods up in such manner as to deceive an intending purchaser, and induce him to believe he is buying those of the plaintiffs."

In *Elgin National Watch Co.* v. *Illinois Watch Co.*, 179 U. S. 665, Chief Justice Fuller repeated the language originally used by Mr. Justice Clifford in the *Canal* case, when he said at page 674:

> "The essence of the wrong consists in the sale of the goods of one manufacturer or vendor for those of another."

Again in the *Howe Scale Co.* v. *Wyckoff*, 198 U. S. 118, at page 140, Chief Justice Fuller said:

> "The essence of the wrong in unfair competition consists in the sale of the goods of one manufacturer or vendor for those of another, and if defendant so conducts its business as not to palm off its goods as those of complainant, the action fails."

In the same case at page 136, appears the familiar sentence repeated in the opinion of the Court below, which says:

> It is dishonesty in the use that is condemned, whether in a partnership or corporate name, and not the use itself."

In 1911 in *Standard Paint Co.* v. *Trinidad Asphalt Co.*, 220 U. S. 426, the subject again was reexamined and Mr. Justice McKenna said at page 461:

> "It is true that the manufacturer of particular goods is entitled to protection of the reputation they have acquired against unfair dealing, whether there be a technical trade-mark or not, but the essence of such a wrong consists in the sale of the goods of one manufacturer or vendor for those of another.* * * Such a wrong is not established against the Asphalt Company. It does not use the word 'ruberro' in such a way as to amount to a fraud on the public."

Both courts below, after careful examination of the evidence, found that the Respondent had not palmed off its goods as those of the Petitioner and that there had been no deception of the public. Undoubtedly the facts, for this is purely a question of fact, amply justified the finding under the authorities.

To begin with, as said by both courts below, the packages are so dissimilar that if the word "Beech-Nut" were removed from them there would be no point of similarity at all. Those of Respondent are the standard scrap and cigarette packages, recognized as such as far as they can be seen and in no wise like the packages of Petitioner. They plainly carry the name of Respondent, which is widely known in the tobacco business, and is not at all like the name of Petitioner. They also carry in plain lettering the name of the products contained in the packages which have already been discussed and found to be totally different from the products of Petitioner and to have been so classified under the Trade Mark Acts, by commercial custom, by all the courts and by every witness who has testified in the case. And the scrap tobacco package has as its dominating feature the "sunburst" effect, nothing like which has ever been used by Petitioner and which we have seen the Petitioner thought so effective that it

suggested the use of this design on the cigarette packages in order that the public might be immediately apprised that the cigarettes were put out by the same concern that made the popular scrap tobacco.

When, therefore, we contemplate the complete dissimilarity in names, products, packages and businesses, we have not only a case in which the parties are not trade rivals, in which there is no competition at any point, but incompatible businesses carried on in a manner that this court must feel, as the lower courts decided, was an honest and successful endeavor by the Respondent to sell its goods on its own good reputation. Indeed, it is perfectly preposterous to assert that such a large and well known tobacco company as Respondent would seek to market a tobacco brand on the reputation of a packing establishment, a maker and vendor of food products.

The principle of Equity invoked by the petitioner requires proof of deceit by the vendor, not mistakes of purchasers, in order to establish a case. If this were not the law proprietors would be at the mercy of the careless and indifferent. This aspect of the rule was succinctly stated by the Circuit Court of Appeals for the Eighth Circuit in *Allen B. Wrisley Co.* v. *Iowa Soap Co.*, 122 Fed. 796, as follows:

> "His competitor has no better right to a monopoly of the trade of the careless and indifferent than he has, and any rule of law which would insure it to either would foster a competition as unfair and unjust as that promoted by the sale of the goods of one manufacturer as those of another. One who so names and dresses his product that a purchaser who exercises ordinary care to ascertain the sources of its manufacture can readily learn that fact by a reasonable examination of the boxes or wrappers that cover it has fairly discharged his duty to the public and to his rivals and is guiltless of that deceit which is an indispensable element of unfair competition. *Centaur Co.* v. *Marshall*, 97 Fed. 785, 789;

Coats v. *Thread Co.*, 149 U. S. 564, 567; *Kahn* v. *The Diamond Steel Co.*, 89 Fed. 706, 707; *Manufacturing Co.* v. *Spear*, 2 Sandf. 599, 606; *Canal Co.* v. *Clark*, 13 Wall. 311, 322; *Gorham Co.* v. *White*, 14 Wall. 511, 528; *McLean* v. *Fleming*, 96 U. S. 245, 255, 256; *N. K. Fairbanks Co.* v. *R. W. Bell Mfg. Co.*, 77 Fed. 869, 876."

And in *American Tobacco Co.* v. *Globe Tobacco Co.*, 193 Fed. 1015, 1018, relief was denied because the testimony in the record showed only that

> "Careless purchasers have probably been deceived, not that purchasers who took enough interest in their purchase to look at the packages before pocketing them were deceived."

In the same case the broad doctrine is thus stated (p. 1018):

> "The rule is settled that 'equity will not interfere where ordinary attention by the purchaser would enable him to discriminate' between the goods put out by the parties, and that one is not bound to prevent a purchase by a careless purchaser" (citing numerous cases).

Mr. Justice Brewer said in the leading case of *P. Lorillard Co.* v. *Peper*, 86 Fed. 956, 960, where both products were tobaccos:

> "We shall not stop to review the testimony which is offered upon the question whether the resemblances between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these questions, and perhaps, looking at the matter of testimony alone, it might be difficult to say on which was the preponderance; but such testimony, giving it all the weight that it is entitled to, does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or be

cause it happens, in isolated instances, that some purchaser was so careless as not to detect the differences. It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's, supposing they were purchasing the plaintiff's package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels."

The courts below did not stop at inquiring as to unfair competition. They went further and inquired if by any "unfair and fraudulent means the plaintiff is injured and the public deceived."

The Circuit Court of Appeals said:

"We are aware, however, that equity may be invoked without market competition. Emphasis should be placed on the word 'unfair' rather than 'competition'. If by unfair and fraudulent means the plaintiff is injured and the public deceived, equity will enjoin, whether the injury comes through competition or in some other way. Aunt Jemima Mills Co. v. Rigney & Co., 247 F. 407, 159 C. C. A. 461, L. R. A. 1918C, 1039; Vogue Co. v. Thompson Hudson Co. (C. C. A.) 300 App. Div. 512. Within the principles announced in these cases, or in any other way, has the defendant injured the plaintiff in its property or reputation?

We are satisfied that it has not." (V, p. 2701.)

It will thus be seen that the courts below went beyond the questions of trade mark infringement and unfair competition into the domain of common law to inquire whether any common law tort had been committed. In so doing it subjected the conduct of Respondent to the very utmost that any law in any way could require and it rendered the verdict that it was satisfied that the Respondent had not offended.

In view of the foregoing it is idle for Petitioner's brief by a process of selective quotations to undertake to show this court that the courts below confined their inquiry in a way that prevented it from properly ascertaining and determining the true merits of the case. To do so in the light of the quotation we have just made from the opinion below is to set up a straw man for the purpose of overturning it.

Both courts below, after careful consideration of the evidence found that the respondent had not palmed off its goods as those of the petitioner and that there had been no deception of the public. On the contrary the evidence clearly shows that respondent's sales were made on the strength of the quality of its product, its genius in meeting the public taste, its effective advertising and marketing organization, and of the Lorillard reputation stretching back into three centuries; that there had been no deception of the public, but that in a few sporadic instances, individuals who had not examined the package nor read the advertising had temporarily thought that the respondent's tobacco was made by the petitioner; that such confusion, if it could so be termed, was due to a failure to look at the package or the label, which in turn was the result of a total lack of interest in the source of manufacture; that no injury had resulted to the petitioner as a result of such occasional confusion; that on the contrary during the period of the use by the respondent of the Beech-Nut name, the petitioner's business had doubled; that the efforts on the part of the petitioner to establish sales by agents of the respondent upon the representation that petitioner was the manufacturer of the goods had not been proven; and that circumstances which already have been referred to indicate strongly that this attempt on the part of the petitioner to prove its case was a deliberate effort to create spurious evidence.

It is clear that if as this court repeatedly has said: "The essence of the wrong consists in the sale of the goods by one

manufacturer or vendor as the goods of another" the petitioner has not made a case and the courts below properly have denied relief.

POINT III.

The use of the word "Beech-Nut" by Petitioner in its corporate name gives it no right to complain of the use of that word in the tobacco trade.

This is true in this case because

(1) The word has not only been used for tobaccos by Respondent and its predecessors as set forth in the statement of the case, but it has also been used for tobaccos by others, such as C. E. Schutz and Broecker Tobacco Co. (IV, p. 2264, and VI, pp. 2977, 2980), and even as the name of a cigar concern, to wit, Beechnut Stogie Co. of Lancaster, Pa., which, it will be recalled, is the concern which the counsel for Petitioner suggested Lorillard seek to stop from using Beech-Nut for tobaccos because such counsel thought Lorillard in a much stronger legal position to do so than Petitioner (VI, p. 2909);

(2) When the word became a part of Petitioner's name it was being used, and for several years had been used, by Respondent's predecessor in title as a trade name for tobacco and therefore could not be exclusively appropriated (*Abestone Co.* v. *The Philip Carey Mfg. Co.*, 41 App. D. C. 509; *Howard Co.* v. *Baldwin Co.*, 48 App. D. C. 442);

(3) Respondent is not using the word as its corporate name but simply as a trade mark on a distinctive package plainly bearing the name of itself and its product, hence no question of similarity of names is involved here such as was presented recently to this court in the *Simplex* case (269 U. S. 372. See *Aunt Jemima Mills Co.* v. *Rigney & Co.* (C. C.

A. 2d) 247 Fed. 407, 410-12, and *Rosenberg Bros.* v. *Elliott* (C. C. A. 3d) 7 F (2d) 962, 963.

It is also true because, to put the proposition concretely, the existence of Beech-Nut Packing Co. and its use of "Beech-Nut" for its food products will not prevent the formation of a Beech-Nut Tobacco Co. and its use of "Beech-Nut" for tobacco products (*Simplex Case*, 269 U. S. 372, 380). In such cases equity will enjoin only "where the business transacted was similar to or the same as that of the complaining party and where the name or style or description under which the business was done was so similar to that used by the complaining party as to mislead" (*International Trust Co.* v. *International Loan & Trust Co.*, 153 Mass. 271, 279, citing *Leather Cloth Co.* v. *American Cloth Co.*, 4 DeG. J. & S. 137, and *Singer Mfg. Co.* v. *Loog*, 8 App. Cas. 15).

Thus in *Dunlop Pneumatic Tyre Co.* v. *Dunlop Motor Co.*, 24 R. P. C. 572, the House of Lords of England refused to restrain defendant from using "Dunlop" for tires where plaintiff had been using "Dunlop" for automobiles, because the court thought that "the objects of the two companies need not be identical in order to entitle the complainants to relief but there must be great similarity" and in that case they did not "think that the measure of similarity established is sufficient either in the names employed or in the objects of the trade sought to be carried on."

So in *Corning Glass Works* v. *Corning Cut Glass Co.*, 197 N. Y. 173, where the respective products were common and cut glass, the court denied relief because "the evidence shows that the manufacture of cut glass is a distinct business in which the plaintiff has not been and was not engaged. Between the two concerns there has been no competition, no rivalry, because each produces a distinct class of ware."

So in *Hub Dress Mfg. Co.* v. *Rothenberg*, 237 Mass. 281, where the parties made clearly different kinds of women's dresses out of different materials, the court refused an injunction saying the business of the parties was not the same and they were not in fact competitors and that "there could

be no unfair competition unless the plaintiff is in fact a rival for the trade which the defendants secure."

Other cases to the same effect are:

Borthwick v. *The Evening Post* (1888), L. R. 37 Ch. Div. 449 the House of Lords;

Scottish Union & National Insurance Co. v. *Scottish National Insurance Co. Ld.* (1908) 26 R. P. 105;

Farmers Loan & T. Co. v. *Farmers Loan & T. Co. of Kansas*, 1 N. Y. Supp. at p. 47;

Investor Pub. Co. v. *Dobinson* (C. C.) 82 Fed. 56, 61;

Elgin Watch Co. v. *Loveland* (C. C.) 132 Fed. 41, 51;

Vassar College v. *Loose-Wiles Co.* (C. C.) 197 Fed. 982;

Borden's Ice Cream Co. v. *Borden* (C. C. A. 7th) 201 Fed. 510, 512;

British-American Tob. Co. v. *British Am. Cigar Stores Co.* (C. C. A. 2nd) 211 Fed. 933, 935;

Keystone Oil Co. v. *Buzby* (C. C. A. 7th) 219 Fed. 473, 476.

POINT IV.

There is no conflict of opinion between the Circuit Courts of Appeal: Alleged conflicting decisions of the Second, Third and Sixth Circuits and in England distinguished.

The cases relied upon by Petitioner as being in conflict with the decision in the instant case are the *Aunt Jemima Case* in the Second Circuit, the *Overland* and *Rolls Royce Cases* in the Third Circuit, the *Peninsular* and the *Vogue Cases* in the Sixth Circuit and the *Kodak Case* and *Walter* v. *Ashton* and some others in England.

The *Aunt Jemima Case* (C. C. A. 2d), 247 Fed. 407, merely held that the same mark could not be used by one concern for pancake flour and by another concern for pancake syrup because "syrup and flour are both food products and food products commonly used together" (p. 410). This holding was neither new nor extraordinary. It was a plain application of the principle of same "descriptive properties" to articles similar both by inherent likeness and associated use and had been anticipated many years by a similar holding as to coffee and cocoa (*Walter Baker Co.* v. *Harrison,* 32 App. D. C. 272). Surely there is nothing in this decision requiring a similar decision as to such unrelated products as foods and tobaccos. And that the *Aunt Jemima Case* is not in conflict with the decision in the instant case is further conclusively shown by the holding in the *Winchester Case* (C. C. A. 2d), 300 Fed. 776, that two different concerns might use the mark "Winchester" for shirts, in the *Washburn-Crosby Case* (C. C. A. 2d) 7 F (2d) 304, that the mark "Gold Medal" might be used by one concern for "straight" and by another concern for "prepared" flour, and the statement in the *National Motion Picture Case* (C. C. A. 2d), 266 Fed. 208, 211, that there must be a real present or prospective competition such as could not exist between an Ideal fountain pen and an Ideal hair brush, but did exist between a Keepclean toilet brush and a Staclean tooth brush.

In the *Peninsular Case* (C. C. A. 6th), 247 Fed. 658, the plaintiff had adopted as its general trade name the word "Penslar," printed in peculiar script with accompanying ornaments and had registered and used it for a line of drug store supplies, selling it so extensively that at the time of the suit the line included more than 175 articles selling to more than 3,500 drug stores, each of which stores had on its door or window the word "Penslar" in prominent lettering. But plaintiff had not registered or used the mark for cigars. Under these circumstances a partnership began attempting to sell cigars to these Penslar stores in a package bearing on it the word "Penslar" as a trade mark with the same

peculiar script and ornamentations as used by the plaintiff, and in addition this partnership represented that it was selling these cigars to these stores *as the agent of plaintiff*. Under these circumstances the court held (1) that the difference in commodities between the cigars and the drug store supplies prevented any trade mark infringement; (2) that it was unnecessary to enter into a discussion of the question whether relief could be afforded on the ground of unfair competition, because (3) the court deemed these partners impostors seeking to sell their goods by falsely representating them to be the goods of the plaintiff, thereby practicing a common law fraud. This process of reasoning is plainly stated in the opinion of the court and as a consequence the relief granted did not prohibit this partnership from using the mark "Penslar" for cigars, but simply from using it in a manner, namely, with the peculiar script and decoration and accompanied by the false representations, which led these drug stores to believe that the cigars were really put out by the plaintiff. The court said:

> "We know of no principle which will forbid malicious destruction of this kind to a competitor and permit it to a stranger; indeed, it was assumed by all parties in the court below and in this court—and we do not doubt—that malicious damage by defendants to the good will of plaintiffs' business and to the good reputation of the plaintiffs' line of goods would be redressed by the law and would call for an injunction where the remedy at law was not adequate." (p. 661.)

Undoubtedly, therefore, the *Peninsular Case* is not one of either trade mark infringement or unfair competition within the accepted meaning of those terms, but of common law fraud proceding on common law principles to prevent the malicious destruction of property by an impostor, a set of facts entirely absent in this case.

In the *Vogue Case* (C. C. A. 6th), 300 Fed. 509, re-hearing 6 F (2d) 875, plaintiff since 1892 had published a magazine

called "Vogue" with a "V" of large size and carrying in its prongs the figure of a woman, which device had come to be known as the "V-Girl." From the beginning this magazine had assumed to be an interpreter of and authority upon styles in women's wear, devoting a considerable share of its efforts to millinery, so that there was no doubt that "prior to 1912 the magazine had become the country over one of the dominating factors in the creation and promotion of styles" in millinery. In 1912 the Vogue Hat Co. began marketing anonymously hats for women having the word "Vogue" on the band across the interior of the crown with a large "V" which carried between its prongs the bust of a woman wearing a straw hat, a device the court regarded as so similar to the "V-Girl" that it said: "The defendant's appropriation of plaintiff's dress is not to be disputed." It was also proved that this had created a very common alternative impression "first that these hats were manufactured by the plaintiff, or, second, * * * that these hats were in some way vouched for or sponsored or approved by the plaintiff."

The crux of the Vogue Case, of course, was the intimate relation of the products, which is entirely absent in the case at bar and would not have existed in the Vogue Case had the magazine been a tobacco journal. Styles and patterns for ladies' hats having for years been sold through the pages of this magazine, the public naturally thought that ladies' hats bearing merely the deceptive imitation of the magazine's name were at least sponsored or approved by plaintiff. The court said: "Such an impression is obviously one that would be unavoidable" and made the situation "pregnant with peril to plaintiff." It therefore granted an injunction. But in the case at bar the complete difference of products and of packages, the latter bearing the different names of the manufacturers, supported by the universal trade custom, made such an impression unnatural and the result of such careless indifference that, as held in *Coats* v. *Merrick Thread Mfg. Co.*, 149 U. S. 562, the public

was charged with notice that the word "Beech-Nut" could be used by different concerns as a mark for food and tobacco products.

The *Rolls-Royce* and *Overland Cases* (4 F. (2d) 333 and 273 Fed. 674) were prior decisions of the same court that decided the instant case, and were regarded by that court, and they undoubtedly are, as in complete harmony with the decision in the instant case. Neither was a trade mark case; they were name cases, and characterized as such in the *Rosenberg Case* (7 F. (2d) 962, 963) where the court said that they are not

> "on the law of trade mark infringement at all for each was tried and decided on the single issue of unfair competition and then not unfair competition in the sale of goods but in the unfair appropriation and use of a competitor's trade name * * * Such an act is not an infringement of a trade mark but is a trespass of the same nature as is committed by one who applies another man's name to his own goods."

The question in the *Overland Case* was whether two different concerns could use "Overland" in its trade name, one for automobiles and the other for automobile tires. And the court held they could not because the products were too closely associated, saying:

> "* * * in exact terms the two do not compete in these particular things, yet the fact remains that the *business of both is so connected with automobiles* that the public" etc. (p. 676).
>
> "It will thus be seen that the business of both companies, *because they both concerned some phase of automobile activity, were interrelated*" (p. 676).
>
> "Such being the fact, it follows that both the English and American authorities justify the court below in its action, *for in fact there was substantial and material competition between these parties*" (p. 677).

The question in the *Rolls-Royce case* was whether two different concerns could use the word "Rolls-Royce" in their trade names, one for radio tubes and the other for automobiles and aeroplanes. And the court held they could not because the products in their component parts were too closely associated, saying:

> "It is true those companies made automobiles and aeroplanes and Wall sold radio tubes and no one could think when he bought a radio tube he was buying an automobile or an aeroplane. But that is not the test and gist of this case. Electricity is one of the vital elements in automobile and aeroplane construction and having built up a trade name and fame in two articles of which electrical appliances were all important factors, what would more naturally come to the mind of a man with a radio tube in his receiving set on which was the name Rolls-Royce, *with nothing else to indicate its origin,* than for him to suppose that the Rolls-Royce Company had extended its high grade of electric product to the new, electric-using radio art as well."

In *Walter* v. *Ashton,* L. R. (1902) 2 Ch.D. 282, plaintiff, the proprietor of the newspaper "The Times", had been in the habit of selling literary productions, such as "Encyclopedia Britannica" and "Century Dictionary" on monthly installments, announcing such sales by circulars typewritten on thin paper headed "The Times" in Old English letters, signed "Yours faithfully, The Manager" and enclosing for reply a pale green envelope addressed "The Manager, The Times, Printing House Square." Defendant advertised in the Daily Mail "The Times Cycle". "The only Bicycle that can be obtained on the Times System of monthly payments, forwarded on approval for 5s, all communications must be addressed to the manager." Circulars were also sent out by defendant, typewritten on thin paper headed "Times Cycles" in Old English, signed "Yours faithfully, The Manager" and enclosing a pale green reply envelope addressed "Times—Royal Arms—Cycles, The Times Cycle Department, 59-60

Chancery Lane"—"Times" and "Cycle" being in Old English. Neither the circular nor the advertisements gave the name of the defendant or told who the manager was or represented. On the windows of the office in Chancery Lane were "The Times" in Old English and beneath it "Cycles" in other type; outside the office was a man in livery with "Times" on his cap. And a clock with the hands pointing to five minutes past six, as in "The Times" newspaper, was stamped or painted in gold on most of the cycles.

Here again the common, not trademark, law was the basis of relief. The Court stated that it was common for a cycle and a newspaper to have the same name and so defendant had a right to call his cycles "The Times Cycles", to adopt the mark of a clock with hands pointing similarly to those of "The Times" and to advertise that payment would be according to "The Times System". But it restrained him from offering his goods in the *anonymous* manner above set out because he was an impostor falsely "holding out" to the public "The Times" as proprietor or partner in a way that, unless discontinued, would bring financial liability on it. It said:

> "It is not part of the general business of a newspaper to carry on a cycle business and this is not a question arising between rivals in trade." * * * *"The case has to be considered apart from those cases turning on trade competition, infringement of rights, trade names, trade marks, or the ordinary passing off equity."*
>
> "The real question I have to consider is whether by what he has done he has in fact held out the proprietors of The Times as either being principals or responsibly connected with him or partners with him in the sale of these cycles. I have come to the conclusion that he has; and I have further come to the conclusion that there is * * * a reasonable probability of The Times being exposed to litigation and possibly of being made responsible had they not taken the steps to disconnect their name from the advertisements and circulars issued by defendant."

In *Eastman Co.* v. *Kodak Co.*, 15 Rep. Pat. Cas. 105, the complainant for some years had made a specialty of cameras suitable for bicyclists and the appliances for affixing same to bicycles and had largely advertised these cameras as "Cycle Kodaks" or "Bicycle Kodaks". It also had a considerable trade in accessories for adapting bicycles to photographic purposes and had had a stall at a large bicycle show. The John Griffiths Cycle Company Ltd. had for some time been selling bicycles under the name "Dunlop" and "Aerial", when

> "it suddenly, and so far as appears for no reason * * * adopted the word 'Kodak' as applied to its cycles and applied to have registered and obtained the registration of the word 'Kodak' * * * upon a statement which was clearly inaccurate * * * that the word 'Kodak' had never been used in any way in connection with cycles and that plaintiff company had never had any dealings in or conection with the cycle trade. The defendant company was not content with merely registering the trademark * * * it incorporated its co-defendant under the name of 'The Kodak Cycle Company, Ltd.', clearly a mere creature of its own with a nominal capital of £100."

On the facts an injunction was granted, the Court saying:

> *"the evidence shows that as between the two trades, the bicycle trade and the camera trade, there is an intimate connection" so great "that in all probability * * * the plaintiff company may wish hereafter to manufacture and to sell cycles specially adapted to carry their kodaks."*

The writ of certiorari was improvidently granted in so far as based upon an alleged conflict with these decisions of the Circuit Courts of Appeal.

These cases have been discussed because it was upon the alleged conflict existing between them and the case at bar that the writ of certiorari was prayed. In view of the sharp

differences in the facts of each of them and of the entire harmony between the principles they announce and the decision in the instant case, as shown by a consideration of those cases, it is clear that the alleged conflict does not exist, and if the writ of certiorari was granted on this ground it was improvidently awarded.

Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 509;
Layne & Bowler Corp. v. *Western Well Works*, 261 U. S. 387, 393;
Houston Oil Co. v. *Goodrich*, 245 U. S. 440.

In so far as these cases were based on the connection between the respective products, such as the syrup and flour in the *Aunt Jemima Case*, the millinery magazine and ladies hats in the *Vogue Case*, the electrical component parts in the *Rolls-Royce Case*, the bicycles and kodaks for bicycles in the *Kodak Case*, and the automobiles and tires in the *Overland Case*, both lower courts on an examination of all the facts held that there was no such connection between the products in this case so as to bring this case within the doctrine of "same descriptive properties"—a question of fact purely—from the nature of the products and the commercial customs and authoritative data concerning them. In so far as those cases involved unfair competition, in whatever sense that term may be used, whether in the sense of trade mark law or as covering a common law tort, such as illustrated by *Peninsular* v. *Levinson* and *Walter* v. *Ashton*, where the defendants were impostors, seeking to perpetrate a deliberate fraud, the courts below subjected the Respondent to that test, inquiring, as we have seen, whether "by unfair competition or in any other way" the Respondent "by unfair and fraudulent conduct" had injured the Petitioner in its business or reputation. This again was purely a question of fact and the courts unhesitatingly answered that they were satisfied the Respondent had not offended in any of these respects.

POINT V.

Petitioner is barred by laches, acquiescence and estoppel from obtaining any relief herein.

The facts heretofore stated and now briefly to be summarized, disclose such delay on the part of the petitioner in bringing this suit and such entire acquiescence in and encouragement of the respondent's conduct herein complained of as completely to bar any right to relief herein. Neither of the courts below discussed this question in detail, placing their decision on other grounds, although the District Court referred to the respondent's contention in its opinion (V, p. 2665).

The respondent commenced its preparation for the manufacture and sale of Beech-Nut scrap tobacco in the autumn of 1914, and by the early part of 1915 had underway a vigorous advertising and sales campaign which resulted in the sale during that year of 7,364,214 pounds under the Beech-Nut mark (VI, p. 2968).

The petitioner first stated its objections to the use of the word "Beech-Nut" in a letter dated June 11, 1915 (VI, p. 2888) and a correspondence ensued which terminated in a very full letter dated September 15, 1915, from the respondent to the petitioner setting forth in detail a history of the respondent's ownership of the name Beech-Nut and stating the legal grounds on which it believed itself justified in continuing the use of that name on tobacco (VI, p. 2897). The respondent was at pains in this letter to give in minute detail the history of the use of Beech Nut on tobacco products. None of these statements has been challenged by the petitioner.

The contention made here (Brief, p. 256) that the statement in this letter that the Lorillard Company and its predecessor had continuously used the Weissinger Beech Nut mark since 1898 was untrue and misleading is a litigant's after-

thought. The contention rests entirely on the unsupported assertion of counsel for Petitioner. Although Petitioner's officers were present in court at the trial, no evidence was offered to support the assertion. On the contrary, when the deposition of Petitioner's vice-president, Mr. Barbour, was taken in this suit, in answer to the express question, he gave the War as the reason for the delay in bringing the suit, making no mention whatever of the alleged misrepresentation (I, pp. 797-8). Proof positive that Petitioner was not misled is the fact that he attempted to register "Beech-Nut for cigarettes, as we do not see how he could possibly under the authorities hope to register "Beech-Nut" for cigarettes if the facts prevented him from proceeding with this suit (See *Ex Parte Penn Tobacco Co.*, 144 O. G. 275, and *American Tobacco Co.* v. *Polacsek*, 170 Fed. 117, holding that use of a mark for one tobacco product gives title thereto for all.)

This letter was acknowledged by the petitioner on September 20, 1915 (VI, p. 2901) in a letter in which it said:

> "Your letter is a very interesting one and before giving a definite reply to same, we desire to review the matter as presented by you so that we can give you an intelligent reply."

No further correspondence or other action took place for four years. During this time the respondent's sales grew from the 7,000,000 pound figure for 1915 to 27,602,606 pounds for 1919 (VI, p. 2970). The 1919 business amounted to retail sales of a value of $14,650,865.63. This was nearly twice the money value of the entire volume of petitioner's business, which in 1919 amounted to $8,979,586.35, a growth from 1915 of $3,265,640.96, notwithstanding the fact that during that period the gum business of the petitioner, which is about 50% of its business, had been seriously curtailed owing to the difficulty of obtaining chicle during the war years (I, pp. 868-870).

In the spring of 1919, the respondent commenced preparation for manufacturing and offering to the public Beech-

Nut cigarettes, although it did not get into actual marketing operations until 1921 (V, pp. 2593, 2598). Its attention had been called in June, 1919, to the fact that the petitioner had ordered a small consignment of cigarettes from the American Tobacco Company and had made shipments to two jobbers in the locality of New York, *supra,* page 11.

On June 28, 1919, the respondent wrote the petitioner reminding it of the correspondence of four years earlier and insisting that the petitioner respect the respondent's right to the name Beech-Nut for tobacco products (VI, p. 2902). An interview ensued in which the petitioner protested against the proposed form of label which the respondent was then preparing for its cigarettes and as a result of which the respondent changed the slogan of the label to meet the petitioner's wishes. This was confirmed in a letter dated July 15, 1919, from the respondent to the petitioner (VI, p. 2907). A reply to this letter was written August 7, 1919, in which the petitioner said in respect of the proposed cigarette package of the respondent:

> "In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your ciragettes; in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you had already gained through the merchandising of that product. Our thought in regard to the above is prompted by the procedure of the Patterson Co. in connection with their Lucky Strike Smoking Tobacco and Lucky Strike Cigarettes (VI, p. 2912).

The respondent replied to this suggestion on August 27, 1919, in which it pointed out that the Sun-Burst scrap tobacco design was not suitable for the cigarette package (VI, p. 2915).

It had been the respondent's belief as a result of these interviews and letters that the petitioner's abortive cigarette venture would be dropped, but in September, 1919, it observed a formal notice in the Official Gazette of the Patent Office that the petitioner had applied for the registration of Beech-Nut Cigarettes. Accordingly it wrote the petitioner on September 17, 1919 (VI, p. 2917) that it would be compelled to file a formal opposition opposing this registration.

On October 8, 1919, the petitioner replied that it proposed to press its application and charged that the respondent by adopting an oval trade-mark and a solid red color scheme for its cigarette package was adopting trade-mark property of the petitioner. No intimation was made, however, that the scrap tobacco package was objectionable and respondent's rights in the name Beech-Nut for that package were recognized and conceded (VI, p. 2920). The respondent replied to this on October 15, 1919 (VI, p. 2922) insisting that its ownership of Beech-Nut for tobacco products entitled it to proceed with the cigarette package, employing the wrapper appearing in the record at page 2708 of Vol. VI. The opposition of the respondent to the registration application of the petitioner was sustained by the Patent Examiner and on appeal this ruling was affirmed by the Assistant Commissioner of Patents (VI, pp. 2821-2833). No further appeal was taken.

This summary of the facts shows that in respect of the scrap tobacco package issue was clearly joined between the petitioner and the respondent and the legal principles stated in the respondent's letter of September 15, 1915. Thereafter no objection of any character whatsoever was made to the use of the Beech-Nut on scrap tobacco. The 1919 correspondence related only to cigarettes, the sale of which long since has disappeared from the market. It was six years after the September 15, 1915, letter before the bill of complaint was filed on June 17, 1921. During this period, without protest on the part of the petitioner, respondent's

business grew to the enormous volume already stated. By 1922, out of a total business throughout the country of 60,000,000 pounds of scrap tobacco the respondent was selling 30,000,000 pounds under its Beech-Nut Brand (V, p. 2635). By 1921 it had expended on Beech-Nut scrap tobacco alone $61,691,954.61 (V, p. 2570). While this enormous business was being built up, the petitioner made no protest whatsoever. Indeed its own business was growing enormously during this period, reaching a total of $12,109,573.68 for all its products in the year 1921 (I, p. 868).

In 1921, it asked a court of equity to kill this enormously valuable business by enjoining the use of the Beech-Nut name for scrap tobacco and to require the respondent to pay over to it all the profits which had been made during these six years, notwithstanding the fact that it had silently watched the respondent push its brand until it outsold all the petitioner's products combined; notwithstanding the fact that during this period it referred any misdirected orders which came to it in the mails to the respondent (I, pp. 794, 795); notwithstanding the fact that from time to time it replied to letters received from the trade informing its correspondent that respondent was the maker of Beech-Nut tobacco; notwithstanding the fact that in its last letter of October 8th, 1919, it clearly admitted that the respondent had already acquired rights in the name of Beech-Nut for the scrap tobacco (Appendix B, p. 136), notwithstanding the fact that in its letter of August 7, 1919, it encouraged the respondent to apply the Beech-Nut scrap wrapper to the cigarette package in order to tie up "the advantage and publicity you have already gained through the merchandising" of the scrap tobacco product (Appendix B, p. 128).

It needs no citation of authority to show that under circumstances such as these the plaintiff is not entitled to relief at the hands of a court of equity. In *United Drug Co. v. Rectanus*, 248 U. S. 90, 102, this court said that the cases

holding that laches and acquiescence will not ordinarily bar injunctive relief find their "appropriate application in cases of conscious infringement or fraudulent imitation" and so they are not applicable here where Respondent was proceeding under a bona fide claim of *right which has been* sustained by both of the lower courts.

The principle involved was forcibly stated by the late Judge Mayer in *Valvoline Oil Co.* v. *Havoline Oil Co.*, 211 Fed. 189, as follows:

> "But it cannot be equitable for a well-informer merchant with a knowledge of a claimed invasion of right to wait to see how successful his competitor will be and then destroy, with the aid of a court decree, much that the competitor has striven for and accomplished--especially in a case where the most that can be said is that the trade-mark infringement is a genuinely debatably question."

Likewise squarely in point is *Pflugh* v. *Eagle White Lead Company*, 185 Fed. 769, 772, in which the Third Circuit Court of Appeals said:

> "We are not unmindful of Menendez v. Holt, 128 U. S. 524, 9 Sup. Ct. 143, 32 L. Ed. 526, and other cases cited in the opinion below, that mere failure to enforce trade-mark rights will not preclude injunctive relief when it is sought. But those were cases where, as said in Menendez v. Holt, supra, there was nothing 'in the nature of an estoppel, nothing which rendered it inequitable to arrest at this stage any further invasion of complainant's rights.' In this case there is. The complainant notified the respondents of its alleged rights; the respondents positively asserted their adverse rights; the complainant acquiesced in the respondents building up their trade under their label for 8 years without further objection; then complainant notified again and again, but respondents stood their ground and continued for 6 years more to build up their adverse trade-mark rights before the complainant again broke its silence by asserting an exclusive right by filing this bill.

Under such facts it would, in our judgment, be inequitable to arrest at this stage the respondents' trade, and therefore the decree of the court below must be reversed with costs.

The case of Carroll v. McIlvaine (C. C. A.), 183 Fed. 22, decided since the preparation of this opinion, is in line with the conclusion above stated."

In accord are:

Window Glass Company v. *Pittsburg Co.*, 284 Fed. 685 (3rd C. C. A.);

Old Lexington Club Co. v. *Kentucky Company*, 234 Fed. 464, 468;

Col. W. F. Cody Co. v. *Colonial Co.*, 284 Fed. 873;

Carroll v. *McIlvaine*, 183 Fed. 22.

POINT VI.

Petitioner has failed to establish any damage and is entitled neither to an injunction nor to an accounting.

The testimony in this case heretofore summarized shows that the only members of the public who received the impression that respondent's products were an addition to the petitioner's line, were careless observers who did not examine the articles they were purchasing or who did not read the advertising matter describing the respondent's product. The respondent is not obliged at its peril so to dress its article or so to word its advertising as to prevent the possibility of confusion in the minds of the careless public. It has discharged its duty so far as the petitioner is concerned when it has brought home to the ordinarily attentive purchaser the true source of the articles manufactured. The petitioner therefore has failed in this record to establish such confusion on the part of the public as to entitle it to an injunction in a court of equity.

Furthermore, such confusion as did exist in the minds of the public was not shown to have resulted in injury to the petitioner's business nor did it imperil petitioner's reputation.

The argument has been made in both courts below that the respondent's scrap tobacco is a cheap and inferior product and that the respondent's cigarettes were of an inferior quality and that the public so believed and that therefore the petitioner's reputation for putting out a line of food products of the highest quality has been impaired.

The substantial element in the case, of course, is the scrap tobacco, now selling at the rate of about thirty million pounds per year. This alone should be sufficient answer to the contention that the article is inferior. It is enough that the public likes it, that it now forms approximately 50% of the annual country-wide business in this article, and that it has grown to this enormous volume in the short space of about ten years. Nor is any discussion appropriate here as to the relative dignity and integral merit of a 10¢ package of scrap tobacco and a 5¢ package of chewing gum or bar candy.

The testimony showed that the respondent's Beech-Nut tobacco was formulated after an extensive study on the part of respondent's experts as to the tastes of the consuming public and the possibilities of blending various kinds of tobacco. These experiments were highly successful, resulted in the production of an unusually sweet blend, with a consequent wide-spread public approbation. In these facts there is clearly no evidence of inferiority of product likely to result in injury to the petitioner. Indeed, the argument might just as well be made, if it were pertinent here, that respondent's product now selling in twice the volume of all of petitioner's food products combined, has by its good reputation enhanced the reputation which petitioner has established.

So far as the cigarette package is concerned, the facts heretofore stated have shown that when this cigarette was put on the market in 1921 and sold at the rate of 20 for 15¢,

it was designed to compete with the better known medium priced cigarettes, especially Lucky Strikes, Sweet Caporals and Camels, which were then selling for 20 for 20¢. The respondent endeavored to present to the public a cigarette equal in quality to those well-known brands but more attractive in price. Unfortunately the time was not an appropriate one, a bitter cigarette price war ensued and the better known brands were soon selling for 15¢ and occasionally as low as two packages for a quarter. Although for a time good progress was made, respondent's Beech-Nut cigarettes were not able to stand the competition of the older and more widely known varieties, sales fell off and in a short time the cigarette business was negligible. It must be apparent that this was due to two causes; first, the impossibility of competing in a price war with brands as well-known as those of the respondent's competitors; and, second, to the failure on the part of those responsible for preparing the recipe used in the manufacturing of Beech-Nut cigarettes correctly to guess the taste of the consuming public. Obviously, varieties and taste and preferment resulting therefrom are never an index to inferior or superior quality where a product like tobacco is concerned. Varieties of cigarettes come and go, and even the most successful disappear from time to time for reasons which are wholly unexplainable except because of a change in the taste of the consumers. This has happened repeatedly although there has been no change whatever in the formula used.

The petitioner endeavored to establish the inferiority of Beech-Nut cigarettes by presenting witnesses who testified that they were disappointed because a cigarette so widely advertized did not equal in quality Pall Malls or Philip Morrises. These are well-known brands made from pure Turkish tobacco and selling at 10 or 15 for 25¢. Obviously they were not in the same competitive field as Beech-Nut, Lucky Strikes, Fatimas and other well-known middle priced varieties.

The essential element necessary to entitle the petitioner to an injunction, namely, the danger to the petitioner's reputation due to the inferior quality of the respondent's product was not made out and no injury from this source possibly could have resulted to the petitioner.

Furthermore, the evidence as to the petitioner's growth of business appearing at page 868 of Vol. I of the Record shows a steady growth which was maintained as steadily after the respondent came into the field with its scrap tobacco as had been the case before.

This Court has pointed out that where danger to reputation exists acquiescence of long standing on the part of the injured party will bar it from the right to an accounting for profits.

McLean v. *Fleming*, 96 U. S. 245, 258.

If this Court should hold, notwithstanding the finding of both courts below, and the overwhelming weight of the testimony that confusion does exist in the public mind, that the petitioner's good reputation is in peril by reason of such confusion, and that the laches of which the petitioner has been guilty are not such as to deprive it of its right to an injunction, nevertheless the delay in asserting its rights and the acquiescence which it has manifested in the enormous growth of the respondent's business will prevent it from obtaining an accounting for profits as sought by the bill. This contention need not be elaborated. The facts already have been stated which show that from the termination of the correspondence in 1915, at which time the issue was clearly drawn between the parties to the suit, nothing was done by way of protest by the petitioner in respect of the scrap tobacco until this bill was filed in 1921, and that it was during this period that the respondent's business grew from nothing to thirty million pounds a year. A plaintiff in equity, who has stood by and watched enormous profits accumulate in this manner is

not entitled at the end of so long a time to ask a court of equity to compel the defendant to transfer those profits to it.

It is also well settled that where actual damage can be shown, and where acquiescence sufficient to bar a recovery of profits has not been made out, nevertheless where it is impossible as a practical matter to allocate the profits between that part of the infringer's business which is directly attributable to the use of the trade-mark owner's rights and good-will in contra-distinction to that part of the profits attributable to the infringer's own good reputation, no accounting will be decreed.

> *Rushmore* v. *Badger Bros. Manufacturing Co.*, 198 Fed. 379, 381;
> *Ludington* v. *Leonard*, 127 Fed. 155.

Giving the petitioner's case its most favorable aspect, it would be impossible to determine what profits the respondent has made which are attributable to its own good name, sales force, advertising efforts and essential quality of its product, and those which are attributable to the alleged periodical use of the petitioner's mark and good-will. Under such circumstances even if an injunction be authorized, no accounting would be decreed.

Furthermore, no basis for claiming profits in an accounting is made out unless the plaintiff shows that it has lost the sales out of which the profits it seeks to recoup were made.

Even in the case of *Vogue Co.* v. *Thompson* (C. C. A. 6th) 300 Fed. 509, notwithstanding the Court granted an injunction because of the deliberate fraud attempted on the basis of the intimate connection between the millinery magazine and the ladies hats, making the latter sell on the reputation of the former, it refused to award damages or an accounting of profits because it found

> "no satisfactory basis for an accounting against either the manufacturer or the retailer for profits or damages. The case is peculiarly one where such damage as has

> occurred, like that which is still in prospect, is incapable of computation * * * Those cases in which plaintiff in such a suit has been awarded all the profits which defendant received from the sale of the articles wrongfully trade-marked, have been cases in which by the theory of the law, the plaintiff had lost the sales" (pp. 512-3).

And this holding was followed in *Rosenberg Bros.* v. *Elliott* (C. C. A. 3rd) 7 F (2d) 962, 967, where the respective products were men's hats and suits.

There has been a complete failure on the part of the petitioner to establish any damage as a result of the acts of the respondent charged in the bill. As has been mentioned, petitioner's business has grown enormously. After combing the country for two years for witnesses, the petitioner was able to muster a very few biased anti-tobaccoists who testified that they would not have anything to do with the petitioner's hams and bacons if the petitioner entered the tobacco field, and that they had refused to buy petitioner's products while they had been under the mistaken impression that the scrap tobacco was made by the Beech-Nut Packing Company. But on cross-examination each of these witnesses conceded that his impression had been based upon a failure carefully to examine the respondent's package or its advertising, that had such examination been made no confusion would have resulted, and no prejudiced attitude toward the petitioner would have followed. Here again the legal doctrine becomes important that the respondent need not so operate as to protect the petitioner against possible confusion in the minds of careless purchasers. The petitioner has not shown by any testimony an actual falling off of sales in any part of the United States and its evidence of alleged damage consists wholly in the testimony of these inattentive purchasers. No actual damage from this source has been shown.

In summary, the petitioner has failed to show any possibility of danger to its reputation through the alleged inferiority of respondent's product, any actual damage to itself re-

sulting from the respondent's use of the Beech-Nut name, and it has by its inequitable acquiescence deprived itself of any right to claim profits from the respondent's operation.

POINT VII.

There was no abandonment by the respondent of the Beech-Nut Mark.

The petitioner has argued that the record discloses an abandonment by the respondent of its right in the Beech-Nut trade mark which prevented it from introducing the present type of label and package, first designed in 1914 and actually offered to the market in early 1915. The District Court found that there was no abandonment; the Circuit Court of Appeals did not consider the question. The respondent contends that there was no abandonment, and that even if there were, the field was still open in 1914-1915 to the respondent to adopt the Beech-Nut name for its tobacco products.

It is thoroughly well settled that abandonment does not occur unless an actual intent to abandon is established; that the burden of proving such intent is upon the party who affirms it; that such proof must be of the strongest character in view of the fact that abandonment is a forfeiture of property, which equity will be loath to recognize; and that mere non-user is not sufficient without proof of intent.

This was very clearly stated and illustrated in the leading English case of *Mouson & Co.* v. *Boehm*, L. R. 26 Ch. D. 398, where the Court said:

> "Now on the question of abandonment, it appears to me that intention to abandon must be shown. There are some analogous cases in law such as the case of an easement. Mere non-user of an easement, like a right to foul a stream, would not be sufficient to prove an intention to abandon."

The doctrine of this English decision has been adopted by this Court as the law on this subject.

In *Saxlehner* v. *Eisner,* 179 U. S. 19, 31, this Court said:

> "To establish the defense of abandonment it is necessary to show not only acts indicating a practical abandonment but an actual intent to abandon. Acts which unexplained would be sufficient to establish an abandonment may be answered by showing that there never was an intention to give up and relinquish the right claimed." Citing with approval, *Mouson & Co.* v. *Boehm, supra.*

And in *Baglin* v. *Cusenier Co.,* 221 U. S. 580, 597-8, this Court repeated:

> "But the loss of the right of property in trade marks upon the ground of abandonment is not to be viewed as a penalty either for non-user or for the creation and use of new devices. There must be found an *intent* to abandon or the property is not lost." (Court's italics.)

The same rule is stated in *Brown on Trademarks,* Section 681 and in *Hopkins on Trademarks* (Third edition) p. 213. In each of these texts emphasis is laid upon the fact that the owner of a trademark may lay aside his mark temporarily and resume it thereafter without losing his property right and any lapse of time during which no actual use has occurred will be viewed as a mere temporary suspension of use unless an actual intent to abandon is clearly proved. Hopkins refers to cases in which defendants have been restrained from using marks that have been in disuse for periods ranging from one year to twenty years, and in each case the vital question is whether the owner of the mark intended to abandon it.

A decision of the Supreme Court of Massachusetts, *Burt* v. *Tucker,* 178 Mass. 493, is strong authority for the foregoing contention that non-user without any intent to abandon does not destroy one's property right in a trademark. In that case the manufacturer had used "Knickerbocker" in connection

with "school" as a trademark for shoes made by him in Massachusetts. His factory burned down, and thereafter for four years he was out of business for himself, in the employ of others as a salesman in other states and did not use the trademark at all. Then he again began business for himself in Philadelphia under the title "Knickerbocker Shoe Co.," using the trademark "Knickerbocker" on his packages with a label similar to, but not identical with, the one he had formerly used. He testified that he had never intended to abandon and had resumed at the first opportunity. The Court (Mr. Justice Holmes writing the opinion) held that the trial judge was warranted in finding that the manufacturer had made "Knickerbocker" a trademark, that he had not abandoned it, and that his present use was within the scope of the original acquisition.

In the present case the record clearly establishes that actual sales of scrap tobacco under the Beech-Nut mark were made in each of the years 1897 to 1910. During the years 1911-1914 the respondent stood equipped in all respects and ready and willing to fill any orders received (IV, pp. 2259, 2305; V, p. 2636). The sale of 25 pounds in 1910, a transaction wholly without profit stands as conspicuous proof of the respondent's intention to fill all orders received.

The mark was included by name in the list of brands delivered to the respondents in December, 1911, as a part of its assets under the decree of the Federal Court pursuant to the American Tobacco Company's dissolution (VI, p. 2945). In this circumstance, there is very clear evidence of no intention to abandon.

In the years 1912-1913 the mark lay dormant in the list in the respondent's file, but during those years this list was kept available for occasional reference and was used from time to time to supply names for new blends which the respondent proposed to introduce. It was at all times regarded as a list of marks from which selections might be made. All of the names in that list were regarded as property of the respondent which it might see fit to use at any time.

In 1914 preparations were commenced for introducing the new blend of sweet scrap tobacco which came on the market a year later as "Beech-Nut." The actual work in 1914 consisted of revamping the package, preparing the Sun-Burst design, and selecting the Beech-Nut name from the list in the respondent's files. Early in 1915 actual efforts were commenced to introduce the product to the market.

It is too clear for argument on this record that not only is there complete lack of evidence of any intent to abandon, but that, on the contrary, the respondent's conduct discloses an affirmative intention to retain the brand, and an early expression of that intention in its selection in 1914 of the name from the list in its possession. In only two years, 1912, 1913, was there lacking some positive, definite, overt act giving expression to this affirmative intention. It follows that the District Court was right in finding "that in the Fall of 1914 there had been no abandonment of 'Beechnut' on the part of the defendant" (V, p. 2672).

The fact that there was a change in the blend of tobacco at the time Beech-Nut was resumed in 1915 is not evidence of abandonment. Indeed, the alteration of the blend to meet the changed taste of the consumer, coupled with the use of the old mark, indicates a clear intention to preserve the old mark, and is stronger evidence of such intention than would be the case if the tobacco recipe had not been changed. The Court of Appeals of the District of Columbia has said in *Royal Milling Co.* v. *J. F. Imbs Milling Co.*, 44 App. D. C. 207:

> "The trade mark is not to be vitiated by change in the species of wheat used any more than it would be vitiated by an important change of process in the making of flour."

To the same effect are:

W. A. Gaines & Co. v. *Rock Springs Co.*, 246 U. S. 312;

Ball & Gunning Milling Co. v. *Mammoth Spring Milling Co.*, 48 App. D. C. 243 (1918);
White v. *Miller*, 50 Fed. 277.

The finding of the District Court that the change in formula did not work an abandonment is supported therefore both on principle and on authority.

The change in the dress of the package so as to modernize its appearance was not evidence of abandonment. Such modernizing changes frequently occur in current advertising and as long as the essential element in the name remains, the trade mark has not been changed. This Court has said in *Baglin* v. *Cusenier Co., supra,* that abandonment is not to be viewed as a penalty for the "creation and use of new devices."

In *Hier* v. *Abrahams,* 82 N. Y. 519, 525, the Court said:

> "But where the trade mark consists of a word it may be used by the manufacturer who has appropriated it in any style or print or form of label and its use by another in any form is unlawful * * *. The trade mark consisted in the word simply and the plaintiffs might have printed it on any form of label they might fancy without losing the protection of the law."

Abandonment must be predicated upon the features discarded, not the features retained, whenever an alteration in the appearance of a trademark has taken place. So long as the distinctive feature of the mark is preserved in the new device, there has been no abandonment of that distinctive feature, and hence no abandonment of the mark. In *Hopkins on Trade-Marks* (3 ed.), page 214, this principle is stated as follows:

> "the adoption of a new label or brand is, of course, an abandonment of all the distinctive features of the old label or brand *not preserved in the new one.*"

In the present case, the retention of the distinctive name "Beech-Nut" makes it impossible to predicate an abandon-

ment upon the change in the appearance of the package. In accordance with this principle, the District Court correctly found that the modernizing of the label and the change in the decorative feature of the package was not evidence of abandonment, and that to hold to the contrary would be unreasonable because it would prevent the rightful owner of an established trade name from redecorating or reornamenting his package in order to make it better adapted for his commercial needs.

But if the petitioner sustains its contention that the record shows abandonment by the respondent, its right to enjoin the use of the name will not be enlarged. The only legal effect of establishing abandonment is, in so far as the prior user is concerned, that others now are at liberty to apply the mark to the same articles to which that prior user had been applying it. In this case, that would mean only that the petitioner might have entered the tobacco field in 1915 and used the "Beech-Nut" name. It did not do anything of the kind. It adhered strictly to the food business, adding to its line during the period of alleged abandonment Olive Oil, Chewing Gum, Condiment Sauce, Sardines, Mustard, Guava Jelly and Mint Tablet—all food products and all sold under its slogan "Foods of Finest Flavor" (I, p. 810). In this conduct there was but a continuation of the same use for food products which the petitioner had been making of this mark for so many years side by side with the use by the respondent and its predecessors of the "Beech-Nut" name for tobacco products.

It follows therefore that the respondent had a complete right to resume selling tobacco products under the "Beech-Nut" name in 1915, whether or not any abandonment had occurred. So long as no rights of others have intervened, a former owner may, of course, resume his mark after abandonment.

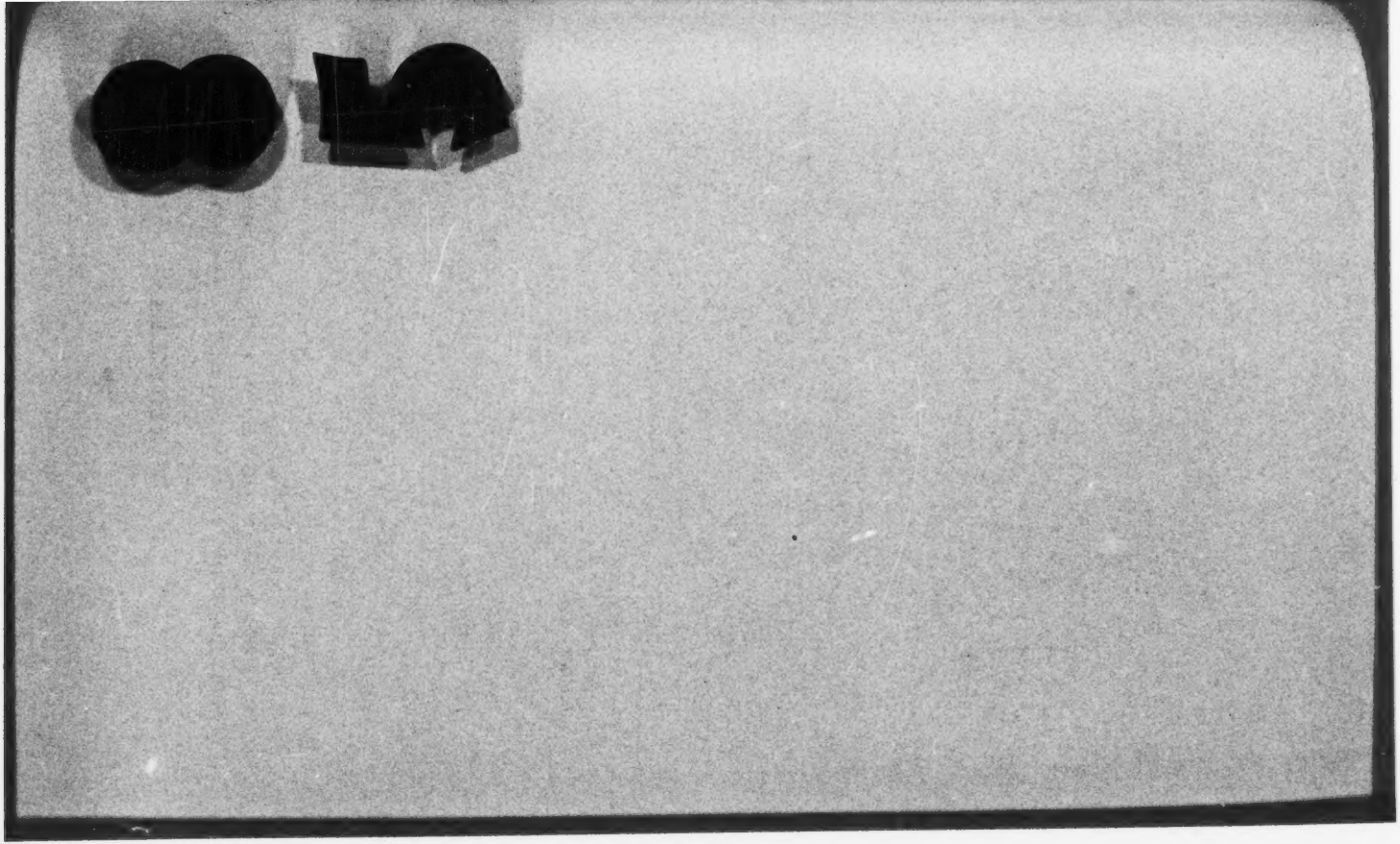
CONCLUSION.

It is respectfully submitted that the decree below should be affirmed.

Respectfully submitted,

William R. Rodes
John S. Miller
Attorneys for the Respondent.

March, 1927.



APPENDIX A.

Testimony on cross-examination of the witnesses to whom Petitioner refers this Court in its Appendices A and B to sustain its assertion that "absolutely the entire purchasing public of the United States has been and is being deceived * * * and believes that the Lorillard Beech-Nut products are produced by the Beech-Nut Packing Company." (Brief, p. 75.)

EDWARD ABRAMS, cigar store, by stipulation admits: "that he never examined a package of cigarettes and never paid any attention to the same * * *; that if he had seen the name P. Lorillard Company on the package he would have known that it was a product of P. Lorillard Company, tobacco manufacturers, as he knows that the P. Lorillard Company is a large tobacco manufacturing concern; * * *" (I, p. 388).

JOSEPH S. AISENBERG, grocer: "X-Q.48. When did you first examine a package of those Beech-Nut cigarettes? A. At the time I made the inquiry regarding the maker of the cigarette or the manufacturer. X-Q.49. Then you examined them? A. Then I looked at them, yes. X-Q.50. Whose name did you see? A. I saw the name that appears on there, P. Lorillard. X-Q.51. You knew it was not the Beech-Nut Packing Company's cigarette? A. Yes. X-Q.52. Up to that time you had not examined the package? A. Up to that time I had not taken the trouble to, no." (I, pp. 153-4.)

R. J. ANDREWS, clerk, by stipulation admits: "I did not ask for Beech-Nut cigarettes of the Beech-Nut Packing Company when I made the purchase but simply asked for a package of Beech-Nut Cigarettes. I did not examine the package particularly and therefore did not notice the name P. Lorillard Co. appearing thereon." (I, p. 342).

FRANK ARNOLD, JR., Accountant: "Q. Did you know who made the Camel cigarette? A. No, sir. Q. As a matter of fact, you didn't care, did you? A. No, sir. Q. The Camel cigarette had pleased your taste? A.

Yes, sir. Q. Like Mr. Disbrow, the last witness, tobacco is tobacco—if it happens to hit your taste, it is what you like, is it? A. Yes, sir. Q. You don't care whether it is made by Beech-Nut or by Lorillard Company or by any one else, do you? A. No, sir. Q. If the blend suits your fancy, that is what you buy, isn't it? A. Yes." (V, pp. 2501-2.)

JAMES F. BALLARD, butcher: "X-Q.20. Did you ever hear of the P. Lorillard Company? A. Yes, I heard of it. X-Q.21. They are a large tobacco company, are they not? A. Yes, sir. * * * X-Q.30. You do not find the name 'Beech-Nut Packing Company' on this package of cigarettes? A. No. X-Q.31. But you do find the name 'P. Lorillard Company'? A. Exactly. X-Q.32. And you know the P. Lorillard Company tobacco people? A. Yes, I know of them." (I, pp. 480-1).

A. V. BOBB, butcher: "X-Q.23. You have heard of the P. Lorillard Company, have you not? A. Yes, I have heard of them; yes. * * * X-Q.29. I understand you have been chewing this tobacco for five years? A. About four years; I would not say five. X-Q.30. About four years? A. About four years. X-Q.31. And you had never taken the trouble to look to see whose name was on there? A. Never looked at the name; just stuck it it my pocket and when I wanted a chew just took a handful out." (I, pp. 475-6).

DORACE L. BOTTOMLY, grocery clerk: "X-Q.23. Did you purchase any of these Beech-Nut cigarettes yourself? A. No, I didn't. X-Q.24. You have never gone into a store and asked for Beech-Nut cigarettes? A. I never have. X-Q.25. Did you handle the package your brother had? A. I did. X-Q.26. Did you take the trouble to examine it? A. Not closely, no. * * * X-Q.37. You don't chew tobacco? A. No. X-Q.38. Smoke cigarettes? A. No." (I, pp. 168-70.)

T. J. BRANIGAN, shoe clerk: "XQ.24. Did you ever hear of P. Lorillard Co.? A. Yes. X-Q.25. They are large manufacturers of tobacco products, are they not? A. Yes. * * * X-Q.31. You never took the trouble to examine that pack of cigarettes to see who did produce

it, did you? A. Never. X-Q.32. And when you were looking at all these advertisements and displays you never took the trouble to see whose name was on them? A. No, I didn't. I just looked at the head line. X-Q.33. At the word Beech-Nut? A. That's all. X-Q.34. You didn't pay any attention to the name at all? A. No." (I, p. 287).

J. E. BRIMAKOW, cigar clerk: "X-Q.25. You know the Lorillard Company is a very large tobacco concern? A. Yes. X-Q.26. They handle a good large line of cigarettes? A. High-grade cigarettes. X-Q.27. You have a good sale of their products? A. We have a good sale of their products. X-Q.28. In other words, you have absolutely no objection to ever putting in a P. Lorillard Company tobacco product, have you, because their reputation is good? A. Sure. X-Q.29. Did you look at these packages when you first received them? A. I did. X-Q.30. You saw the name 'Lorillards' on them? A. Yes. I did. X-Q.31. You knew they were Lorillard's cigarettes? A. Yes." (I, pp. 613-4).

ROBERT N. BROUGHTON, druggist: "X-Q.18. You did not buy from the manufacturer direct? A. No. The first carton I bought direct from their salesman, the P. Lorillard Company salesman. I paid him cash right on the spot. * * * X-Q.21. Did you ever look at this package to decide whether the goods were those of the P. Lorillard Company or the Beech-Nut Packing Company? A. I never did. X-Q.22. Just handed the cigarettes out? A. Yes. If they called for Beech-Nut I handed them out. X-Q.23. That name, P. Lorillard Company, on this package of cigarettes, Plaintiff's Exhibit No. 1, indicates to you that it is the product of the P. Lorillard Company, does it not? A. Yes, it does." (I, p. 229-30).

R. A. BROWN, insurance, by stipulation admits: "I have only purchased, as I recall, one package of these cigarettes, and when I purchased them I did not ask for cigarettes of the Beech-Nut Packing Company, but merely for a package of Beech-Nut cigarettes. I did not notice the name P. Lorillard Co. on the package as I did not examine the package very closely." (I, p. 337).

W. J. BUCKLEY, broker, by stipulation admitted that he simply smoked some Beech-Nut cigarettes proffered by a friend; and "did not pay any particular attention to the package * * * I have not myself purchased any of these 'Beech-Nut' cigarettes." (I, pp. 76-77.)

A. H. CARLSON, sporting goods: "X-Q.24. On this package of scrap tobacco you see the name Lorillard, don't you? A. Yes. X-Q.25. As a person engaged in the tobacco business that would mean that was a P. Lorillard Company? A. Yes. * * * X-Q.41. So when you thought it was made by Beech-Nut Packing Company that was simply a general impression on your part without making any inquiry or study or examination at all? A. Yes. X-Q.42. You had nothing to go on in forming that opinion. That is, if you had looked at the name Lorillard you would have known it was Lorillard tobacco; is that right? A. Yes, I understand that. * * * X-Q.62. So the minute you looked at the package you saw Lorillard's name on it and knew it was Lorillard? A. Yes. X-Q.63. If you had looked at that package when it first came into the store you would have known it was Lorillard? A. Yes, sir. X-Q.64. You never took the trouble to look at it, then? A. No." (I, pp. 427-31).

GEORGE L. CARLTON, grocer: "X-Q.20. The Lorillard Company is a large and well known tobacco concern, is it not? A. Yes. X-Q.21. If you had taken the trouble to look at that package when you first bought those cigarettes you would have known that it was P. Lorillard Company's product, would you not? A. Yes. * * * X-Q.28. You know that these cigarettes are the cigarettes of the P. Lorillard Company? A. Yes. I never examined the package. Never noticed the name on the package." (I, p. 234-5).

JAMES J. CASHMAN, JR., drug clerk: "X-Q.18. And I notice these products that are advertised in the windows are Beech-Nut cigarettes, Murad cigarettes, Mogul cigarettes and other products. Did you ever hear of the P. Lorillard Co.? A. Yes, sir. * * * X-Q.26. Did you ever take the trouble to examine a package of Beech-Nut cigarettes? A. No, I didn't. X-Q.27. Never even

glanced at them? A. No, I didn't. * * * X-Q.38. And the name 'Lorillard' appears on the Beech-Nut package? A. Yes. X-Q.39. And that would indicate to you that is a product of the tobacco people, the Lorillard people, would it not? A. Yes." (I, pp. 265-7).

GEORGE CATLIN, a grain broker, said: "I have never purchased any of these cigarettes, but have smoked some given to me by my friends. I did not examine the package, and therefore I didn't know that the name 'P. Lorillard Co.' appeared thereon, as I now see by examining this package, Plaintiff's Exhibit No. 1." (I, pp. 70-1.)

TRACY N. COLLINS, grocer, by stipulation admits: "I never noticed the name Lorillard or P. Lorillard Company on the packages, as I did not take the trouble to look at them, and as I now see from looking at the package that the name Lorillard's appears on the scrap tobacco and P. Lorillard Company on the cigarette package, and from this I would understand these to be a product of P. Lorillard Company, the tobacco manufacturers." (I, p. 379).

CHARLES P. COOK, a grocer, said: "X-Q.31. Now, when you looked at the package, you saw the name Lorillard on it? A. Yes, but not at that time. X-Q.32. I mean when you did take the trouble to look at it? A. Yes. X-Q.33. And that indicated to you that it was a Lorillard tobacco product? A. Yes, sir. * * * X-Q.36. You would never confuse a food product with tobacco, would you? A. Not likely to. X-Q.37. You regard tobacco as an entirely different class of goods from bacon and chewing gum, do you not? A. We regard them as a different thing, but we carry them both, if that's what you mean." (I, pp. 698-9.)

JOSEPH DERAGO, general store: "X-Q.26. So that you didn't really have any foundation for saying it was made by the Beech-Nut Company? A. No. X-Q.27. Just a guess on your part? A. No, that's all. X-Q.28. You notice the name Lorillard on this package, do you not? A. Yes. X-Q.29. You notice the name P. Lorillard Co. on this cigarette package, do you not? A. Yes, but this

I cannot read, I don't know how to read in English. * * * R.X.Q.42. You never took the trouble to look, did you? A. No, I never took a real look." (I, pp. 331-3).

G. FRANK DISBROW, laborer: "Q. What can you say about it? A. Simply bought the tobacco and put it in my pocket and don't think of looking at it. In the average case, you don't look at the tobacco after it is in your pocket, you reach around and tear the top off and then you reach in for a chew when you care for it. * * * Q. So that not only did you fail to observe that the word 'Lorillard' was on this package of Beech-Nut chewing tobacco which you had in your hand sometimes at least five times a day, and possibly ten times a day for a period of three months, but you likewise failed to observe that on the back of the package is a statement that the tobacco is made under a special process in Middletown, Ohio? A. I never noticed any marks on it. I have handled thousands and thousands, you might say, in 22 years, packages of Murads, and can't tell you anything about it except the Murad is made by Shinasi Brothers. Q. Or Anargyros? A. Or Anargyros, yes. I want the cigarette, not the package, when I buy it." (V, pp. 2495-2498.)

JAMES EUSTACE, grocery clerk, by stipulation admits: "I never made an examination of the package and had not seen the name P. Lorillard Co. on the package." (I, p. 335).

ARTHUR E. FECHTER, druggist: "X-Q.13. Did you ever hear of the P. Lorillard Company tobacco people? A. Yes. X-Q.14. You have handled some of their goods? A. I think so. X-Q.15. Did you ever take the trouble to look at that package and examine it? A. No. X-Q.16. Do you still continue to buy this tobacco? A. Certainly. X-Q.17. You don't have any interest in who it was made by? A. No." (I, p. 438).

HENRY W. FOOTE, a grocer, said: "X-Q.16. You never took the trouble to read the printed matter when you bought the cigarettes, did you? A. No. X-Q.17. Did you ever hear of the P. Lorillard Company, the tobacco people? A. I have heard of them." (I, p. 566.)

BRYAN O. FOSTER, a grocer's clerk, said: "X-Q.28. You didn't pay any attention to who made it—anything of that sort? A. No, I don't know that I paid any attention as to who made it—I don't know that I did. X-Q.29. That didn't make any difference to you at that time at all? A. Well, not right then I don't suppose it did. * * * X-Q.41. You have sold these cigarettes (referring to cigarettes made by P. Lorillard Company) at Mr. Roach's store, have you? A. Yes, sir. X-Q.42. They come in that kind of a carton I show you—a large carton like this, which has been put in evidence in this case Defendant's Exhibit No. ? A. Yes, sir. X-Q.43. And that has 'Lorillard's Beech-Nut Perfect Cigarettes' on it? A. Yes, sir. * * * X-Q.65. As a user of tobacco, you could tell that was a tobacco package, couldn't you? A. Well, I think I could. X-Q.66. And you never knew them to put up any packages of stuff that looked like a package of cigarettes? A. No, sir. X-Q.67. You can tell a cigarette package a mile off—it's got an individuality all of its own? A. Yes, if I wanted to smoke I could. X-Q.68. As a matter of common sense a package of cigarettes has a shape and appearance all its own? A. Yes, sir. X-Q.69. And you can readily tell them on the shelf of a store? A. Yes, sir." (I, pp. 688-9, 691-2.)

ALEXANDER C. GARDNER, grocer: "X-Q.27. You know of the Lorillard Co.? A. Yes. X-Q.28. You know they are large tobacco manufacturers? A. Yes. X-Q.29. And you have handled their goods of various kinds? A. Yes. X-Q.30. Have they always been very satisfactory? A. Yes. * * * X-Q.34. The name Lorillard always appears on the package, does it not? A. Yes. X-Q.35. And that would indicate it was a Lorillard product? A. Well, the name is so small at first you wouldn't notice it. X-Q.36. But if you took the trouble to examine it, you would notice it, would you not? A. Yes, I would notice it; of course I can read." (I, p. 312-3).

CHARLES E. GEARY, drug clerk: "X-Q.17. Do you know what line of business P. Lorillard is in? A. I think they are in the cigarette business. X-Q.18. Tobacco products? A. Tobacco products, yes. X-Q.19. If you took the trouble to look at that package, you would know that P. Lorillard Company made it, would

you not? A. Naturally, if I had looked at it and saw it was marked with their name on it. X-Q.20. You never even took the trouble to look at that and see who made them? A. No; I just passed them out." (I, p. 132.)

EDWARD J. GLYNN, clerk: "X-Q.21. Did you ever hear of P. Lorillard Company? A. I have. * * * X-Q.25. When you first purchased that package of cigarettes (Mr. Cavanagh showing witness package of Beech-Nut cigarettes), did you look on it to see whose name was on it? A. I did not. X-Q.26. If you had looked at that package you would have seen the Lorillard name on it, wouldn't you? A. I presume I would if I had looked at the package, but I didn't look at the package, I looked at the Beech-Nut. XQ-27. You didn't take the trouble to examine the package? A. No, I didn't. X-Q.28. Had you looked at it, you would have seen the Lorillard name? A. Yes, I presume so." (I, p. 270).

A. W. GODFREY, a dealer in mill feeds and flour, said: "And in due course, I don't know whether it was that day or the next day, but very soon after, I went downstairs and purchased a package of them to see what there was in them, and upon looking them over I saw Lorillard's name on it. * * * X-Q.22. When you made your examination, then, you found the name P. Lorillard on it? A. When I read the package all over I found the name of P. Lorillard Co. on it. X-Q.23. You knew that P. Lorillard Co. was a large tobacco manufacturer? A. I simply knew that P. Lorillard Co. had been in the tobacco business, but in regard to their size, I couldn't state." (I, pp. 50, 53.)

NATHAN HAMMERMAN, drug clerk: "X-Q.22. You have heard of P. Lorillard Co.? A. Yes, sir. X-Q.23. They are a large tobacco concern? A. Yes. X-Q.24. That name would naturally indicate to you that it was their product? A. Yes, it would, if I had gone to the trouble to look at it I would have known it; otherwise I wouldn't know whether they were putting it out for the Beech-Nut people." (I, p. 279).

NEWTON HARRISON, dry goods: "X-Q.23. Have you ever heard of P. Lorillard Co.? A. Yes. X-Q.24. You

know them to be large tobacco manufacturers? A. Yes. * * * X-Q.27. If you had taken the trouble to notice the name Lorillard— A. I would have noticed it was not a Beech-Nut product, but the Beech-Nut trade-mark is so conspicuous that I didn't draw any other conclusion but that it was a Beech-Nut product. * * * X-Q.34. You never made any particular inquiries to find out whether or not it was their product? A. I took it as a matter of course that it was their product." (I, pp. 320-1).

JEFFERSON D. HAYDEN, grocer: "X-Q.63. Whose name is on Old Virginia cheroots? A. P. Lorillard Company. X-Q.64. What name on the scrap tobacco? A. P. Lorillard Company. X-Q.65. What name on the Climax chewing tobacco? A. P. Lorillard Company. X-Q.66. I notice you also sell Beech-Nut cigarettes? A. Yes, sir. X-Q.67. Whose name is on that Beech-Nut package (showing package)? A. Lorillard Company, looks like. X-Q.68. P. Lorillard Company? A. Yes, sir. X-Q.69. And this little yellow tag or slip that is over the carton of cigarettes, whose name appears on that? A. Lorillard. X-Q.70. So all of those products are Lorillard products? A. Yes, sir. X-Q.71. You don't find the name of Beech-Nut Packing Company on any of this tobacco, do you? A. No, sir, I don't see it. X-Q.72. And this receipt you have produced in evidence, that receipt bears, or did bear, but torn, the name P. Lorillard Company, 119 West 40th Street, New York, did it not? A. Yes, sir. * * * X-Q.88. As an ordinary careful man, familiar with business, as you are, when that receipt was given to you, if you looked at it you would have seen P. Lorillard, and known it was a P. Lorillard receipt, would you not? A. If I had observed it carefully. * * * X-Q.109. You never bought any tobacco from the Beech-Nut Packing Company? A. I never have bought anything but some beans, peanut butter and chewing gum, and the tobacco was from Lorillard, I offered for sale as a Beech-Nut product. X-Q.110. And the tobacco, you did not take the trouble to see who made it? A. No." (I, pp. 761-5.)

C. HOUSLING, clerk, by stipulation admits: "When I purchased these cigarettes I did not ask for cigarettes made or put out by the Beech-Nut Packing Company

but simply asked for a package of Beech-Nut cigarettes. I did not examine the package and therefore did not notice the name P. Lorillard Co. appearing thereon, * * * I only bought this one package of cigarettes." (I, p. 340).

MARGARET M. HUNT, cigar stand clerk: "X-Q.13. You never took P. Lorillard Co.'s cigarettes for any product of the Beech-Nut Company, did you? A. No." (I, p. 78.)

DANIEL HUTTNER, butcher: "X-Q.20. When you bought that package of cigarettes, you did not take the trouble to notice that name, P. Lorillard Company on it, did you? A. No, I did not." (I, p. 487).

OSCAR JOSEPH, grocer: "X-Q.27. You never took the trouble to read the writing on a package of Beech-Nut scrap? A. No. X-Q.28. You have heard of the P. Lorillard Tobacco Company? A. Yes, I have heard of them sure. X-Q.29. Do you see Lorillard's name on there (exhibiting Exhibit 3 to witness)? A. Yes, of course, if you stop to read." (I, pp. 619-20).

JOHN JOZSA, grocery clerk: "X-Q.21. You never took the trouble to read the printing on the package to see who made the Beech-Nut scrap, did you? A. No. Generally when somebody wants tobacco in a hurry, I just grab it and give it to them. X-Q.22. You never even took the trouble to look at it to see who made it? A. No. X-Q.23. You see the name Lorillard on there, don't you? A. Yes." (I, p. 627.)

JOHN J. KING, a grain broker, said: "X-Q.17. Did you ever carefully examine that package of Beech-Nut cigarettes, marked Plaintiff's Exhibit No. 1? A. Why, never, carefully, no. I have seen them at a distance, that is all. X-Q.18. You find the name, P. Lorillard Co. on that package, do you not? A. Yes. X-Q.19. Did you ever hear of P. Lorillard Co.? A. Yes. X-Q.20. They are big tobacco people, are they not? A. I understand so. * * * X-Q.23. So, if you had looked at this package you would have considered that it was put up by Lorillard Company, wouldn't you? A. Yes, sir." (I, pp. 60-1.)

CLEMENT W. KIRKPATRICK, rubber business: "X-Q.22. Did you ever hear of the P. Lorillard Company? A. I have heard of it. X-Q.23. What line of business were they in? A. I assume that they are in the tobacco business. X-Q.24. They are large tobacco manufacturers? A. Yes. * * * X-Q.31. And judging from that, would you not take the name P. Lorillard Company on that package of cigarettes to indicate that it is the product of the P. Lorillard Company, tobacco manufacturers? A. I would. X-Q.32. When you first purchased a package of the Lorillard Beech-Nut cigarettes like that Exhibit No. 1, did you look to see whose name was on it? A. I didn't. X-Q.33. Then you didn't examine the package in particular; did you? A. No." (I, pp. 212-3).

SOLOMON S. KRAMER, delicatessen; by stipulation admits: "I never made a close examination either of the cigarette or the scrap tobacco package, and I never read the name Lorillard thereon." (I, p. 334).

F. J. LATZEL, delicatessen: "X-Q.19. You see the Lorillard Company name on it? A. I see it now. I see it last week; never before. X-Q.20. Never took the trouble to look for it? A. Never looked at it. X-Q.21. It doesn't make any difference to you, as long as you sell the tobacco, whose name is on it, does it? A. If they want tobacco and Beech-Nut stuff is good, maybe I sell it." (I, pp. 493-4).

HENRY LE CLAIR, grocer: "Q.6. When you saw, bought and smoked these cigarettes, by whom did you think they were put out? A. Well, by the Beech-Nut people, of course. I did not notice and did not care who they were put out by. * * * X-Q.15. You notice P. Lorillard Company on this package of cigarettes, don't you? (Mr. Kavanagh displays a package of P. Lorillard Company's cigarettes to Mr. LeClair) A. I notice it after I have been shown. I never cared to look at it. I gave them away. I could not smoke them. X-Q.16. You did not pay any attention to the package at all? A. No." (I, p. 1-2).

LEO LEWIS, a cigar clerk, said: "X-Q.44. When this cigarette first came to your attention, or reached your store, did you notice the name on it? A. No, sir.

X-Q.45. You didn't take the trouble to examine the package? A. No. I don't think I did. X-Q.46. If you had examined that package, would you have known it was not made by the Beech-Nut Packing Company? A. If I had examined it, yes. X-Q.47. You don't find the Beech-Nut Packing Company's name on it, do you? A. No, I don't find it on it. X-Q.48. But you do find 'P. Lorillard Co.' on there? A. Yes. X-Q.49. And that indicates to you that it is a product of P. Lorillard Company, doesn't it? A. Yes." (I, pp. 84-5.)

P. LYNCH, market clerk, by stipulation admits: "When I purchased the pack of cigarettes I did not ask for cigarettes made by the Beech-Nut Packing Company but merely for a package of Beech-Nut cigarettes and made no particular examination of the package and therefore did not notice the name P. Lorillard Co. appearing thereon." (I, p. 341).

THOMAS F. MALONEY, salesman: "X-Q.11. Did you examine the package to see if the Beech-Nut Packing Company's name appeared on it? A. No, sir. X-Q.12. Then you didn't deliberately buy this as a product of the Beech-Nut Packing Company? A. I did not, no." (I, p. 69.)

JAMES F. MASTERSON, publisher: "Q. Your friend having offered you casually a cigarette out of a Beech-Nut cigarette package, you assumed that the Beech-Nut Packing Company made that cigarette, and when you came to write this financial article for the Financial News you also assumed that the Beech-Nut Packing Company, being the manufacturer of a cigarette must be the manufacturer of a chewing tobacco and a smoking tobacco, that is right? A. Yes, sir. Q. What was on the package of cigarettes that your friend offered you a cigarette from? A. The only thing I observed—on the package of cigarettes? Q. Yes. A. The only thing I observed was the name Beech-Nut. Q. You didn't see P. Lorillard Co. on that, did you? A. I didn't observe it, no." (V. p. 2489.)

JAMES MATREACE, grocery clerk, by stipulation admits: "I know the P. Lorillard Company is a large tobacco concern and I have handled other products of

theirs and if I had seen the name P. Lorillard Co. on the package I would have presumed it was their products. I never paid any particular attention to the matter but simply bought the cigarettes from time to time and sold them over the counter." (I, p. 344).

E. J. McFADZEN, grocer: "X-Q.24. You have heard of P. Lorillard Company? A. Yes. X-Q.25. You know they are large tobacco manufacturers? A. Yes. X-Q.26. If you had seen that name 'P. Lorillard Company' on that package of Beech-Nut cigarettes you would have known it was Lorillard's cigarettes? A. Yes. X-Q.27. Same as you would know the Lucky Strike was the American Tobacco Companys' cigarettes? A. Yes, sir. X-Q.28. But you didn't pay any attention to it and didn't take the trouble to read it? A. That is right. I just took it for granted it was a Beech-Nut product." (I, pp. 557-8).

JOHN MEAD, market clerk, by stipulation admits: "I never made any examination of the Beech-Nut scrap tobacco package and did not notice the name Lorillard thereon. I have never purchased a package of the Beech-Nut cigarettes and have not paid any particular attention to the same." (I, p. 343).

EDWARD MOSCOVITZ, cigar clerk: "X-Q.13. You know the P. Lorillard Company, do you? A. Yes. * * * X-Q.24. So you really never took the trouble to examine the cigarette package, that Beech-Nut cigarette package to know who it was made by? A. No. X-Q.25. When you were under the impression that that cigarette was the Beech-Nut Packing Company product, you hadn't taken the trouble to examine the package to know? A. No." (I, pp. 128-9.)

GEORGE F. MOULTON, druggist: "X-Q.15. Ever hear of the P. Lorillard Company? A. Yes, tobacconists. * * * X-Q 18. So when you first saw that package, or when you handled them first, you didn't pay any attention to the name, just glanced at the package? A. Well, Beech-Nut was the prominent name. X-Q.19. If you had seen Lorillard's name on them you would have known it was the product of the tobacco company, wouldn't you? A. Yes." (Vol. I, pp. 377-8).

THEODORE MUELLER, a druggist, said: "X-Q20. Mr. Mueller, did you ever hear of the P. Lorillard Company, tobacco manufacturers? A. Yes, sir. X-Q.21. They are very large tobacco manufacturers, aren't they? A. Yes, sir. * * * X-Q.27. And as I understand it, when you first ordered these cigarettes and you received them you noticed they were not made by the Beech-Nut Packing Company, didn't you? A. Yes. X-Q.28. As a man purchasing goods you looked and saw they were not a Beech-Nut brand? A. Yes." (I, pp. 607-8.)

FRANKLIN G. NEAL, trademark lawyer: "X-Q.30. You have heard of the P. Lorillard Company, haven't you? A. I have. X-Q31. What kind of business do you know them to be in? A. Tobacco business. X-Q.32. When you purchased that package of Lorillard Beech-Nut cigarettes, you didn't examine it to see the name of the manufacturer or the producer thereon, did you? A. No." (I, p. 204.)

CARL W. NEMETZ, grocer: "X-Q.25. You never took the trouble to find who they were made by, did you? A. No, sir, never. X-Q.26. You don't chew tobacco, do you? A. No. X-Q.27. You never read that name 'Lorillard's' on the package, did you? A. I never took particular notice of it, no." (I, p. 552).

FRANK O'CONNELL, HENRY DIECKMAN, W. SHAFFER, H. A. NEFF, grocers, and ISABEL SHAFFER, drug clerk, by combined stipulation admitted: "I never took the trouble to read the printed matter on the package and did not notice the name 'Lorillard' or the name of the manufacturer, and paid no attention to the matter at all, as this Beech-Nut scrap tobacco is a good selling tobacco, which I have had on sale for a number of years past, and have bought at different times, and I would sell it irrespective of what company made it." (I, p. 634.)

MICHAEL O'CONNOR, market clerk: "X-Q.18. When you first purchased a package of these cigarettes, about two months ago, you did not notice the name on it, did you? A. No, I did not. X-Q.19. You did not ask the dealer who they were made by, did you? A. No. I did not. X-Q.20. You just went in and bought cigarettes

and told them just what you wanted? A. I just went in and said 'Give me a package of Beech-Nut cigarettes.' X-Q.21. That was the only thing you asked him? A. Yes." (I, p. 238).

MRS. AMELIA PETERSEN, grocery store: "X-Q.66. You didn't look at a package very closely, did you and read it? A. No, I never read it either." (I, p. 507).

RICHARD E. POPE, grain merchant: "X-Q.17. (By Mr. Cavanagh) Did you ever hear or know of the P. Lorillard Company? A. Oh, yes. X-Q.18. You know they are a large tobacco concern, do you not? A. Yes, I know they are. X-Q.19. Will you examine this cigarette package, Plaintiff's Exhibit No. 1? What name appears on it? A. P. Lorillard Co. X-Q.20. Would that indicate to you that it was a package of P. Lorillard Company? A. I would not notice it. I don't know who makes Lucky Strike, even. X-Q.21. So you don't examine the label? A. No. I am like a Chinaman, I will take a chop without any knowledge of what goes with it." (I, p. 64.)

MIKE SABA, grocer: "X-Q.11. You never took the trouble to find out who made the tobacco, did you? A. No. X-Q.12. You never read the package? A. No, I do not read very much, and I did not look. X-Q.13. You did not pay any attention to it at all? A. No." (I, p. 623).

JOHN SABELIS, commissary clerk: "X-Q.1. Did you ever look for the name of the manufacturer on it? A. No, sir. I don't chew myself and I am not interested. X-Q.2. So you weren't interested in what appeared on the package? A. No, sir. X-Q.3. Did you ever hear of the P. Lorillard Company, tobacco manufacturers? A. I believe I have. * * * X-Q.7. You never took the trouble to notice any of the printing on that package, whether it had name 'Lorillard' on it? A. No, sir. X-Q.8. You weren't at all interested in what was on it or who made the tobacco? A. No, sir." (I, p. 446).

WILLIAM H. SAGE, druggist: "X-Q10. Did you ever hear of the P. Lorillard Company? A. Oh, yes. X-Q.11. They are large manufacturers of tobacco, are they not?

A. Yes. X-Q.12. On this package of Beech-Nut cigarettes you see the name P. Lorillard? A. Yes, sir. X-Q.13. That would indicate it is that tobacco company? A. Yes. X-Q.14. And likewise on this Beech-Nut scrap tobacco you find the name Lorillard? A. I didn't notice this until after a conversation with this gentleman. X-Q.15. As a matter of fact, when you told the party that the same people that put out the gum were putting out scrap tobacco and cigarettes, you had never really looked into the matter? A. No. X-Q.16. Wasn't of any particular interest to you? A. No. None whatever." (I, pp. 420-1).

C. A. SATTIG, grocery clerk: by stipulation admits he "made no particular examination of the package and did not notice the name P. Lorillard Co. thereon; that if he had he would have known the cigarette to be a product of that company." (I, p. 317).

LLOYD SCHULTZ, grocery clerk: "X-Q.45. You did not pay any attention to who manufactured it or where it came from, or anything? A. No. X-Q.46. When the customers came in like this customer you spoke of this morning, you never got a package of tobacco to compare it with a package of chewing gum to see who made it, did you? A. No. X-Q.47. Just simply had some idle conversation and paid no further attention to it; is that right? A. Yes. X-Q.48. If you wanted to find out whether a newspaper was of a certain date, or a product was made by a certain concern, and you were enough interested, you would read the printing matter and see? A. Yes. X-Q.49. But you were not interested in this case, and paid no attention? A. I did not pay any attention." (I, p. 632.)

ROBERT SKENE, JR., a dealer in sacks for flour and feed, said: "Q.13. Now, you stated you went down and bought a package of these cigarettes. Then what did you do? A. Of course, I examined it and found that the name Lorillard Company was on them. * * * X-Q.26. Are you familiar with the names of any of the big tobacco companies? A. Oh, I am with the Lorillard name and the American Tobacco Company, and Liggett. * * * X-Q.47. When you examined this package of

Beech-Nut cigarettes, Plaintiff's Exhibit No. 1, and saw the name P. Lorillard Co. on it, didn't that indicate to you that that package was made by P. Lorillard tobacco people? A. Yes. X-Q.48. Did you ever know the Beech-Nut Packing Company to put out any tobacco product? A. No." (I, pp. 39-44.)

ARTHUR A. SKINNER, grain broker: "X-Q.12. Did you ever hear of the P. Lorillard people? A. The tobacco people, yes. * * * X-Q.22. So when you purchased those cigarettes, after you examine them, you would have seen that name, P. Lorillard Co. on it, would you not? A. Oh, yes, if I examined them closely, but I didn't notice the cigarettes. I am not particularly interested in who makes them. I open them and smoke them. Of course, I don't know who makes the Fatimas, or the Camel, but I do know who makes Lucky Strike, because I smoke so many of them. X-Q.23. You never really take the trouble to examine them? A. No." (I, pp. 57-8.)

WILLIAM I. THOMAS, grocer: "X-Q.17. Did you ever hear of the P. Lorillard Company? A. Oh, yes. X-Q.18. They are large tobacco manufacturers, are they not? A. Yes. X-Q.19. Put out a nice class of goods? A. Yes. X-Q.20. You notice the name Lorillard on this package, do you not? A. I do on this one. I have never noticed it before. X-Q.21. Never took a good look at it, did you, now? A. No. All I was looking for was tobacco. X-Q.22. If you had noticed the name 'Lorillard's', you would have connected it with the tobacco? A. Why, evidently, yes." (I, pp. 471-2).

W. G. TORREY, a miller representative, said: "X-Q.17. (By Mr. Cavanagh.) You say you have got packages of these cigarettes? A. When they were first on sale here. X-Q.18. When you examined the package, what name did you find on it? A. P. Lorillard Company. Mr. Hinton: Witness examined package before answering the question. X-Q.19. What did that indicate to you? A. That P. Lorillard were the manufacturers." (I, pp. 73-4.)

JOHN E. WATSON, druggist: "X-Q.15. Did you ever see the name 'Lorillard' on it? A. Never paid any partic-

ular attention to it. As a matter of fact, it is same as Bull Durham. Didn't pay any attention to it. X-Q.16. Just simply sell it as so much tobacco? A. That's the idea. X-Q.17. Does the same apply to the cigarettes? A. Yes. X-Q.18. You never noticed the name P. Lorillard Company on those cigarettes? A. Never paid any particular attention to it. * * * X-Q.24. So when you told people that you thought that the scrap tobacco and cigarettes were made by same people who made gum, you didn't have anything on which to base that? A. No." (I, p. 416).

MRS. MATILDA WEDEL, in the cigar business, said: "X-Q.8. What is the name on that package? A. Lorillard. X-Q.9. Do you find the name Beech-Nut Packing Company on that package? A. Not at all. If I had ever stopped to read, I would have never said this was Beech-Nut Packing Company's product. X-Q.10. If you had stopped to read the package you would never have said it was Beech-Nut Company's? A. No. X-Q.11. What brands of cigarettes do you handle? A. All popular brands. Means most established. X-Q.12. Do you handle Murad? A. All. All of Lorillard. X-Q.13. You know Lorillard is a good tobacco concern? A. Yes, sir. X-Q14. If you had ever taken the slightest trouble to examine that package you would have connected it with the Lorillard Company? A. Yes, sir. Lorillard." (IV, pp. 2212-3.)

WILLIAM C. WEIGEL, grocer: "X-Q.30. Did you ever take the trouble to read any of the writing or printing on the package (indicating)? A. I don't recollect. That is, I couldn't say what it said on there. X-Q.31. You notice the name Lorillard's' on the package? A. Yes. X-Q32. Did you ever hear of P. Lorillard Company, the tobacco people? A. Yes. X-Q.33. They are a large tobacco concern? A. Yes. X-Q.34. Those jobbers you now get the Beech-Nut tobacco from, they did not tell you it was from the Beech-Nut Packing Company, did they? A. No, sir. X-Q.35. And none of the agents told you it was made by the Beech-Nut Packing Company, did they? A. No, sir. X-Q.36. You never knew the Beech-Nut Packing Company to put out a package of tobacco like this (indicating), did you? A. No. X-Q.37. You

never knew them to sell tobacco at all, did you? A. No." (I, p. 563).

CLARENCE A. WILKINS, variety store: "X-Q.23. But you do sell the Beech-Nut cigarettes? A. I do. X-Q.24. And you buy that from P. Lorillard Co.? A. I buy it through a jobber; the original order was given to the Lorillard salesman. * * * X-Q.37. You know of P. Lorillard Company, do you not? A. Oh, yes, I have bought their goods for years, but I never bought anything direct from them, as I know of." (I, pp. 110-2.) This witness had defective eyesight and was somewhat color blind.

MRS. IDA W. WILKINS, wife of above witness: "X-Q.13. You have never taken any trouble to observe that package, have you? A. No, only as I put it out, not to go through it closely, all the reading on it, and look at it. X-Q.14. Whose name is that written on it? A. P. Lorillard Co., I see written on it. X-Q.15. So, if you had observed that package closely, you would have known that it was a P. Lorillard Co. cigarette? A. Yes, sir; the Lorillard tobacco company." (I, p. 121.)

ROY J. YUNKERS, a cigar salesman, said: "X-Q.3. I show you this package. Exhibit 16, and ask you if you can read that name? A. Lorillard. Yes, sir. X-Q.4. Whose tobacco would you take that to be from that package? A. I would take it to be Lorillard's tobacco. X-Q.5. You do not find the word Beech-Nut Packing Company any place on that package? A. No, sir. X-Q.6. And you know that Lorillard is a large and reputable manufacturer of tobacco? A. Yes, sir. X-Q.7. Have you a very good standing in the trade? A. Very good. X-Q.8. If a man asked you whose tobacco that was, if you took time to even look at it you would say it was Lorillard? A. Yes, sir. X-Q.9. You would immediately connect the name with such cigarettes as Murad, Mogul, Egyptian Dieties, and Climax chewing tobacco? A. Yes, sir." (IV, pp. 2221-2.)

APPENDIX B.

CORRESPONDENCE BETWEEN PETITIONER AND RESPONDENT IN REFERENCE TO THE BEECH-NUT TRADE-MARK.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

6/11/15

LORILLARD CO.,
Middletown, O.

Dear Sirs:

We adopted many years ago as our trade name the word "Beech-Nut" arbitrarily selected by us as the mark or name for our manufacturing output of food material. We also associated with such trade name "BEECH-NUT" and as a part of the trade mark, an oblong or oval frame or border of a red color surrounding and enclosing a white oblong space with a picture or representation of a Beech-Nut centered therein.

We have built up during the last quarter of a century a vast trade in our products and always with our trade name or trade mark associated therewith. We have expended a very large sum of money in so doing and the word or name "BEECH-NUT" and our trade mark has become of vast value to us not only for these reasons but for the reason of a high quality and perfection of the various products manufactured by us to which this name and mark has been applied.

So completely has this name and mark been attached to and associated with our goods during all of these years that the purchasing public has come to recognize this name and mark as our property as to origin and to purchase the manufacture and output to which this name and mark is applied without any further identification as to the origin of the word or name itself, believing that wherever they see

our name and mark applied that we are the manufacturers of the product and purchase accordingly.

We have from time to time added to the variety of our manufacturing commodities to which this name or mark has always been applied; as for example, a chewing gum product of somewhat recent production upon our part. While we have never as yet manufactured tobacco, the taking on of such manufacture in the future is by no means impossible or improbable. You will also see that the name or word "BEECH-NUT" is a part of our corporate name. We have been thus particular to state this matter to you by reason of the acts upon your part which now follow.

We have been shown a lined bag evidently employed for packing "Beech-Nut Scrap Tobacco," apparently manufactured by one of your factories at Middletown, O. A prominent feature upon the bag is our trade name "BEECH-NUT," including the oval band and our characteristics burrs and nuts. It is difficult to believe that the presence of our trade name "Beech-Nut" and mark upon the bag will not deceive the purchasing public in the belief that the contents of the bag are of our manufacture, and to us there is no other explanation to be given to the presence of our trade name "Beech-Nut" and mark upon this bag except the intention on your part that the public shall be so deceived: and you will sell your tobacco by reason of the presence thereon of our name and mark. In other words, these acts strongly indicate to us intentional unfair trading.

We have decided in the first instance to write you fully as to this matter and present to you our view of your acts and to request to you immediately to cease this use of our name and mark and give us written assurance of the same.

We have confidence that now your attention is called to it you will recognize the justice of our position and that there will hereafter be no necessity of using any harsher course to enforce recognition of the same. We have been thus particular also for the reason that there can be no contention

hereafter that we have not fully stated your position and ours in this matter. An early reply upon your part is requested and expected.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

6/18/15.

P. LORILLARD CO.,
Middletown, O.

Dear Sirs:

Will you kindly advise if we may expect an early reply to our recent communication with reference to the use of the word "Beech-Nut" in connection with your new brand of chewing tobacco?

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

June 23, 1915.

BEECH-NUT PACKING COMPANY,
Canajoharie, N. Y.

Dear Sirs:

Your letters of June 11th and June 18th addressed to this Company at Middletown, Ohio, relative to the use by us of the name "Beech-Nut" for Scrap Tobacco, have been referred to me.

Preliminary to any discusion of the matter, will you be good enough to let me know when you first began to use the name "Beech-Nut?" I notice on your letterhead, "Incorporated 1899," but this of course does not necessarily mean that you began to put products on the market under the name "Beech-Nut" at that time.

The statement in your letter of June 11th, that you believe we are using the name "Beech-Nut" with the intention that the public shall be deceived into thinking that our product is of your manufacture, is not only without the slightest warrant, but is little short of ridiculous. As a matter of fact, if such an impression should be formed, it would be to our detriment.

Yours very truly,

TSF/L

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

P. LORILLARD CO., 7/2/15.
119 W. 40th St.,
New York.

Mr. Thomas S. Fuller.

Dear Sirs:

Your favor of the 23rd ult. duly received.

Our "BEECH-NUT" trade mark and trade name has been used by ourselves and our predecessors since and prior to the year 1891. Both our trade mark and our trade name "BEECH-NUT" has been used continuously since that date in our business and to such an extent and in such manner that both the name and the mark long since came to have a "secondary significance and meaning"; that is, wherever the mark and name "BEECH-NUT" is seen and no matter with what product it is associated with, it has a "secondary significance" and means only the product and products of the Beech-Nut Packing Company.

You are woefully mistaken and entirely misinformed in your assumption and, indeed, your statement that the public is not deceived by your clients use of our trade mark and name "BEECH-NUT." We know as an absolute truth what is apparent on the face of the facts that the general purchasing public is deceived by your use of our "Beech-Nut" trade mark and trade name and, indeed, this could not well be otherwise, but we know further that your salesmen and agents deliberately push your goods and trade under this identity of use of their mark and name.

We beg to call your attention in this connection to our former communication to you in this matter and to again urgently request that you immediately stop the use in every way and manner of our trade name and mark "BEECH-NUT," in your business without further action upon our part.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

July 8, 1915.

BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

(Attention F. E. Barbour, Esq.)

Gentlemen:

We have your letter of July 2nd, further with reference to our use of the name "Beech-Nut" on scrap tobacco, and informing us that you and your predecessors have used the name since and prior to the year 1891.

That the name "Beech-Nut" has acquired a secondary significance and meaning in the packing industry and is associated in the public mind with goods of your manufacture may be perfectly true, but this would not give you the right to the name for all purposes. The authorities are overwhelming on this subject. You seem to proceed upon the assumption that we have recently begun to use the name on the tobacco. This is not the case. This Company and its predecessor in ownership of this brand have used it continuously since prior to the year 1898, as shown by records in my office. I have not made a search beyond that time, but I have no doubt that I can find that the brand is very much older.

We would not desire to have it thought that our "Beech-Nut" tobacco is made by your Company, and if you can give us the name of any salesman of ours who has made such a representation, we would be very glad to have it, and we can assure you that if he did make such a representation, his discharge will immediately follow. It could be of no conceivable advantage to us to have the public think that our tobacco product was manufactured by a packing establishment. Our concern has been in business for more than one hundred and fifty years, and in that length of time has built an enviable reputation for the excellence of its tobacco products.

Though you may turn out an excellent quality of bacon, it does not follow that you could turn out an excellent quality of tobacco, or steel rails, or pianos or aeroplanes. If your contention were true, we, who have a brand of tobacco called "Climax," could enjoin the use of the name on a well-known threshing-machine which is sold in the Western States, or we could enjoin the use of our name on the Lorillard Refrigerators. It has never occurred to us to attempt either.

If you will look at our package of Beech-Nut Tobacco, you will see that the name "Lorillard" is prominently displayed thereon. This was done with the desire that people should know the tobacco is coming from the Lorillard Company. It has been our belief that the fact that Lorillard made it would of itself be of value to the brand.

It is difficult to see how you can seriously claim that there is the slightest similarity in the marking of the package and the fac-simile of your mark as displayed on your letterhead.

If you desire me to point out to you authorities which I consider completely sustain my view as expressed herein, I will take pleasure in doing so.

Yours very truly,

TSF/L

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

7/26/15.

P. LORILLARD CO.,
119 West 40th St.,
New York.

Thomas S. Fuller.

Dear Sirs:

Please pardon the delay in acknowledging receipt of your favor of July 8th.

We will greatly appreciate it if you will send us samples of your product showing the manner of use of the word "BEECH-NUT" since the year 1898, copies of advertisements or of letter-heads showing your use of this name. We trust you will consider this a fair request as we would like to reach a prompt and friendly termination of the correspondence on this subject.

We also desire to take advantage of the offer contained in the last paragraph of your letter to point out to us the authorities which sustain your views.

Thanking you in advance for the information requested herein, we remain,

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

9/2/15.

MR. THOS. S. FULLER,
119 W. 40th St.,
New York.

Dear Sirs:

Kindly refer to your favor of July 29th in which you advised that you would collect the information requested in our letter of July 26th after your return from a week's absence. Up to the present we do not seem to have heard from you and will greatly appreciate the information requested.

In this connection, we received today an inquiry from New River Gro. Co., Hinton, W. Va., asking the best jobbing price on Beech-Nut scrap tobacco, from which you will note that in the minds of some, at least, Beech-Nut scrap tobacco is credited to the Beech-Nut Packing Co.

Thanking you to favor us at your early convenience, we remain,

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

September 15, 1915.

F. E. Barbour, Esq.,
Beech-Nut Packing Company,
Canajoharie, N. Y.

Dear Sir:

I have been able to locate some old price lists which contain our Beech-Nut Scrap Tobacco, and enclose them herein. I am also sending you an old package showing the use of the name "Beech-Nut" and our present package.

Beech-Nut chewing and smoking tobacco (scrap) was made by Harry Weissinger Tobacco Company, of Louisville, Kentucky. This Company was bought out by The American Tobacco Company some time in 1903. Prior to the acquisition of the Weissinger Tobacco Company by the American Tobacco Company the Luhrman & Wilbern Tobacco Company of Middletown, Ohio, was acquired by the Continental Tobacco Company. In 1904 the American Tobacco Company and the Continental Tobacco Company were merged into a new company formed for that purpose and known as The American Tobacco Company.

Under a decree of the Circuit Court of the United States for the Southern District of New York, the so-called Tobacco Combination, which included The American Tobacco Company, was split up. In this disintegration proceeding the Luhrman & Wilbern Tobacco Company, which had always been maintained as a separate entity, was acquired by P. Lorillard Company. In the meantime some of the brands formerly manufactured by the Weissinger Tobacco Company had been taken over and manufactured in the Luhrman & Wilbern factory in Middletown, and after the acquisition by our Company of the Luhrman & Wilbern business, including these brands, we continued to operate it as a separate Company until about two years ago, when we dissolved it, taking over all of the business and brands directly in our own name.

I give you this history so that you may understand the various price lists in the name of Luhrman & Wilbern Tobacco Company and the package in the name of Harry Weissinger Tobacco Company. I do not know the exact date of the old package, as the stamp is not legible, but it was prior to 1903.

The price lists that I send you are dated January 2, 1904; May 6, 1907, July 1, 1910, and November 3, 1910.

It is difficult for me to see how anyone can claim that there is any similarity in our products and yours, or in your label and ours, other than the name "Beech-Nut." Your claim that we would not have the right to use the name "Beech-Nut" on tobacco products must find its basis in the idea that you can appropriate the name "Beech-Nut" for all products of whatever character.

That the law does not permit of such a claim is elementary. If your claim were maintainable, then the Lion Brewery in New York could enjoin the manufacture of Lion brand collars, or vice versa. Suppose that the J. B. Williams Company should tomorrow put out a new brand of shaving soap, called "Beech-Nut." Do you argue that you could stop it because you have first used the name on hams and bacon? It seems to me that your argument must lead to this conclusion. The law of unfair competition, so far as it assumes to protect the public, assumes to protect the purchaser of average intelligence. It is difficult to believe that a person of average intelligence who enters a store for the purpose of buying "Beech-Nut" hams or bacon could be deceived into thinking he was getting either if he were handed a package of "Beech-Nut" chewing tobacco, or that the "Beech-Nut" chewing tobacco was manufactured by the manufacturer of the hams and bacon. It is no more the custom in this country for a packer to manufacture chewing tobacco than it is for a manufacturer of beer to manufacture collars, and the purchaser of average intelligence perfectly well knows this.

We have tried to make it evident on our package that our "Beech-Nut" chewing tobacco is of our manufacture, by stamping across the top of the package, before the name "Beech-Nut," "Lorillard's." We have also on the other side of the package, plainly printed that it is manufactured at Middletown, Ohio. There is nothing in the get-up of the label, whether in design, color or wording, which could suggest to a person of average intelligence that it was of your manufacture, or in fact the manufacture of anyone except the Lorillard Company.

As I have written you before, we consider it of immense value to the brand itself that it is manufactured by the Lorillard Company, and we desire the consumers of tobacco to know this, because we believe that the Lorillard name carries with it a vast amount of good-will and a guarantee of excellence. We are justified in this belief by reason of the immense increase in the sales of "Beech-Nut" Scrap since we took the former manufacturer's name off and put "Lorillard's" thereon.

I think this covers the situation except with respect to any representations which you claim that some of our salesmen made, to the effect that our "Beech-Nut" Scrap was a product of your Company. I have written you before that if you will give me the name of any salesman who has made such representation, and that fact can be determined, his discharge will be immediately forthcoming, as he can be of no service to us. If you will point out to me anything in the conduct of our business which tends to create a belief in the trade that our "Beech-Nut" Scrap is made by you, we will thank you, so that we may rectify it. I assure you that we are just as anxious as you are, if not more so, to prevent any impression that our tobacco is made by you. Will you let me have a copy of the letter you received from the merchant in West Virginia making inquiry of you for "Beech-Nut" tobacco?

On this general subject, if you have not already done so, you might consult Nims on Unfair Business Competition,

pages 200 to 300; therein I think you will find a very complete and satisfactory discussion of the law governing this subject. I will quote you paragraph 117 on page 236:

> "Property in a place name for all purposes cannot exist in one person, under ordinary circumstances. The defendant must be using it in the same or a similar business as the plaintiff. Large amounts of rubber as well as licorice might be found in Anatolia. If there were, the rights which the complainant has acquired in the use of the name in the licorice business, would not prevent another under certain conditions from acquiring a sole right to use the name in the rubber trade."

There is no distinction so far as the principle here laid down is concerned between a place name, a generic name, or a fanciful name. You might also consult the cases of Bordens Ice Cream Company against Bordens Condensed Milk Company, 201 Fed. 510 and Wells v. Ceylon Perfume Company, 105 Fed. 621.

I apologize for the length of this letter. I desire to give you the facts fully, together with our views, and I sincerely hope that this will satisfy you as to the law and our entire good faith. We are as proud of our good will and the excellence of our products in the tobacco business as you are of yours in the packing industry, and we believe with good reason.

Yours very truly,

(Sgd.) THOS. S. FULLER.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

9/20/15.

MR. THOS. S. FULLER,
119 West 40th St.,
New York.

Dear Sir:

We have your very interesting letter of Sept. 15th together with the pricelists referred to and the package of tobacco.

Your letter is a very interesting one and before giving a definite reply to same, desire to review the matter as presented by you so that we can give you an intelligent reply.

At this time, however, we may express our agreement with you that the name Lorillard carries with it a vast amount of good will and unquestionably a guarantee of excellence. So does the name "Beech-Nut Packing Co." and we take the view that the increase in sales of Beech-Nut Scrap Tobacco is due to the exploitation of the name "Beech-Nut" with the oval label, and we cannot help but assume that the general impression is that these goods are manufactured by this Company rather than by Lorillard, at least to a considerable degree, for since writing you last we have another inquiry, and this time from Wm. Edwards Co. of Cleveland, O., asking us to ship them 5 cases of Beech-Nut scrap tobacco. The previous inquiry came from New River Gro. Co., Hinton, W. Va.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

June 28, 1919.

BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

Gentlemen:

Some four years ago, there occurred a correspondence between the two companies begun by your Mr. F. E. Barbour's letter of June 11th, 1915, complaining of our use of "BEECH-NUT" for tobacco products. Several letters having intervened, we wrote you on September 15th, 1915, setting forth at some length the title to and use of this trade-mark for tobacco products, asserting our ownership of it for tobacco products and denying that you had cause or right to call this ownership in question. Your response was an acknowledgment, dated September 20th, 1915, characterizing our letter as very interesting and stating that before giving definite reply you desired to review the matter presented by us so that you could give us an intelligent reply.

On your part, there the matter was dropped, you having made no further reply or objection. On our part we have continued the manufacture and sale of tobacco products under the trade-mark "BEECH-NUT" until today it is one of the leading tobacco trade-marks of this country.

On or about the 17th of this month information came to us of small shipments to two jobbers in this locality of cigarettes bearing the trade-mark "Beech-Nut" and your name, but manufactured by The American Tobacco Company. Our counsel immediately by phone took the matter up with Mr. Junius Parker, counsel for the Tobacco Company and, on being told by Mr. Parker that the Tobacco Company did not claim any title to the trade-mark, but was manufacturing cigarettes under it for your account, our counsel asserted our ownership of the trade-mark for tobacco products and demanded that the Tobacco Company cease making these cigarettes. We now have Mr. Parker's letter dated June 25th, 1919, stating that the Tobacco Company has

"easily and definitely concluded" not to manufacture any tobacco products under the name "Beech-Nut." We do not enclose copy of this letter, as we take it for granted that the Tobacco Company has made you fully cognizant.

We very much hope that further consideration will bring you to a like conclusion, as we must and do insist that you respect our rights and cease using "Beech-Nut" as a trade-mark for cigarettes. You have never heretofore used this trade-mark for tobacco products. Indeed, you have never heretofore manufactured or sold any tobacco products, but always goods of an entirely different class. "BEECH-NUT" has been used by ourselves and our predecessors in title for many, many years as a trade-mark for tobacco products, and under numerous decisions this gives us ownership of the trade-mark "BEECH-NUT" for cigarettes.

We are mailing a duplicate original of this letter to your New York Office.

Yours very truly,

P. LORILLARD COMPANY,
President.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

July 7, 1919.

P. LORILLARD CO.,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Dear Sirs:

At the request of Mr. B. Arkell, you are advised in Pittsburg, Pa., there is a firm trading under the name of Beech-Nut Stogie Co. It is our understanding that this firm markets Beech-Nut Big Havana Stogies.

On 5/25/18 our Pittsburg salesman sent us an order for shipment of Beech-Nut Gum to H. Myers, 305 Wood St., Pittsburg, Pa. This party re-ordered under the name of Beech-Nut Stogie Co.

Yours very truly,

BEECH-NUT PACKING CO.,
W. C. Arkell.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

July 7, 1919.

P. LORILLARD CO.,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Dear Sirs:

Wm. A. Stickney Cigar Co., 105 West 2nd South, Salt Lake City, Utah, has written us requesting us to make shipment to Fred Vogel, Ogden, Utah, of 5 gross Beech-Nut Scraps.

We are writing them that this product is made by your concern.

Yours very truly,

BEECH-NUT PACKING CO.,
W. C. Arkell.

July 9, 1919.

"BEECH-NUT."

MR. W. C. ARKELL,
c/o BEECH-NUT PACKING COMPANY,
Canajoharie, N. Y.

Dear Sir:

I have your two letters of the 7th inst.—one calling to our attention the manufacture of "BEECH-NUT" Big Havana Stogies by the Beech-Nut Stogies Company of Pittsburg, Pa., and the other calling our attention to an order received by you from Wm. A. Stickney Cigar Co., for 5 gross of "BEECH-NUT" Scrap, and enclosing copy of your reply to the Cigar Company.

We thank you very much for this information and the same shall have our prompt attention.

Yours very truly,

P. LORILLARD COMPANY,
(Sgd.) THOS. J. MALONEY,
President.

TJM/ELM

July 15, 1919.

MR. BARTLETT ARKELL, President,
BEECH-NUT PACKING CO.,
New York City.

Dear Mr. Arkell:

Pursuant to our interview, I am sending you by registered mail, under separate cover, a sample of the old package for BEECH-NUT cigarettes, also one showing color scheme for the new package.

The new package will carry the same printing and gilt as the old package, except that the printing on the reverse side of the new package will be: "Cigarettes of this quality have never before been offered to the public. Guaranteed by P. Lorillard Company (Established 1760)." in lieu of that now appearing on the old package.

The color scheme we have adopted for the new package is not only strikingly different from the old package, but it is a distinctly new color, in so far as we know. Our lithographer tells us it is a recently "created" color.

In making this change we are destroying wrapping and advertising material that cost us $10,231.36. I mention this, as I feel sure you will not permit us to suffer such a loss in accommodating ourselves to your wishes.

Yours very truly,

President.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

Room 1818, 120 Broadway, New York City.

July 17, 1919.

MR. THOMAS J. MALONEY, President,
P. LORILLARD COMPANY,
119 West 40th Street,
New York City.

Dear Mr. Maloney:

I am in receipt of your courteous favor of the 15th inst. together with sample packages, which I will submit to my associates, and also to our counsel. As soon as I hear from them, I will take the matter up further with you.

I do not understand the last paragraph of your letter. Do you mean that we should pay for all, or part of, the loss which you suffer, or what? If so, such a request is not in accord with my recollection of our interview.

Yours sincerely,

BEECH-NUT PACKING CO.,
BARTLETT ARKELL,
President.

LAW OFFICES OF OFFIELD & POOLE.
Attorneys and Counselers.
1225 Monadnock Building, Chicago.

JAMES R. OFFIELD. CHARLES H. POOLE.

July 22nd, 1919.

MR. W. C. ARKELL,
c/o BEECH-NUT PACKING COMPANY,
Canajoharie, New York.
In Re Beech-Nut Stogie Company.

Dear Sir:

In reply to you letter of June 10th, the fact that you were aware of the existence of the Beech-Nut Stogie Company and have actually filled their orders with your goods without making any complaint will, of course, have a bearing upon the question of damages in the event you sued them, but I doubt if it would have any bearing upon your right to stop the use by them of your mark. Of course, the time to have taken the matter up was upon the first shipment but that is now past and I think it would be a good idea to call this matter to the attention of the Lorillard Company and let them take steps against the Beech-Nut Stogie Company as they are in a much better position to do so than the Beech-Nut Packing Company.

Very truly yours,

(Sgd.) JAMES R. OFFIELD
for O. and P.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

Room 1818, 120 Broadway, New York City.

July 25th, 1919.

MR. THOMAS J. MALONEY, President,
P. LORILLARD COMPANY,
119 West 40th Street,
New York City.

Dear Mr. Maloney:

I am enclosing letter addressed by our counsel, Mr. Offield, to my son, William Clark Arkell, in reference to the Beech-Nut Stogie Company, thinking that you would be interested in same.

Yours sincerely,

B. ARKELL.

Enclosure
Cy/Canajoharie.

July 28, 1919.

MR. BARTLETT ARKELL, President,
BEECH-NUT PACKING COMPANY,
Room 1818, 120 Broadway,
New York City, New York.

Dear Mr. Arkell:

I have your letter of the 25th, enclosing letter from your counsel, Mr. Offield, to your son, Mr. William Clark Arkell, in reference to the Beech-Nut Stogie Company.

We are now opposing in Washington an attempted registration by this concern of the name "Beech-Nut" for some tobacco products. This is the beginning of measures which we hope will result in stopping the use of the name by this concern for tobacco products.

I also received your letter of the 17th, with respect to the sample package sent you, and as to which I hope you will find yourself in position to reply at an early date.

You state you do not understand the last paragraph of my letter of the 15th. Should we change from the label we had adopted for "BEECH-NUT" cigarettes, it will result in our being unable to use the labels and advertising and wrapping material which we had procured for this brand of cigarettes, and which cost us the figures stated in my letter. Mr. Perkins mentioned this to you—though not the figures—in our interview when you were here. There was no discussion of the point. It seems to me that we should not stand this loss and that you would not wish us to stand the loss, inasmuch as any change that we might make would be simply to accomodate ourselves to your wishes.

Yours very truly,

President.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

August 7, 1919.

P. LORILLARD COMPANY,
119 West 40th Street,
New York.

Mr. Thomas J. Maloney.

Dear Sirs:

Our President, Mr. Arkell, was here yesterday and your letter of July 28th was presented at a meeting of our Executive Committee.

In discussing the situation, a suggestion was made which possibly has not occurred to you, and therefore we are submitting it to you for your consideration. In view of the splendid success of your Beech-Nut Scrap Tobacco, would it not be worth while to simulate your Beech-Nut scrap tobacco package in a wrapping for your cigarettes: in other words, use for your cigarettes a form of label which will immediately apprise the prospective purchaser that the cigarettes are made by the same company making the popular Beech-Nut tobacco, and tie up the advantage and publicity you have already gained through the merchandising of that product. Our thought in regard to the above is prompted by the procedure of the Patterson Co. in connection with their Lucky Strike Smoking Tobacco and Lucky Strike Cigarettes.

Should you not care to follow the suggestion offered above, we hope you will abandon the red background and change the same to blue or some other color, and we would like to see the words "Beech-Nut Brand" a straight line instead of a curve, provided you could work out this idea to your satisfaction.

Mr. Arkell has no recollection of hearing mentioned the advertising matter or wrappings you have provided for your Beech-Nut cigarettes, and while Mr. Lipe recollects some mention made of it, no reference, as far as he can recall, was made in regard to the quantity and neither of these gentlemen gained the inference that you would expect the Beech-Nut Packing Co. to absorb the cost of these supplies.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

Room 1818, 120 Broadway, New York City.

August 9, 1919.

MR. THOMAS J. MALONEY, Pres.
P. LORILLARD CO.,
119 West 40th Street,
New York City.

My dear Mr. Maloney:

I am enclosing copy of letter written by my son relative to the Beech-Nut Stogie Company, at Pittsburgh.

Yours sincerely,

B. ARKELL.

Enclosure.

August 8, 1919.

MR. JAMES R. OFFIELD,
1225 Monadnock Building,
Chicago, Ill.

Dear Sir:

We are in receipt of a communication from Mr. V. P. Burby our Pittsburgh representative under date of August 5 as follows:

> "The Beech-Nut Stogie Co. is not incorporated. Mr. H. Meyers trades under the name. Mr. Meyers mentioned the other day that A. Schulte, who operate a string of Cigar Stores in New York, recently offered $5000.00 per year for the use of the name. This may be bunk but I thought it might be of interest.
>
> Mr. Meyers claims he has secured a copyright on the word Beech-Nut for stogies."

We have answer as per attached copy. We are also sending copy of this letter to Mr. B. Arkell with the thought that he will call it to the attention of the Lorillard people.

Yours very truly,

BEECH-NUT PACKING COMPANY.

August 27, 1919.

MR. F. E. BARBOUR, Secretary,
BEECH-NUT PACKING COMPANY,
Canajoharie, New York.

Dear Sir:

Your letter of the 7th has been received and its contents noted, and we appreciate very much your suggestion of our use for the cigarette package of the design now upon our scrap package. This thought occurred to us when we were originating the package for the cigarette and was tried out, with the result that in our opinion the design was not adaptable to a package the size of a cigarette package.

The matter of the oval upon the package was mentioned by Mr. Arkell, but he did not press the point against our objection, the only things remaining for discussion between us being the color of the background of the package and the wording as respects "BEECH-NUT" quality. In the light of this interview the sample which we sent you made changes in both these respects, and we still very much hope that it will prove acceptable.

Indeed, your averseness to assuming the loss which a change in wrapping material would occasion us indicates that the matter is of such small importance to you as not to justify further consideration, for you could not expect us to bear the loss of changes made just to accommodate ourselves to your wishes.

As we are anxious to get along with this matter, will you not let us have your prompt and full answer.

Very truly yours,

President.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

8/28/19.

P. LORILLARD CO.,
119 West 40th St.,
New York City.

Mr. Thomas J. Maloney.

Gentlemen:

Your letter of the 27th is received and the same will have prompt consideration.

Yours very truly,

BEECH-NUT PACKING CO.,
F. E. Barbour.

September 17, 1919.

Mr. Bartlett Arkell, President,
Beech-Nut Packing Company,
Room 1818, 120 Broadway,
New York City, New York.

Dear Mr. Arkell:

Although from my interview and correspondence which ante-dated your application for the registration of "BEECH NUT" for cigarettes, makes me feel sure that you did not intend to press this application, the appearance of a notice of it in the "Official Gazette" of September 9th compels us to file a formal opposition in order that the registration may not become complete through our default.

I am writing you in advance of the filing of this opposition, so that you will understand the circumstances.

I hope that you may be able to let me hear at an early date something further as to the proposed package for "BEECH NUT" Cigarettes.

Very truly yours,

(Sgd.) T. J. Maloney,
President.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

Room 1818 120 Broadway, New York City.

September 19th, 1919.

MR. THOMAS J. MALONEY, President,
P. LORILLARD CO.,
119 West 40th Street,
New York City.

Dear Sir:

I take the liberty of acknowledging receipt of your courteous favor of the 17th inst. which has arrived during Mr. Arkell's absence from the city.

It is expected that Mr. Arkell will return to the city the forepart of the coming week, at which time your letter will be placed before him for his attention.

Yours very truly,

M. E. CARROLL,
Secretary to Mr. Arkell.

BEECH-NUT PACKING COMPANY
CANAJOHARIE, N. Y.

Room 1818 120 Broadway, New York City.

September Twenty-second, 1919.

MR. THOMAS J. MALONEY, President,
P. LORILLARD COMPANY,
119 West 40th Street,
New York City.

My dear Mr. Maloney:

I appreciate, and understand thoroughly, your courteous favor of the 17th inst.

I take it for granted that the application for registration of Beech-Nut Cigarettes was a procedure advised by our Legal Department. I understand that Mr. Offield, who has offices in Chicago, and who has these matters in charge, has been in California and for that reason there has been this unusual delay. Or it may be that we felt that our suggestions as to your package should have been regarded in a more favorable light by you.

Yours sincerely,

BARTLETT ARKELL.

BEECH-NUT PACKING COMPANY

Oct. 8, 1919.

MR. THOMAS J. MALONEY,
Pres. P. LORILLARD CO.,
119 West 40th Street,
New York City, N. Y.

Dear Mr. Maloney:

We have just had a communication from our attorney regarding our application for the registration of our trade-mark "Beech-Nut" for cigarettes. It is his opinion that this application should stand in the Patent Office in order to preserve the rights of the Beech-Nut Packing Company and that no doubt your attorneys will advise the filing of a formal opposition against this registration to preserve any rights that you may have, and that it would be unwise for us to abandon this application for registration without contest unless we reach some definite agreement.

Up to the present time we have come to no final understanding and as the matter stands to date you have agreed to make certain changes in your label and submit your proposed changes to us, but have asked us to assume the loss which your company will incur by reason of making such change.

We do not feel disposed to reimburse your company for losses sustained by reason of adopting trade-mark and common law property which rightfully belongs to this company although such adoption may have been a mistake on the part of those in your employ who prepare such illustrative matter.

Briefly stated, our position is this—That regardless of the trade-name or mark "Beech-Nut" your company adopted our oval trade-mark and our general color scheme and other embellishments for your cigarette package, and this your company had no right to do regardless of any rights that

you may have had in so far as the name "Beech-Nut" is concerned.

From a pure equitable standpoint we therefore believe that you should make the necessary changes so that there will be no similarity as to designs or marking upon the package other than the name "Beech-Nut."

The mistake, we believe, is due entirely to your organization and therefore this company should in no wise contribute to its correction. On the other hand, we are advised that for a sum less than the amount which you have suggested we contribute to reimburse you for the necessary changes, our legal rights could be determined and regardless of what the court might hold as to our respective rights in the trade-name "Beech-Nut" we are assured that a court would sustain our contentions as to the subject-matter which we now ask you to abandon.

Of course we know that lawyers cannot always foretell the outcome of any litigation on any given set of facts, and contests of this kind are undesirable to both parties.

The matter has been given very thorough consideration by us and we feel that your package should be changed and that such changes should be made at your expense. Our other differences, such as the opposition proceeding, can be very readily adjusted after we have definitely agreed upon the main issue, and we should be pleased to hear from you further.

Very truly yours,

BEECH-NUT PACKING CO.,
F. E. Barbour.

October 15, 1919.

Mr. F. E. BARBOUR, Secretary,
Beech-Nut Packing Company,
Canajoharie, New York.

Dear Sirs:

Replying to your letter of the 8th inst., this Company has not adopted any trade-mark or common-law property or design or color scheme or other embellishment belonging to your Company, nor have we agreed to make changes in our labels.

When knowledge of your attempted marketing of a "BEECH NUT" Cigarette reached us, we at once wrote asserting our ownership of the trade-mark "BEECH-NUT" for all tobacco products and asked your Company to respect this ownership. There followed an interview with Mr. Arkell and Mr. Lipe. In this interview it developed that the only real matters in difference as respects our use of the trade-mark "BEECH-NUT" for cigarettes were the color of the background and the wording of the catch-phrase on our proposed package of "BEECH-NUT" cigarettes, and we promised to submit a sample package with a different background and a different catch-phrase, in an endeavor to see if these differences could not be amicably adjusted, stating to you at the time, however, that if we did come to an agreement in this respect it would involve the loss of material we had already bought and that this loss should be borne by your Company. We subsequently submitted the sample as promised.

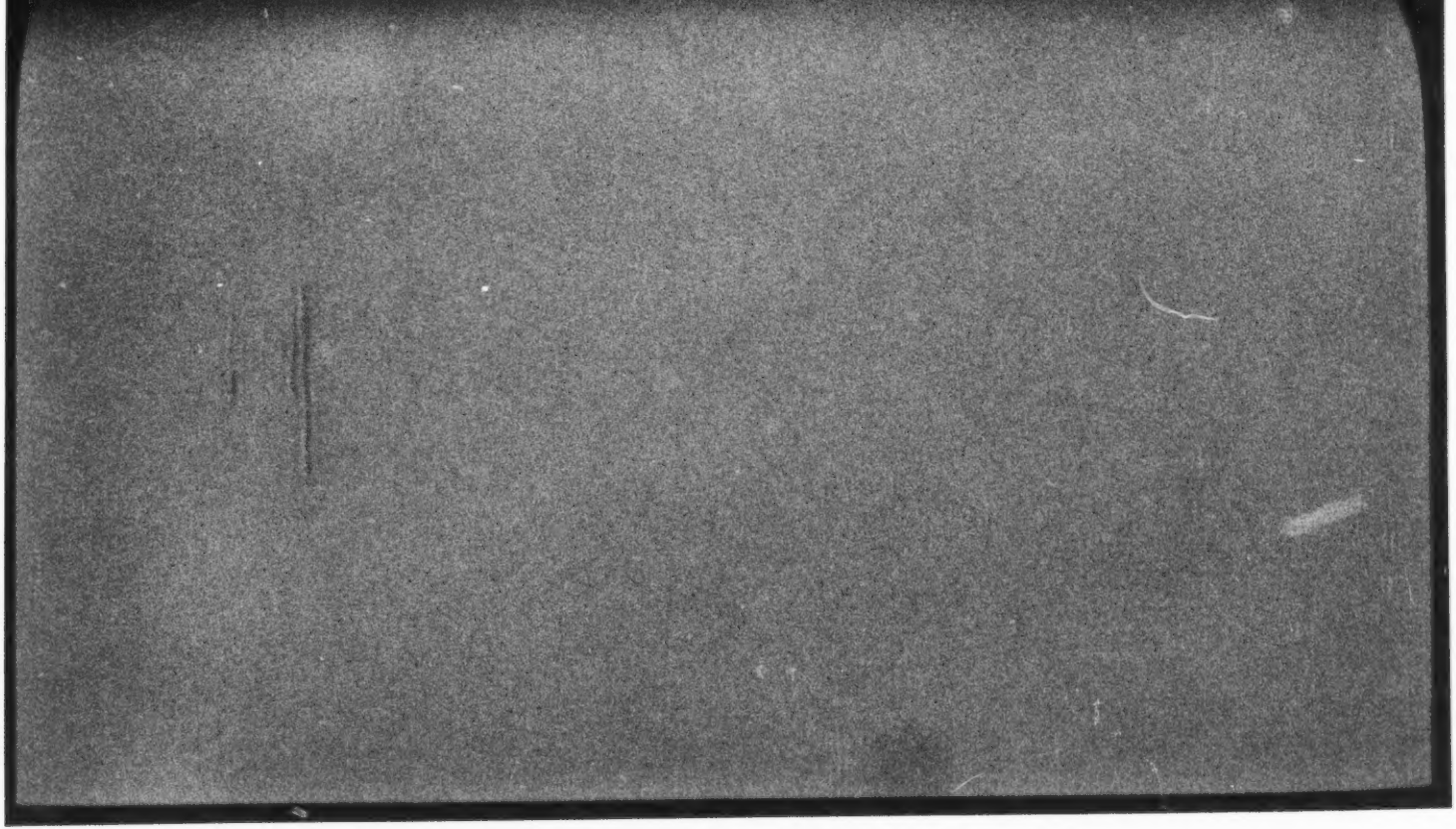
What we did and said in this connection was without any waiver of our rights and without recognition of any right in your Company to require any such change; but solely as explained in the interview and as we have tried to make plain in our correspondence, in a friendly endeavor to get together in this matter. Our ownership of the brand

"BEECH-NUT" for all tobacco products is clear and we are exercising our ownership of this brand, including the proposed package for "BEECH NUT" Cigarettes, in an entirely legal manner.

If we have failed in this endeavor, as your letter seems to indicate and which we sincerely regret, will you kindly return the sample package which we sent you.

Very truly yours,

President.



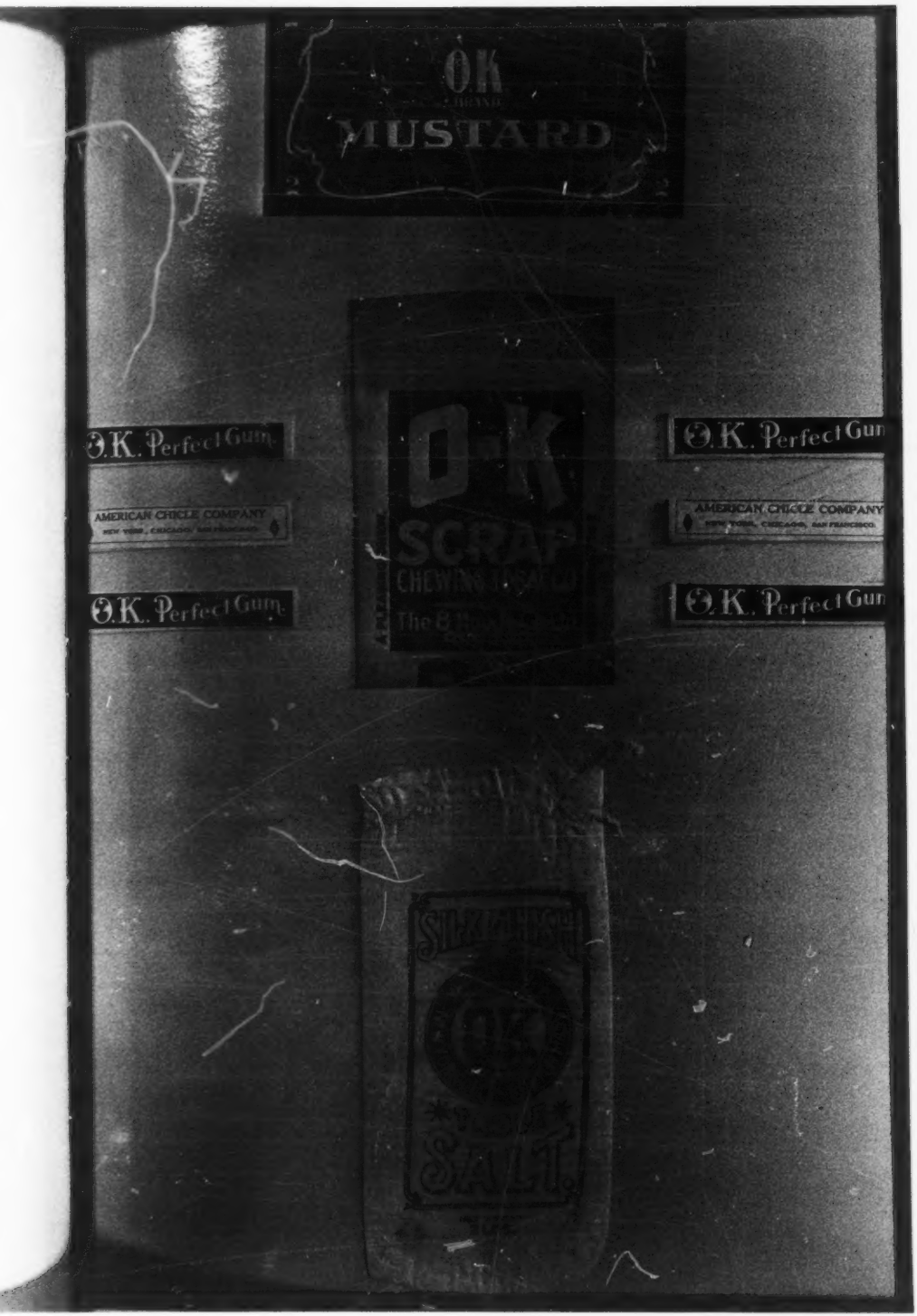
BUZZ
FRIENDS
CUBIST
UNION LEADER
PUSH UP
PIONEER
PAN HANDLE
ROMEO
BUZZ
ZIRA
LORIVANA
ROCKY FORD
BLOT
THE BEST

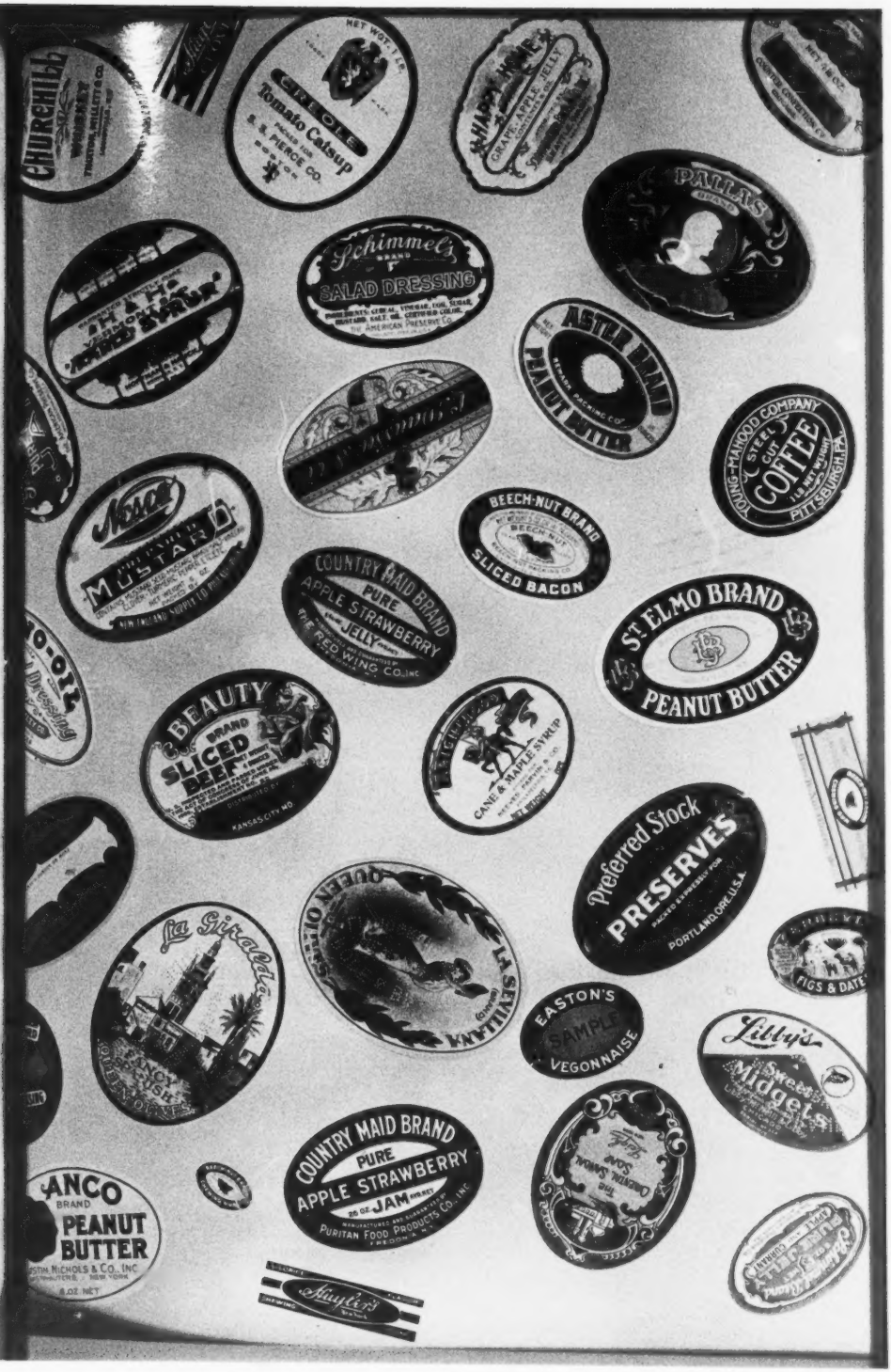
THE
STUDIO

CAMEL
Camel Brand
CAMEL
CAMEL
CAMEL

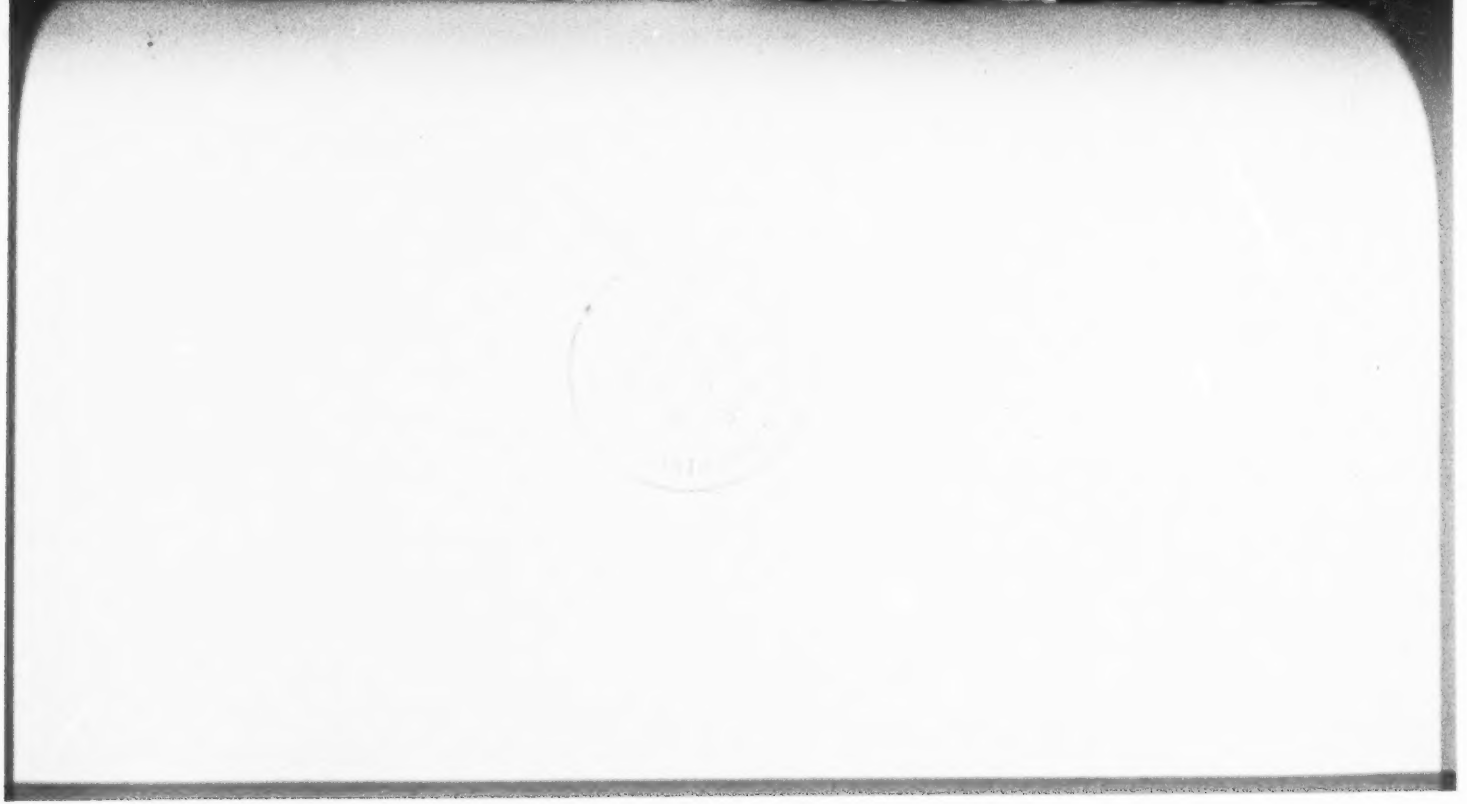
OMAR
OMAR
OMAR
STEELCUT
COFFEE
OMAR
OMAR
GRAPES
OMAR
APRICOTS
OMAR
OMAR
OMAR

MOGUL
TAPIOCA
SUGAR
SALMON

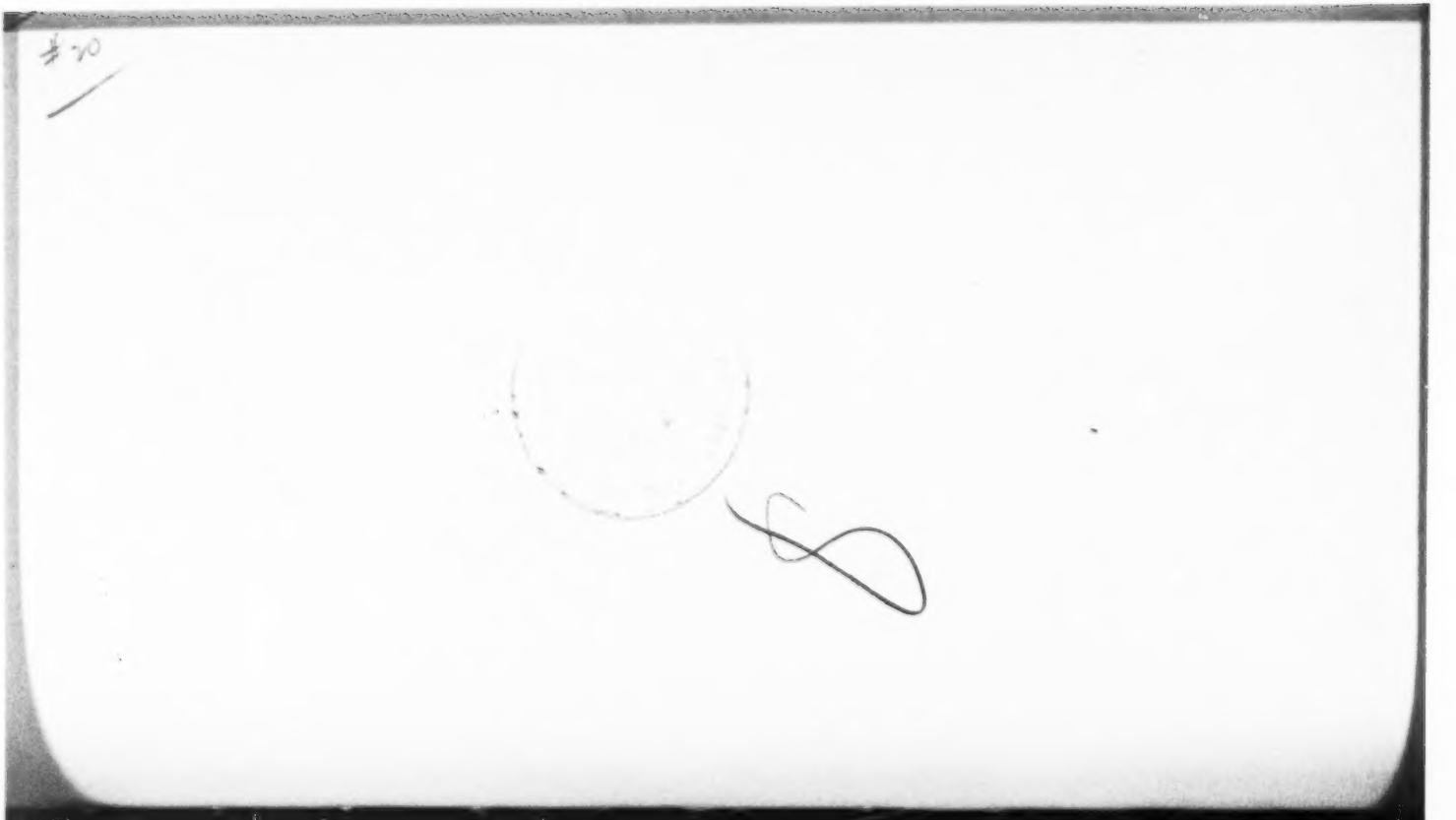

O.K.
MUSTARD
O.K. Perfect Gum
AMERICAN CHICLE COMPANY
O.K.
SCRAP
O.K. Perfect Gum
AMERICAN CHICLE COMPANY
O.K. Perfect Gum
SALT
O.K.


CHURCHILL'S
CRESCENT
Romaio Catsup
S. S. PIERCE CO.
HAPPY HOME
GRAPE APPLE JELLY
PALLAS
Schimmel's
SALAD DRESSING
ASTER BRAND
PEANUT BUTTER
YOUNG-MANOOD COMPANY
STEEL CUT
COFFEE
PITTSBURGH
BEECH-NUT BRAND
SLICED BACON
COUNTRY MAID BRAND
PURE
APPLE STRAWBERRY
JELLY
THE RED WING CO. INC
ST. ELMO BRAND
PEANUT BUTTER
BEAUTY
BRAND
SLICED
BEEF
KANSAS CITY MO
CANE & MAPLE SYRUP
Preferred Stock
PRESERVES
PORTLAND, ORE. U.S.A.
FIGS & DATE
QUEEN OLIVES
LA SEVILLANA
La Giralda
EASTON'S
SAMPLE
VEGONNAISE
Libby's
Sweet
Midgets
COUNTRY MAID BRAND
PURE
APPLE STRAWBERRY
JAM
PURITAN FOOD PRODUCTS CO. INC
ANCO
BRAND
PEANUT
BUTTER
8 OZ. NET
Hawley's

POLAR
TOBACCO
BEECH-NUT
TOBACCO
BEECH-NUT
BRAND
SLICED
BACON



BEECH-NUT
PERFECT CIGARETTES
Chesterfield
CIGARETTES
FATIMA
TURKISH
CIGARETTES
OMAR
TURKISH CIGARETTES
CAMEL
Piedmont
CIGARETTES
BEECH-NUT BRAND
SLICED BACON
You can't mistake the flavor
BEECH-NUT BRAND
SLICED BACON
BEECH-NUT BRAND
TOMATO CATSUP


#70

HAGLEY'S
HAZEL NUT
HAZEL NUT
FOR PIPE OR CIGARETTE
LONG CUT
UNION MADE
SMOKING or CHEWING
UNION MADE

HAZEL NUT
BRAND
PEANUT BUTTER
EMPIRE MFG. CO.
SYRACUSE, N.Y.

(4)

SUPREME COURT OF THE UNITED STATES.

No. 249.—October Term, 1926.

Beech-Nut Packing Company, Petitioner, vs. P. Lorillard Company.	On Writ of Certiorari to the the United States Circuit Court of Appeals for the Third Circuit.

[April 11, 1927.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a suit in equity brought by the petitioner, Beech-Nut Packing Company, a corporation of New York, charging the P. Lorillard Company, a corporation of New Jersey, with infringement of its registered trade-mark, "Beech-Nut", and with unfair competition. The bill also takes the possibly broader ground that 'Beech-Nut', being the plaintiff's trade-mark and part of its corporate name, has become the plaintiff's badge and autograph so far that the public seeing the mark on any package of commodity goods will believe that the article is of the plaintiff's make. The trade-mark was first used on ham and bacon but gradually has been extended to many other articles as diverse as chewing gum, peanut butter, and ginger ale, but always, the plaintiff says, as a guaranty of excellence, often expressed by it in advertisements, as 'Beech-Nut Quality'. The defendant uses the words "Beech-Nut" on chewing tobacco and cigarettes and the bill takes the hardly consistent positions, on the one hand that the plaintiff's reputation is hurt with its refined female customers by the belief that it would manufacture a cheap chewing tobacco, and on the other hand that it may wish to extend its business into that domain. The bill was dismissed on the merits by the District Court, 299 Fed. Rep. 658, and by the Circuit Court of Appeals. 7 F. (2d) 967. As the principles involved seemed important and as it was urged that the decision was in conflict with decisions in other Circuit Courts of Appeal, such as *Aunt Jemima Mills Co.* v. *Rigney*, 247 Fed. Rep.

407, and *Vogue Co.* v. *Vogue Hat Co.*, 6 F. (2d) 875, a writ of certiorari was granted by this Court. 269 U. S. 551.

The plaintiff's trade-mark goes back to before the beginning of this century. The registration specially relied upon was dated December 31, 1912, and states that the plaintiff has adopted the mark for use upon a large number of specified objects, including those that we have mentioned, "all in Class 46, Foods and ingredients of foods." The defendant claims the mark 'Beechnut' for tobacco through successive assignments from the Harry Weissinger Tobacco Company, of Louisville, Kentucky, which used it from and after 1897. The plaintiff does not contest the original validity of this mark or suggest any distinction on the ground that it originated in a different State, but says that the right has been lost by abandonment. It appears that brands of tobacco have their rise and fall in popular favor, and that the Beechnut had so declined that in 1910 only twenty-five pounds were sold, and the trade-mark was left dormant until after the dissolution of the American Tobacco Company which then held it. This was in 1911, and the Lorillard Company took over the mark with many others. Then in connection with an effort to get a new brand that would hit the present taste, this mark was picked out, some of the adjuncts were changed, and in 1915 the new tobacco was put upon the market. Nothing had happened in the meantime to make the defendant's position worse than if it had acted more promptly and we see no reason to disturb the finding of two Courts that the right to use the mark had not been lost. The mere lapse of time was not such that it could be said to have destroyed the right as matter of law. A trade-mark is not only a symbol of an existing good will although it commonly is thought of only as that. Primarily it is a distinguishable token devised or picked out with the intent to appropriate it to a particular class of goods and with the hope that it will come to symbolize good will. Apart from nice and exceptional cases and within the limits of our jurisdiction a trade-mark and a business may start together, and in a qualified sense the mark is property, protected and alienable, although as with other property its outline is shown only by the law of torts, of which the right is a prophetic summary. Therefore the fact that the good will once associated with it has vanished does not end at once the preferential right of the proprietor to try it again upon goods of

the same class with improvements that renew the proprietor's hopes.

It may be true that in a case like the plaintiff's its rights would not be sufficiently protected by an injunction against using the marks upon goods of the same class as those to which the plaintiff now applies it and to which its registration is confined. Upon that we express no opinion. For when it is conceded that whatever its effect the defendant has a right to use 'Beechnut' on tobacco unless the right has been abandoned, that possibility does not matter. Again it may be true that in putting a hyphen between Beech and Nut, framing its label with an oval and substituting a beechnut for a squirrel in the centre the defendant was trying to get an advantage from the plaintiff's good will and if challenged at once might have been required to make it even plainer than it was made by the word 'Lorillard's' in large letters upon the label that the plaintiff had nothing to do with the goods. But the plaintiff waited until 1921. The Lorillard Company is at least as well known to those who do not despise tobacco as the Beech-Nut Company is to its refined customers and the time and the need for that additional precaution has gone by. If the plaintiff was misled in its reason for thinking that the defendant's right had been kept alive it was right in its belief, and further, the belief had no bearing on the question whether the mark was presented in an unjustifiable form.

Now that the case has been more fully considered than it could be on the petition for certiorari it seems to us that the facts do not present the nice question upon which the petitioner wished us to pass. Both Courts having found for the defendant we see no ground upon which it can be said that they were wrong as matter of law. *Joseph Schlitz Brewing Co.* v. *Houston Ice & Brewing Co.*, 250 U. S. 28, 29.

Decree affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.